

NEW MOTOR VEHICLE BOARD
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STATE OF CALIFORNIA
NEW MOTOR VEHICLE BOARD

In the Matter of the Protest of
CALIFORNIA MOTORCYCLE ASSESSORIES,
INC., dba LONG BEACH HONDA, a California
corporation,

Protestant,

v.

AMERICAN HONDA MOTOR CO., INC., a
Corporation,

Respondent.

Protest No. PR-2136-08

DECISION

At its regularly scheduled meeting of February 5, 2009, the Public and Dealer Members of the Board met and considered the administrative record and Administrative Law Judge's "Proposed Order Granting Respondent's 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 FEBRUARY 2009.



ALAN J. SKOBIN
President
New Motor Vehicle Board

ROBERTS T. FRESIT
v.p.

1 NEW MOTOR VEHICLE BOARD
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2 Sacramento, California 95811
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CERTIFIED MAIL

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8 STATE OF CALIFORNIA
9 NEW MOTOR VEHICLE BOARD

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11 In the Matter of the Protest of

12 CALIFORNIA MOTORCYCLE ASSESSORIES,
13 INC., dba LONG BEACH HONDA, a California
corporation,

14 Protestant,

15 v.

16 AMERICAN HONDA MOTOR CO., INC., a
Corporation,

17 Respondent.
18

Protest No. PR-2136-08

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

19
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1 protest had been sent by Certified Mail on October 31, 2008. Pursuant to the Board's regulations, the
2 protest was deemed filed on October 31, on the date it was sent by Certified Mail.⁵

3 11. Among other things, the protest alleges that:

- 4 ▪ "On or about and no earlier than October 11, 2008, protestant received a letter
5 from respondent...purporting to advise protestant that its franchise as a Honda
6 dealer...was terminated on October 9, 2008."
- 7 ▪ "Protestant did not receive the notice required by Vehicle Code section 3060..."
- 8 ▪ "Protestant avers that any purported notice allegedly given was not properly made
9 or given, and further avers that respondent may not legally rely upon (and should
10 be equitably estopped from) relying on any such purportedly given notice."

11 (Protest, page 2, lines 7-19)

12 (As will be discussed, whether the notices were "given" by Honda is not the significant issue. The
13 significant issue is a dual issue of whether the notices were "received" by a "franchisee".)

14 **THE MOTION TO DISMISS THE PROTEST**

15 12. Honda's Motion to Dismiss Protest asserts that:

16 A. "The Protest Must be Dismissed Because King⁶ Lacks Standing" (Motion, page 4, line
17 7); and,

18 B. "The Protest was Not Timely Filed, Mandating Dismissal." (Motion, page 5, line 4)

19 13. The analysis of Contention A. requires a determination of who is a "franchisee".

20 14. The analysis of Contention B. will be dependent upon the conclusions reached as to the
21 first contention and in addition will require an analysis of whether the notices of termination were
22 "received" by the person determined to be the franchisee .

23 15. Both contentions require an analysis as to the identity of the "franchisee" as defined in

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27 ⁵ As will be discussed, Honda claims that both notices were received by the "franchisee" on September 18 and that the protest
was not filed within the statutorily mandated time periods.

28 ⁶ "King" is Mr. Scott King, one of two persons who it is alleged now own all of the shares of stock of Protestant (a
corporation), having purchased them from Thomas Ridings, the former owner of those shares.

1 the Vehicle Code.⁷ To be a "franchisee" as defined in the Vehicle Code, the person must have the rights
2 stated "pursuant to a franchise". Therefore it becomes necessary to look first to the franchise documents
3 to see which persons have such status.

4 THE PARTIES TO THE SALES AND SERVICE AGREEMENTS AND STANDARD PROVISIONS

5 16. The Board has been provided with copies of the three sets of Sales and Service
6 Agreements and a portion of the Standard Provisions for each.⁸ As the facts and issues as to each set of
7 documents are almost identical for purposes of this motion, the Sales and Service Agreements for all the
8 products will be referred to as the "Agreements" and the Standard Provisions for all will be referred to
9 as the "Standard Provisions". The combinations of each set will be called the "franchise" and all three
10 sets combined will be the "franchises". Any variations in the terms of the documents will be indicated.

11 17. All the Agreements identify one party as "Honda Motorcycle Division, American Honda
12 Motor Co., Inc. ('American Honda')", with the other party identified as "*California Motorcycle*
13 *Accessories Inc., (Dealer), a(n), Corporation* doing business as *Long Beach Honda/Yamaha/Sea-Doo.*"
14 (The italicized words are hand-printed in all three Agreements.)

15 18. The Standard Provisions⁹ contain definitions which include the following:

16 ...

17 1.3¹⁰ Dealer means the corporation, partnership, or other legal entity that signs the Agreement
18 and each of the persons identified in Paragraph B thereof. [This reads "Paragraph C" in
the motor scooter Standard Provisions]

19 1.4 Dealer Manager means the principal manager of Dealer identified in Paragraph C of the
20 Agreement upon whose personal service American Honda relies in entering into the
Agreement. [This reads "Paragraph D" in the motor scooter Standard Provisions.]

21 ⁷ Section 331.1 states: A "franchisee" is any person who, pursuant to a franchise, receives new motor vehicles subject to
22 registration under this code, new off-highway motorcycles, as defined in Section 436, new all-terrain vehicles, as defined in
23 Section 111, or new trailers subject to identification pursuant to Section 5014.1 from the franchisor and who offers for sale or
lease, or sells or leases the vehicles at retail or is granted the right to perform authorized warranty repairs and service, or the
right to perform any combination of these activities. (Underline added.)

24 ⁸ There are separate documents for the motorcycle franchise, the ATV franchise and the motor scooter franchise. The Board
has received two pages of the Sales and Service Agreements and also pages 1, 2, and 17, 18, and 19 of the Standard Provisions
25 for each product. As the Board does not have the complete set of documents it is unknown what other provisions there may be
that relate to the effectiveness of the franchises or their signing by the parties to them.

26 ⁹ The Agreements state that the terms of the Standard Provisions are incorporated into the Agreements "by reference with the
same force and effect as if the same were fully set forth..." and the Standard Provisions state they are "... made a part of the ...
27 Sales and Service Agreement."

28 ¹⁰ The numbers, 1.3, 1.4, and 1.5, preceding these three sentences appear in the Standard Provisions for both the ATV and the
motor scooter Agreements but not for the motorcycle Agreement. It is assumed that these numbers on the motorcycle Standard
Provisions "disappeared" during copying.

1 1.5 Dealer Owner means the owner(s) of Dealer identified in Paragraph B of the Agreement
2 upon whose personal service American Honda relies in entering into the Agreement.
[This reads "Paragraph C" in the motor scooter Standard Provisions]

3 19. Section 1.3 can be read to include as "Dealer":

4 (a) "the corporation...that signs the Agreement..."; or

5 (b) "the corporation," ... "or other legal entity that signs the Agreement..."

6 Section 1.3 also includes as "Dealer" ... "the persons identified in Paragraph B" of the Agreement.

7 20. As will be discussed below, whether interpretation (a) or (b) of the definition of "Dealer"
8 is used, it is possible that "the corporation" (in this case, CMA) is not a "Dealer" under the terms of the
9 franchise and has never been a party to the franchises. This would be possible under interpretation (a) as
10 there is no clear signature of the corporation on the Agreements. If this is the case, then CMA would not
11 be a franchisee in accordance with the Vehicle Code, and would have no standing to file a protest.
12 Further, if this is the case, there would be no franchise in existence with CMA as a party and the protest
13 as filed, even if timely, would be moot.

14 21. If interpretation (a) is used - There is no clear signature of "the corporation". Rather than
15 signing the Agreement "California Motorcycle Accessories, Inc., by Thomas G. Ridings, President", the
16 document contains only the signature of "Thomas G. Ridings", on the signature line above the printed
17 word "(Dealer)". As will be discussed, Ridings personally is a "Dealer" as defined in the terms of the
18 franchises. Therefore, it is possible, as Honda alleges, that Ridings is the only party to the franchises as
19 he signed only in his individual capacity as a "Dealer" and not as an agent of CMA. This would mean
20 there is no signature in behalf of CMA on the document. The signature of Ridings appears as follows on
21 all three Agreements:

22 By s/ Thomas G. Ridings
23 (DEALER)

24 22. In comparison all three of the Agreements are signed in behalf of Honda as follows:

25 American Honda Motor Co., Inc.
26 Honda Motorcycle Division

27 By s/ John G. Petas
28 JOHN G. PETAS, SENIOR VICE PRESIDENT

///

1 23. Comparing the two, one can see that Petas was unambiguously signing for “American
2 Honda Motor Co., Inc.”; that Petas signed only as an agent of Honda; that Honda is the party to the
3 contract; and, Petas is not a party to the contract. The signing by Petas identifies the principal, identifies
4 Petas as an agent of the principal, and unambiguously indicates Petas is signing in behalf of his
5 principal, thus making Honda a party to the Agreements. Whereas, Ridings does not identify any
6 principal, does not indicate his status as an agent for anyone, and does not indicate he is signing for or in
7 behalf of anyone other than himself, in his status as “Dealer”. Again, this is an accurate indication of his
8 status as Ridings personally is within the definition of “Dealer” as defined in Section 1.3 of the Standard
9 Provisions.)

10 24. There is no indication from the appearance of Riding’s signature that he signed as an
11 agent/officer of the corporation, rather than in his personal capacity. Therefore Ridings personally is a
12 party to the contract as an individual and is a “Dealer” as defined in the contracts.

13 25. If this is deemed to be the signature of Ridings in his personal capacity only, he is the
14 only Dealer (as defined in the documents) to have signed the Agreement. Although the corporation is
15 stated to be the Dealer in the text of the first page of the Agreements, there would be no signature of or
16 in behalf of the corporation and the corporation would not be a party to the franchise.¹¹ If the
17 corporation is not a party to the franchise, the corporation may not be a “Dealer” under the franchise and
18 may not be a “franchisee” within the definition of the Vehicle Code. The only “Dealer” would be
19 Ridings and the only “franchisee” would be Ridings.¹²

20 26. If interpretation (b) is used – There is no “other legal entity” that signed the Agreement.
21 This interpretation could lead to the conclusion that no legal entity would be bound to the Agreement as
22 “Dealer” as there is no signature of the “corporation” or any “other legal entity”. Only Ridings, a
23
24

25 ¹¹ All of the pages of the Standard Provisions were not provided to the Board, therefore it is unknown if there is a franchise
26 provision which states that the franchise will be effective as to any party only when signed by that party. Even if such a
27 provision is not in the terms of the franchises, because of the definition of “Dealer”, this conclusion is still possible.

28 ¹² If Ridings is the only franchisee, then the claims of Honda that the protest was not filed by CMA and that the protest, if it
was filed by CMA, is not timely, would be moot. Likewise, the claims of CMA that CMA never received the notices and that
the notices did not comply with the statutory requirements, would also be moot. CMA does not dispute that Ridings did receive
the notices. However, Ridings is not a party to these proceedings and the facts as stated by CMA or even as determined by the
Board would not be conclusive as to Ridings personally.

1 natural person, would be the Dealer and only Ridings would be a “franchisee”. CMA would not be a
2 “franchisee”.

3 27. Without the use of extrinsic evidence to show that Ridings signed in his capacity as
4 President of the corporation, the corporation would not be a “Dealer” as defined in the Standard
5 Provisions, even though the corporation is stated to be the “Dealer” in the first paragraph of the
6 Agreements. This would be so as the corporation is not a party to the contracts. If extrinsic evidence is
7 admitted to show that Ridings signed in his corporate capacity, the conclusion could be that the
8 corporation is bound as a “Dealer” even without its signature as the signature of Ridings could bind the
9 corporation.¹³ The corporation could then be a “franchisee”.

10 28. In addition to the two interpretations as to “Dealer” above, Section 1.3 of the Standard
11 provisions also includes as “Dealer”, “the person identified in Paragraph B” of the Agreement.
12 Paragraph B in all three of the Agreements, states in part that the “...ownership of dealer...” is:
13 “*Thomas G. Ridings*” with the title of “*President*” with Percent of Ownership shown as “*100%*”. (Italics
14 added. The words and numbers in italics are handwritten in all three of the Agreements.) Therefore,
15 Ridings individually is included within the definition of “Dealer”.

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19 ¹³ For example, this conclusion would be reached by statute if this were a negotiable instrument (which it is not). California
Uniform Commercial Code (“UCC”) section 3402 states in part:

20 (a) If a person acting, or purporting to act, as a representative signs an instrument by signing either the name
21 of the represented person or the name of the signer, the represented person is bound by the signature to the
22 same extent the represented person would be bound if the signature were on a simple contract. If the
23 represented person is bound, the signature of the representative is the “authorized signature of the
represented person” and the represented person is liable on the instrument, whether or not identified in the
instrument. (Underline added.)

24 The Official Comments to this section state in part: “Subsection (a) states when the represented person is bound on an
25 instrument if the instrument is signed by a representative. If under the law of agency the represented person would be bound
by the act of the representative in signing either the name of the represented person or that of the representative, the signature is
the authorized signature of the represented person.”

26 This language, if applied here by analogy, could make CMA a party to the contract even without the proper signature of CMA,
27 and CMA would be included in the definition of “Dealer”. CMA would then be a “franchisee” as it would be acting “pursuant
to a franchise” as required by Section 331.1. The parties did not address this issue in their pleadings. Honda merely stated that
28 only Ridings had signed the Agreement and therefore only Ridings is a “franchisee”. Under Agency law, if the language is
ambiguous as to whether the party signed as a principal or as an agent, extrinsic evidence may be introduced to show the
intention of the parties.

1 **“Dealer” as Defined in the Motorcycle and ATV Documents**

2 29. Pursuant to Section 1.3 of the Standard Provisions, the term “Dealer” may or may not
3 include “the corporation” (meaning California Motorcycle Accessories, Inc.), as there is no
4 unambiguous signature of the corporation. Extrinsic evidence of the intentions of Ridings and the
5 Honda representatives would be necessary to establish their intentions. “Dealer” would clearly include
6 Ridings as he is the person “identified in Paragraph B” of the Agreements.

7 **“Dealer Owner” as Defined in the Motorcycle and ATV Documents**

8 30. Pursuant to Section 1.5 of the Standard Provisions, the “Dealer Owner” is the person
9 identified in Paragraph B, of the Agreements, which is Thomas G. Ridings.

10 **“Dealer Manager” as Defined in the Motorcycle and ATV Documents**

11 31. Pursuant to Section 1.4 of the Standard Provisions, the “Dealer Manager is the person
12 stated in Paragraph C of the Agreement, which is again Thomas G. Ridings.

13 32. To re-cap for both the motorcycle and the ATV franchises:

14 The “Dealer” may include CMA¹⁴ and clearly includes Thomas G. Ridings.

15 The “Dealer Owner” is Thomas G. Ridings.

16 The “Dealer Manager” is Thomas G. Ridings.

17 **For the Motor Scooter Franchise**

18 33. The terms of the Agreements and the Standard Provisions of the motor scooter
19 documents do not mesh. The Standard Provisions refer to the “Dealer” and “Dealer Owner” as being the
20 person in Paragraph C of the Agreements (rather than B), but Paragraph C refers to the “Dealer
21 Manager”. The Standard Provisions refer to the “Dealer Manager” as being the persons shown in
22 Paragraph D of the Agreements (rather than C) but Paragraph D of the Agreements refers to the location
23 of the dealership premises. Therefore, it is assumed that what was intended for the motor scooter
24 franchise was the same as that stated in the other two franchises. If so, then “Dealer” would possibly
25 include CMA as well as clearly including Ridings. “Dealer Owner” and “Dealer Manager” for the

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27 ¹⁴ This is assuming that, contrary to the present contention of Honda, the extrinsic evidence shows that the parties intended that the
28 signature of Ridings to be as an agent of CMA and not solely in his individual capacity. If so, “Dealer” includes CMA. In addition,
regardless of the prior sentence, “Dealer”, under the definition contained in the franchise, includes Thomas G. Ridings and the problem
then could be whether the one signature of Ridings could bind him both individually as a “Dealer” and also CMA as a “Dealer”.

1 motor scooter franchise would also be Ridings.

2 **FACTS PERTAINING TO THE SALE OR TRANSFER OF OWNERSHIP OF CMA**

3 34. All the Dealer Agreements were executed in February 1993 and identified Ridings as
4 owner of 100% of the stock in CMA. There has been no change that has been approved by Honda as to
5 the "Dealer", the "Dealer Owner" or the "Dealer Manager", all of which are Ridings as stated or defined
6 in the franchises.

7 35. The Declaration of Scott King submitted in support of the opposition to the Motion to
8 Dismiss states that in September 2007 King and Pablo Veglia bought all of the shares of corporate stock
9 of CMA from Ridings, and that the stock transaction closed before there was approval of the sale by
10 Honda. It is stated that Honda learned of the stock sale after it had occurred but Honda expressed a
11 willingness to process an application for a new dealership agreement or to amend the current agreement
12 to reflect the new owners.

13 36. The application process was started but despite the passage of over a year, Honda, for
14 reasons not relevant to this motion, has never consented to the transfer of ownership. Whether Honda's
15 refusal to approve the buy/sell was reasonable or not is not an issue within the Board's jurisdiction.

16 **THE STATUTES APPLICABLE TO PROTESTS**

17 37. The statutes that address the filing of protests before the Board all use the term
18 "franchisee", rather than "dealer" or "owner". For example:

- 19 ▪ Section 3050(d) states that the Board is empowered to "Hear and decide ... a protest
20 presented by a franchisee..."
- 21 ▪ Section 3060 states in part that "...no franchisor shall terminate ... any existing franchise
22 unless..."
- 23 (1) "The franchisee and the board have received written notice from the franchisor..."
- 24 (2) "...The franchisee may file a protest with the board within..."
- 25 (3) "The franchisor has received the written consent of the franchisee..." (Underline
26 added).

27 38. The Vehicle Code defines "franchise", "franchisor" and "franchisee" as follows.

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1 Franchise:

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

4 (1) A commercial relationship of definite duration or continuing indefinite duration.

5 (2) The franchisee is granted the right to offer for sale or lease, or to sell or lease at
6 retail new motor vehicles or new trailers subject to identification pursuant to Section
7 5014.1 manufactured or distributed by the franchisor or the right to perform authorized
8 warranty repairs and service, or the right to perform any combination of these activities.

9 (3) The franchisee constitutes a component of the franchisor's distribution system.

10 (4) The operation of the franchisee's business is substantially associated with the
11 franchisor's trademark, trade name, advertising, or other commercial symbol designating
12 the franchisor.

13 (5) The operation of a portion of the franchisee's business is substantially reliant on the
14 franchisor for a continued supply of new vehicles, parts, or accessories. ...

15
16 There is no dispute that the Agreements and the Standard Provisions are "franchises" within the above
17 definition.

18 Franchisor:

19 331.2. A "franchisor" is any person who manufactures, assembles, or distributes new
20 motor vehicles subject to registration under this code, new off-highway motorcycles, as
21 defined in Section 436, new all-terrain vehicles, as defined in Section 111, or new trailers
22 subject to identification pursuant to Section 5014.1 and who grants a franchise. (Emphasis
23 added.)

24 There is no claim that Honda is not a "franchisor" within the meaning of this section. Honda has granted
25 a franchise to at least Ridings and also possibly to CMA.

26 Franchisee:

27 331.1. A "franchisee" is any person who, pursuant to a franchise, receives new motor
28 vehicles subject to registration under this code, new off-highway motorcycles, as defined
in Section 436, new all-terrain vehicles, as defined in Section 111, or new trailers subject
to identification pursuant to Section 5014.1 from the franchisor and who offers for sale or
lease, or sells or leases the vehicles at retail or is granted the right to perform authorized
warranty repairs and service, or the right to perform any combination of these activities.¹⁵
(Underline added.)

¹⁵ There has been no contention that for a "person" to be a "franchisee" that the person must have a valid new motor vehicle dealer's license for that line-make or location. No evidence has been presented as to the state of the licenses (if any) of any of the "persons" involved (natural or legal entity). The two requirements that must exist to be a "franchisee" are that there be a "person" and that person has the right to engage in the listed activities "pursuant to a franchise" (not "pursuant to a license"). These activities "pursuant to a franchise" are: (a) receive the specified new vehicles or new trailers from the franchisor; and (b) offer for sale or lease, or sell or lease, the vehicles at retail; or (c) the right to perform authorized warranty repairs and service; or (d) the right to perform any combination of these activities. Because of the broad scope of this language and because some of the rights are in the disjunctive, it is likely that some of these could be performed even by a person who does not have an effective license as a new motor vehicle dealer. This order does not address whether a "person" must be properly licensed to engage in the listed activities in order to be a "franchisee". There may be a license needed to engage in (b) herein (offer for

1 There is no agreement as to the identity of the "franchisee".

2 39. Honda is claiming that:

3 (a) Only Ridings is the franchisee;

4 (b) Only Ridings may file the protest;

5 (c) The protest was filed in behalf of King;

6 (d) King is a "purchaser in an illegal sale/transfer of the Franchise who lacks standing" to
7 file a protest.

8 **HONDA'S FIRST CONTENTION – THE PROTEST MUST BE DISMISSED BECAUSE KING LACKS STANDING**

9 40. Honda's first contention which as stated in its Motion to Dismiss is as follows:

10 First, the Protest was not filed by the franchisee under the Honda Sales and Service
11 Agreements (the "Agreements" or the "Franchise") with California Motorcycle
12 Accessories (sic), Inc. dba Long Beach Honda/Yamaha/Sea Doo ("Long Beach").
13 (Footnote 1 omitted.) Although the Agreements were between Honda and Long Beach,
14 through its sole owner Thomas G. Ridings (the "Franchisee" or "Ridings"), the Protest
15 was purportedly filed on behalf of an individual named Scott King ("King"), a purchaser
16 in an illegal sale/transfer of the Franchise, who lacks standing...
17 (Underline added; Motion, page 2, lines 8-15)

18 41. As can be seen, Honda is asserting in this language that the Agreements were between
19 Honda and "Long Beach",¹⁶ but also refers to "Thomas G. Ridings (the "Franchisee" or "Ridings")."

20 42. In its Motion, Honda claims, "Here, Honda entered into the Franchise with Long Beach
21 [CMA] through *Ridings* and granted *Ridings* the right to perform authorized Honda repairs and service."
22 (Italics in original; Motion, page 4, lines 24-25)

23 43. Although Honda states that it "...entered into the Franchise with Long Beach (CMA)...",
24 Honda is also claiming that the "franchisee" is Thomas G. Ridings, that only a franchisee may file a

25 sale or lease or sell or lease the vehicles at retail), but a person could be granted that right by the franchisor (thus becoming a
26 franchisee), but still not be a "licensee". In fact, the "person" may have to obtain that right from the franchisor ("pursuant to a
27 franchise"), and become a "franchisee" before that "person" could become a licensee. There is no doubt that Honda has been
28 permitting CMA to engage in the activities listed both before and after the sale of the corporate stock. The problem is whether
CMA was ever granted these rights "pursuant to a franchise", which, per Section 331(a) requires there be a "written
agreement".

¹⁶There is no legal entity or "person" known as "Long Beach". The only "Long Beach" is Long Beach Honda/Yamaha/Sea
Doo which is a fictitious name under which California Motorcycle Accessories, Inc. ("CMA") is doing business. As Honda, in
its pleadings, has placed "Long Beach" in parentheses at the end of "California Motorcycle Accessories, Inc., dba Long Beach
Honda/Yamaha/Sea Doo" it is assumed that when Honda refers to "Long Beach" it means the corporate entity California
Motorcycle Accessories, Inc. This ruling will use "CMA" or "Long Beach (CMA)" to indicate the corporate legal entity,
California Motorcycle Accessories, Inc., dba Long Beach Honda/Yamaha/Sea Doo.

1 protest, and, "Accordingly, Ridings, as the franchisee, was the only person with standing to protest ... on
2 behalf of Long Beach (CMA)." (Underline added; Motion, page 4, lines 24-28) See also the November
3 26, 2008, Declaration of Brenda N. Buonaiuto in which it is asserted that all the Agreements were
4 "between Honda and Thomas G. Ridings ('Ridings')". (Page 1, lines 27-28, page 2, lines 1-9)

5 44. Honda asserts that, "By contrast, the illegal and unauthorized transfer of the Franchise
6 from Ridings to King did not vest King with any rights under the Agreement, and Honda never entered
7 into any separate agreements with King. As such, King never became a "franchisee" within the meaning
8 of the applicable statutes. Rather, King was – and is – an unauthorized buyer, and a third-party, with no
9 standing to protest the Franchise's termination." (Motion, page 4, lines 27-28, page 5, lines 1-3)

10 **Analysis of Honda's First Contention**

11 45. Who is the franchisee? Because the definition of "franchisee" in the Vehicle code states
12 that it is "any person who, pursuant to a franchise, receives new motor vehicles ... and who offers for sale
13 or lease ...", it is necessary first to determine who, pursuant to the Honda franchises, this "person" would
14 be.¹⁷ (Underline added.)

15 46. This requires a review of the terms of the Agreements. The Agreements do not define or
16 even use the term "franchisee", but rather use the terms "Dealer" and "Dealer Owner".

17 47. Although Honda asserts that Ridings is the franchisee, there are many references to the
18 notices being given by Honda to "Long Beach" or "the corporation". Honda has stated that Ridings is the
19 only signatory to the Agreements. Protestant asserts that it is CMA that is the franchisee. However,
20 neither side raised the issue of, or introduced any evidence as to whether the signature of "Thomas G.
21 Ridings" as "Owner" could be effective to bind CMA.

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26 ¹⁷ "Person" is defined in the Vehicle Code to include a corporation. Section 470 states: "Person" includes a natural person,
27 firm, copartnership, association, limited liability company, or corporation. See also UCC section 1201(b) (27) which states:
28 "Person" means an individual, corporation, business trust, estate, trust, partnership, limited liability company, association,
joint venture, government, governmental subdivision, agency, or instrumentality, public corporation, or any other legal or
commercial entity." The contracts are contracts for the sale of goods. This makes Division 2 of the UCC applicable along with
the definitions contained in Division 1 of the UCC.

1 48. As discussed above, the terms "Dealer" in the text of the motorcycle and ATV¹⁸ franchises
2 means CMA as CMA is identified as the Dealer in the first paragraph of page 1 of the Agreements.
3 However, whether or not CMA became a party to the franchise depends upon the interpretation of the
4 effect of the signature of Ridings. CMA could be a party to the franchise if the signature of "Thomas G.
5 Ridings" "Owner" was effective to operate as the signature of the corporation, CMA. If so, then CMA, as
6 a "Dealer" under the terms of the Agreement, would be a franchisee.

7 49. In addition to the possibility that CMA is a "franchisee", Ridings himself is also a
8 franchisee". This is so because Ridings is the person identified as coming within the definition of
9 "Owner" in Paragraph B of the Agreements. And, according to the definition of "Dealer" in the Standard
10 Provisions (Section 1.3) those persons in Paragraph B identified as "Owner" are included within the
11 definition of "Dealer". Therefore, Ridings, whose name is hand-printed in Paragraph B of the
12 Agreements as "Owner", is also the "Dealer" within the definition of Section 1.3 of the Standard
13 Provisions. As Ridings is within the definition of Dealer, and Ridings signed the franchise "Thomas G.
14 Ridings, Owner", he would be a party to the franchise and thus a person within the Section 331.1
15 language of "pursuant to a franchise", so Ridings would be a "franchisee".

16 50. Because of this inclusion of the individual named in Paragraph B of the Agreement as a
17 "Dealer", and because of ambiguity as to the signature of Ridings, it would appear that both CMA and
18 Ridings could be dealers as defined in the franchises. Almost all of the rights and obligations under the
19 franchise are owed to or by the "dealer", which by the terms of the documents includes Ridings, and
20 depending upon the effect of the signature of Ridings, may include CMA. If both CMA and Ridings
21 would have the rights referred to in Section 331.1 "pursuant to a franchise", both would be "franchisees"¹⁹
22 within the meaning of Section 331.1 and either of them could file a protest.²⁰

23
24 ¹⁸ As discussed above, it is assumed this would hold true for the motor scooter franchise as well despite what appear to be
25 confusing cross-references between the motor scooter Agreement and its Standard Provisions.

26 ¹⁹ Section 331(a) defining a "franchise" clearly recognizes that there may be more than just two parties to a franchise. It states
27 that "A 'franchise' is a written agreement between two or more persons..." (Underline added)

28 ²⁰ What is uncertain and has not been addressed is, if both Ridings and CMA are franchisees, whether the notices required by
Section 3060 must be received by both CMA and Ridings. It is possible that any notices received by Ridings, who is "Dealer",
"Dealer Owner" and "Dealer Manager", would be deemed receipt by Ridings in his individual capacity as a "franchisee", as
well as receipt by CMA due to the receipt by Ridings who is shown as the President of and agent of CMA. Nothing was
presented to indicate that there was a change of the officers of CMA in connection with the sale of the stock, and if so whether

1 51. Through a combination of the franchise terms and the statute, Honda's contention that
2 Ridings is a "franchisee" is correct.

3 52. However, any contention that CMA is the franchisee may not be correct. If there was no
4 signature on the Agreements that would bind CMA, CMA may not be a party to the contracts. If CMA is
5 not a party to the contracts, CMA may not have any rights "pursuant to a franchise" as required by
6 Section 331.1.²¹ If CMA has no rights "pursuant to a franchise", CMA cannot be a "franchisee".

7 53. However, if Riding's signature is sufficient to bind CMA to the franchise (or if CMA is an
8 intended third-party beneficiary), then CMA would have rights "pursuant to a franchise". CMA would
9 then be a franchisee under the statute and Honda's contention that only Ridings could file the protest
10 would not be correct. If CMA is a party to the contract (because of the signature of Ridings in his
11 capacity as an agent of CMA or because CMA is an intended third-party beneficiary), then CMA would
12 also be a "franchisee" under the statute and CMA would have standing to file the protest.

13 54. Although the protest was not filed by Ridings, it was filed by or in behalf of CMA.
14 Assuming that the signature of Ridings on the Agreements was effective to make CMA a party to them,
15 CMA would be a "Dealer" under the franchises and thus would be a "franchisee" as defined in Section
16 331.1.

17 55. Honda is correct that King has no standing to file a protest. However, King did not file the
18 protest. The protest was filed by or in behalf of CMA, the corporate entity, which, based upon the text of
19 the Agreements, was the entity that Honda intended to be the franchisee. If extrinsic evidence is admitted
20 and establishes that the signature of Ridings was intended by both Honda and Ridings/CMA to be the
21 signature of CMA (or if CMA is an intended third-party beneficiary), then CMA is a "franchisee" and
22

23 Honda was informed of such a change. But, as will be discussed, this may be irrelevant as both CMA and Ridings would have
24 "received" the notices upon their delivery to the place of business of CMA.

25 ²¹ Whether CMA could be an intended third-party beneficiary of the three franchises was not explored. If CMA is found to be
26 an intended third-party beneficiary, CMA would have rights "pursuant to a franchise" (as required by Section 331.1) and thus
27 be a "franchisee". It appears quite likely that Honda intended CMA to be the franchisee, and, more important for determining
28 whether CMA is an intended beneficiary, Ridings likely intended for CMA to have enforceable rights under the contracts.
However, whether there is any language in the franchise documents that would preclude such an interpretation cannot be
determined as the Board was not supplied with all of the pages of the documents. It may seem anomalous that a person could
be a "franchisee" as a third-party beneficiary as that could mean that CMA gets the "benefits" of enforceable rights under the
contract but may not have any of the "duties". However the definitions of "franchise" and "franchisee" as stated in the Vehicle
Code list only what rights must be conferred upon a person to create the status of "franchisee".

1 CMA has standing to file a protest.

2 56. King may be one of the owners of CMA but King is not the "Owner" as defined in the
3 franchise. King's name does not appear in the franchise in Paragraph B of the Agreements. King is not a
4 Dealer under the Standard Provisions of the franchises (which have been incorporated into the
5 Agreements). Because King has no rights "pursuant to a franchise",²² he is not a "franchisee" as defined
6 in the Vehicle Code.

7 57. Although Ridings would have standing to file a protest in his own name as "Dealer" and
8 "franchisee", King could not file a protest in his own name.

9 58. There is nothing in the Vehicle Code that requires the protest be filed by the owner so long
10 as it is filed by a franchisee²³, which in this case could include CMA. There would be a need for the
11 person filing the protest in behalf of a corporate franchisee be both an agent of the corporation and also be
12 authorized to do the filing.

13 59. There are two levels of agency here relating to CMA's protest and Honda's contentions as
14 to the propriety of its filing. Starting with the filing of the protest, the protest was filed by "HALBERT B.
15 RASMUSSEN, Attorneys for protestant, California Motorcycle Assessories, Inc., dba Long Beach
16 Honda". The critical question then is: "Was Rasmussen, the person who signed the protest, an authorized
17 agent of CMA?" This requires asking, "Was the person who appointed Rasmussen (to act in behalf of
18 CMA) an authorized agent of CMA with authority to appoint Rasmussen?"

19 60. It is clear from his signature that Rasmussen is purportedly signing as an agent for CMA.
20 If Rasmussen is an agent of CMA and if he has the authority to file the protest, the protest is deemed to
21 have been filed by CMA. There is nothing that precludes an attorney from signing a protest in behalf of
22 the client (if authorized by the client to do so). The protest would be deemed effectively filed by the
23 client. The focus is on whether Rasmussen is an agent of CMA and whether Rasmussen has the authority

24
25 ²² King could claim rights "pursuant to a franchise" as an assignee of Ridings, but the buy/sell agreement was not provided to
26 the Board and there was nothing presented to establish there was an assignment of the contract rights. There was a sale of the
27 franchises" in derogation of the contract provisions and in violation of statute may be void.

28 ²³ In the case of a franchisee that is a corporation, it may be more appropriate to say "so long as it is filed in behalf of the
franchisee". However, so long as the person filing the protest in behalf of the corporation is an agent and has the authority to
do so, basic Agency law would apply and treat the filing by the agent as filing by the principal. The act of an agent done
within the scope of his or her authority is deemed to be the act of the principal.

1 to file the protest.

2 61. Although there are no facts before the Board, it is assumed that it was King acting as an
3 agent of CMA, who appointed Rasmussen as an agent of CMA and granted Rasmussen the authority to
4 file the protest. It is also assumed that: (a) King is an agent of CMA; and (b) King had the authority to
5 appoint Rasmussen as an agent; and (c) King, acting in behalf of CMA, granted the authority to
6 Rasmussen to file the protest in behalf of CMA. If these assumptions are correct, the two levels of agency
7 here are:

8 (a) King, as an agent of CMA with the authority to do so, appointed Rasmussen to be an agent
9 of CMA with the authority to file the protest in behalf of CMA.

10 (b) Rasmussen, as an agent of CMA with the authority to do so, filed the protest in behalf of
11 CMA.

12 62. If King is an agent of CMA with the authority to appoint Rasmussen,²⁴ the result is that the
13 protest was filed in behalf of CMA (the principal of both King and Rasmussen) by Rasmussen, an
14 authorized agent of CMA, and therefore the protest was filed by CMA.

15 63. Honda has not directly raised the claim that the unauthorized sale of the "Franchise" (as
16 stated by Honda) was such that King could not become an agent of the corporation. If this unlikely event
17 were so, this would make the filing of the protest void. If King was not an agent of the corporation, King
18 did not have the power to appoint Rasmussen as an agent of CMA, then Rasmussen did not have the
19 authority to act in behalf of CMA in filing the protest. What Honda has argued is that, "The Protest must
20 be dismissed with prejudice..." because "...the Protest was purportedly filed on behalf of an individual
21 named Scott King ("King"), a purchaser in an illegal sale/transfer of the Franchise, who lacks standing..."
22 (Motion, page 2, lines 7-15)

23
24 ²⁴ Being the owner of the corporate stock does not by itself make the shareholder an agent of the corporation. The Declaration
25 of King does not state his status or capacity in regard to CMA, other than that he is one of the two shareholders of CMA (King
26 Declaration, page 1, lines 26-27) The language of Honda's franchise may have the effect of precluding Ridings from having
27 the right to transfer his ownership interest, but the franchise may have no effect upon Ridings having the power to transfer his
28 ownership interest. When Ridings exercised his power to transfer ownership, the stock was effectively conveyed to the buyers.
Ridings may have breached the contract by doing something he had no right to do but which Ridings nonetheless still had the
power to do. In addition, it may be that there is a distinction between transferring the shares of stock of the corporation
compared to assigning the contracts themselves. Sale of the stock may be a breach of the contract but still valid, whereas
assigning the franchise may also be a breach of the contract but void as the assignment "of the contract" may also include a
delegation of duties which may be too personal to be delegable. (See UCC section 2210.)

1 64. However, the protest was not filed in behalf of King but rather it was filed by Rasmussen,
2 a purported agent of CMA, in behalf of CMA.

3 65. Honda is claiming that "Ridings, as the franchisee, was the only person with standing to
4 protest the Notices of Intent to Terminate on behalf of Long Beach."²⁵ Under these facts, there is no
5 doubt that the protest was filed in behalf of CMA. If, as Honda states here, Ridings is the franchisee, he
6 could file a protest in his own name. But this was not done, and Honda appears to be challenging whether
7 anyone else can be an agent of CMA. CMA is the asserted principal in whose behalf the protest was filed.
8 It is the consent of the principal (CMA in whose behalf the protest was filed) that is required for the
9 creation of an agency relationship. It is hornbook law that an agency relationship is a consensual
10 relationship between the principal and the agent and all that is required is that the principal consent to
11 have the agent act in its behalf and that the agent consent to so act. Although it is unknown who at CMA
12 appointed King as an agent of CMA, or whether King would have inherent agency power due to his
13 position with CMA, here there are no facts to show that there is any lack of consent between CMA and
14 King (to have King act in behalf of CMA and appoint Rasmussen to file the protest), and between CMA
15 (through King) and Rasmussen, to have Rasmussen act in behalf of CMA in filing the protest.

16 66. As a corporation, CMA can act only through its agents and CMA can, though its directors
17 or officers, if properly done, appoint virtually anyone to act as its agent for acts that are within its powers,
18 which the filing of a protest would be (assuming CMA is a franchisee).

19 67. The fact that there was a sale of stock by Ridings to King and Veglia (without the consent
20 of Honda) may be a breach of the contract and a basis for termination of the franchise (and may even be
21 illegal as claimed by Honda) but that does not prevent King from acting as an agent of CMA with
22 authority to appoint another (such as Rasmussen) to act as an agent of CMA.

23 68. As discussed above, if CMA is a "franchisee" (assuming it is a party to or third-party
24 beneficiary of the Agreements), CMA would have standing to have a protest filed in its behalf by any
25

26 ²⁵ This statement is partially correct. Ridings is a franchisee. As such, he could file a protest in his own name. If CMA is not
27 a franchisee, no one can file a protest in behalf of CMA, not even Ridings. If CMA is a franchisee (under either of the two
28 theories mentioned above), CMA, a corporation that can act only through its agents, could appoint any person as its agent.
Honda's contentions that a protest filed by Ridings "on behalf of Long Beach (CMA)" can be interpreted as meaning that
Ridings would be an agent, filing the protest "on behalf of: his principal, Long Beach (CMA).

1 agent of CMA's choosing, whether the agency relationship is consented to by Honda or not. If anyone
2 lacks standing in connection with the filing of the protest, it would be Honda that would lack standing to
3 object to the appointment by CMA of an agent (Rasmussen) for the purpose of filing the protest in
4 CMA's behalf.

5 69. A franchisee should not be deprived of its statutory right to file a protest and have a
6 hearing before the Board because there is an unauthorized transfer of the corporate stock of the
7 franchisee, or because there is some other transfer of the ownership rights of the entity if the entity is the
8 franchisee. To dismiss a protest filed by or in behalf of a corporation because the protest was filed after
9 there had been a sale of the stock of the corporation (without the consent of the franchisor), would be to
10 nullify the language in Section 3060(a). This section is expressly applicable to what has occurred here, as
11 there is a "Transfer of any ownership or interest in the franchise without the consent of the franchisor..."
12 What has happened here is the very class of event that must have been within the contemplation of the
13 legislature as, if such a transfer occurs, the section prohibits a franchisor from terminating the franchise
14 unless "The franchisee and the board have received written notice" of the intent to terminate. The notice
15 must state the grounds for termination, which, as here in NOIT-1, was that there had been a transfer of
16 ownership interest without prior written approval of Honda. A franchisee then has 10 days after receipt of
17 the notice to file a protest, and, if a timely protest is filed, despite the transfer of the ownership interest,
18 the franchisor may not terminate the franchise relationship with the corporation until a hearing has been
19 held during which the franchisor must prove there is good cause to allow the termination.

20 70. It would be odd indeed if the statutes were interpreted to require a franchisor to give notice
21 of its intent to terminate the franchise of a corporation because the owners of the corporation transferred
22 their stock, give the corporation the right to file a protest within 10 days of receipt of the notice, and then
23 permit summary dismissal of the protest filed by the corporate franchisee because its former owners
24 transferred their stock. If this should be the result, then the only "person" or "persons" with standing to
25 file a protest would be the former owners who sold their stock. However, there may be times when the
26 corporate entity may be the only franchisee and the former owners would not be "franchisees" as defined
27 in the Vehicle Code. The result would be that no "person" could file a protest.

28 71. To grant a motion to dismiss the protest because the stock of the corporation had been sold

1 prior to the protest being filed would: (a) Ignore the status of a corporation as a person; (b) Nullify the
2 statutory language in Section 3060; (c) Deprive the corporate franchisee of the legislatively created right
3 to a hearing before the Board; and (d) Relieve the franchisor from its statutory burden of proving there is
4 good cause for the termination.

5 72. The “good cause factors” that Section 3061 requires be considered in evaluating whether
6 termination shall be permitted must include more than a showing of the unapproved transfer of
7 ownership. Otherwise the legislature would not have mandated a hearing, or even permitted the filing of
8 a protest, if all that the franchisor needed to establish was the transfer of ownership without its consent.

9 73. The legislature did not state that such a transfer by itself was good cause for termination.
10 The legislature merely stated that, if such a transfer occurred, the franchise could be terminated after 15
11 days from receipt of the notice of termination, but only if no timely protest is filed. If a timely protest is
12 filed the franchise may not be terminated “notwithstanding the terms of any franchise”. The franchisee is
13 entitled to a hearing at which the franchisor must prove the existence of good cause for the termination,
14 taking into account the existing circumstances, including but not limited to several specific
15 considerations, which must be in addition to the reason for the notice of termination which is the sale of
16 the ownership interest without the prior approval of the franchisor. The statutes have clearly made a
17 distinction between the reason for the notice of termination (the transfer of ownership) as stated in Section
18 3060, and the good cause that must be established by the franchisor that would constitute good cause for
19 the termination itself, as stated in Section 3061. To grant the Motion to Dismiss would be to merge these
20 two concepts and have the notice control the termination rather than the good cause factors control the
21 termination. (Of course there could be a conundrum if the franchisor does not establish good cause for
22 the termination. The result could be that the franchise of the corporation may not be terminated, and the
23 franchisor could be required to recognize the new ownership despite the fact that the prior owners/
24 transferors had violated the terms of the franchise and the proscriptions of the Vehicle Code.²⁶ There
25 may also be some difficulty in keeping the “good cause for termination” factors separate from the issue of
26

27 ²⁶ The statutes that prohibit transfer of ownership without the franchisor’s consent refer to the seller/transferor, not the
28 buyer/transferee. This shall be discussed below.

1 whether the franchisor unreasonably withheld its consent to the transfer, an issue over which the Board
2 has no jurisdiction. However, these concerns are not before the Board in regard to this Motion to
3 Dismiss.)

4 **Conclusion as to Honda's Contention that "The Protest Must be Dismissed Because King**
5 **Lacks Standing"**

6 74. Honda is correct that King is not a franchisee and has no standing to file a protest.
7 However, the protest was not filed by King nor directly filed in behalf of King. Therefore, the protest
8 should not be dismissed due to any lack of standing of King.

9 75. Based upon the above discussion, there are two "persons" who could have standing to file
10 a protest. These are Ridings and CMA.

11 76. Ridings, who is a "dealer" under the terms of the franchise, is a party to the franchise, and
12 would be a "franchisee" as defined in Section 331.1. However, the protest was not filed by or in behalf of
13 Ridings.²⁷

14 77. The other "person" who could have standing to file the protest is CMA. But, as correctly
15 stated by Honda in its motion, a "franchise" must be a written agreement between two or more parties, per
16 Section 331(a). (Motion, page 4, line 14-17) Although CMA is stated in the text of the Agreement to be a
17 "Dealer", it is unclear as to whether CMA is a party to the franchise. This is because the franchise was
18 signed only "Thomas G. Ridings, Owner" which, on its face appears to be the signature of Ridings in his
19 individual capacity as a "Dealer" as defined in the Agreement. (Again, compare the signature of the agent
20 of Honda versus the signature of "Thomas G. Ridings" with no reference to the corporation or the status
21 of Ridings as an agent of the corporation.)

22 78. If Ridings signed the Agreement as an agent of CMA, this signature is effective to operate
23 as the signature of the corporation and CMA would be a party to the franchise. If CMA is a party to the
24 franchise, then CMA is a "Dealer" under the terms of the franchise and would be a "franchisee" as
25 required by Section 331.1.

26 _____
27 ²⁷ As Honda is claiming that only Ridings had standing to file a protest, it is assumed that Honda would not have challenged a
28 filing by Ridings (based on lack of standing and assuming it was timely) even though Ridings no longer owned the shares of
stock.

1 79. Although Honda did state that "Honda and Ridings were the only signatories to the
2 Agreements" (Motion, page 2, lines 21-22), neither side addressed the issue of whether the signature of
3 Ridings could operate as the signature of CMA. As stated above, it is possible that, even though Ridings
4 was the only signatory, his signature was effective to bind CMA.

5 80. In addition, as stated above, if CMA is an intended third-party beneficiary of the three
6 franchises, CMA may have rights "pursuant to a franchise" and thus be a "franchisee" within the
7 definition of Section 331.1. No evidence was presented as to this possibility. The analysis of this would
8 generally require that the intention of Ridings be looked to, to determine whether he intended to create
9 enforceable rights in CMA under the franchises. And, as stated, Ridings is not a party to this proceeding
10 and no declaration was submitted as to his intention or that of Honda regarding his signature on the three
11 Agreements.

12 81. There is insufficient information to make a determination as a matter of law that CMA is
13 not a party to the franchise.

14 82. As Honda asserted only that it was King who lacked standing, the protest cannot be
15 dismissed on the first ground alleged by Honda. King is not the Protestant. The protest should not be
16 dismissed because of the lack of standing of King.

17 83. However, the protest should be dismissed if: (a) CMA is not a "Dealer"²⁸, as it would not
18 be a "franchisee" and (b) If CMA is not a "franchisee" as an intended third-party beneficiary under the
19 franchises. If CMA is not a party to the contracts, or an intended third-party beneficiary of the contracts,
20 CMA would have no rights "pursuant to a franchise" as required by Section 331.1.

21 **HONDA'S SECOND CONTENTION IN ITS MOTION TO DISMISS – THE PROTEST WAS NOT**
22 **TIMELY FILED, MANDATING DISMISSAL**

23 **The Notices Required by Section 3060**

24 84. Section 3060 establishes what a franchisor must do to terminate a franchise and also
25 establishes the time within which a franchisee must file a protest or lose the right to a hearing before the
26 Board.

27 _____
28 ²⁸ This would be dependent upon the interpretation of the legal effect of the signature of Ridings.

1 85. Among other things, Section 3060 requires or provides that:

2 (a) The franchisee and the Board must receive written notice 60 days before the effective date
3 of termination (referred to in the statute as “a 60-day notice”); or

4 (b) If the reason for termination includes any one of five specified in the statute, the franchisee
5 and the Board must receive written notice 15 days before the effective date of termination (referred to in
6 the statute as a “15-day notice”);²⁹

7 (c) The franchisee may file a protest within 30 days of receiving a 60-day notice (or within 30
8 days after the end of any appeal procedure provided by the franchisor);

9 (d) The franchisee may file a protest within 10 days of receiving a 15-day notice (or within 10
10 days after the end of any appeal procedure provided by the franchisor);

11 (e) When a timely protest is filed, the Board shall advise the franchisor that a timely protest
12 has been filed, that a hearing is required pursuant to Section 3066, and that the franchisor may not
13 terminate or refuse to continue until the Board makes its findings;

14 (f) If the proper notices have been received by the franchisee and the Board, the franchise may
15 be terminated if “...the appropriate period for filing a protest has elapsed.”

16 **The Notices Sent by Honda**

17 86. In this case, Honda, on September 17, 2008, sent two notices of its intention to terminate
18 the three franchises of CMA. Two notices were sent separately because a 15-day notice and a 60-day
19 notice each require different statutorily mandated language.³⁰

20 87. The 15-day notice stated that:

21 “Long Beach Honda transferred ownership interest to Scott King and Pablo Veglia (trustee of
22 the Pablo and Veronica Veglia Trust) without the prior written approval or consent of AHM.” Honda has
23 identified this notice as NOIT-1.

24 88. The 60-day notice stated that:

25
26 ²⁹ Honda gave both a 60-day notice and a 15-day notice. One of the five reasons allowing a 15-day notice is pertinent here,
27 Section 3060(a)(1)(B)(i) which states: “(i) Transfer of any ownership or interest in the franchise without the consent of the
28 franchisor, which consent shall not be unreasonably withheld.”

³⁰ CMA contends that the notices were ineffective because: (a) They were sent separately; and, (b) The statutorily required
28 notices were on the front page of each notice whereas “the two 3060(a)(1)(C) notice statements are on two separate pages.”
Opposition, page 9, lines 24-27, page 10, lines 1-4). These arguments are not tenable.

1 “(1) Long Beach Honda fails to purchase and keep at the Dealership Premises an inventory of
2 Honda Products which comprises a representative sample thereof;

3 (2) Long Beach Honda fails to maintain retail sales performance satisfactory to American Honda.”
4 Honda has identified this notice as NOIT-2.

5 89. Copies of both notices were also sent to the Board on September 17, 2008 and received by
6 the Board on September 19, 2009.

7 90. Honda contends that:

- 8 ■ “Long Beach received NOIT-1 on September 18, 2008” (Motion, page 3, line 11), but
9 “Long Beach did not file a protest within the statutory 10-day period” and that
10 “Termination of the Franchise therefore became effective, as a matter of law, on October 3,
11 2008 – 15 days after Long Beach received NOIT-1.” (Motion, page 3, lines 12-14); and,
12 ■ “Long Beach received NOIT-2 on September 18, 2008.” (Motion, page 3, lines 18-19)
13 However, “It did not file a protest within the statutory 30-day period, i.e. by October 18,
14 2008.” (Motion, page 3, lines 19-20)

15 91. A protest was received by the Board on November 3, 2008. Because it was sent by
16 Certified Mail, the protest was deemed filed as of October 31, 2008, the date of mailing.³¹

17 92. If NOIT-1 had been received by the franchisee on September 18, 2008, the time to file the
18 protest would have expired on September 29 (a Monday because the last day of the 10-day period falls on
19 Sunday, September 28, 2008) and if NOIT-2 had been received by the franchisee on September 18, the
20 time to file a protest in response to it would have expired on October 20 (a Monday because the last day
21 of the 30-day period falls on Saturday, October 18, 2008). It is undisputed that no protest was filed until
22 October 31, 2008. If the notices were received by the franchisee on September 18, as claimed by Honda,
23 this was more than a month after the time within which a protest would have been timely as to NOIT-1

24
25 ³¹ The Board’s regulations state:

26 **§ 585. Time of Filing and Content of Protests Pursuant to Sections 3060, 3062, 3070, and 3072, Vehicle Code.**

27 (a) The protest shall be considered received on the date of receipt by the executive director of the board or on
the date of certified or registered mailing.

28 ...
(Bold in original.)

1 and about two weeks beyond the time limit to file a protest in response to NOIT-2.

2 93. As discussed above, part of the problem is determining the identity of the "franchisee".
3 The other part of the problem to be discussed now is whether and when the person or persons identified as
4 a franchisee "received" the notices.

5 94. It has been determined that Ridings is a franchisee. It has also been determined that CMA
6 may be a franchisee under either of two circumstances. Therefore, this portion of the ruling will address
7 whether the notices were "received" by CMA and whether they were "received" by Ridings.

8 **HONDA'S CONTENTIONS AS TO THE EFFECTIVENESS OF THE NOTICES**

9 95. The dispute here is whether the notices were received by the franchisee as required by
10 Section 3060. Honda sent two notices separately by U.S. Postal Service, Certified Mail – Return Receipt
11 Requested.

12 The letters themselves indicate the following address:³²

13 California Motorcycle Assessories, Inc. (Sic) #105030
14 Attention: Thomas G. Ridings
15 dba Long Beach Honda
3291 Cherry Avenue
Long Beach, California 90807

16 **The Postal Service Forms Used to Send the Envelopes**

17 **The Sending of NOIT-1**

18 96. The "Certified Mail Receipt" forms used in connection with the sending of the notices each
19 have handwriting on them which indicate where they were sent. One "Certified Mail Receipt" form
20 indicates it was sent to:

21 Thomas Ridings (In signature form)
22 CA M/C Assessories
105030 Dealer LB Honda Ridings
23 3291 Cherry Ave
LB CA 90807

24 97. There is no postmark in the block that has printing reading "Postmark Here". There are
25 two numbers there – 105030 and 10. The first number is likely the Honda Dealer number for "Long
26 Beach Honda" as that number also appears elsewhere. The second number could refer to the "10" as in

27
28 ³² What addresses were on the envelopes containing the notices was not established. The whereabouts of the envelopes are unknown.

1 "10 days to file a protest" which would indicate this was NOIT-1 that was sent.

2 *The Sending of NOIT-2*

3 98. The other "Certified Mail Receipt" form used in connection with the sending of the
4 notices, in handwriting, has:

5 Thomas Ridings (in signature form)
6 CA Motorcycle Assessories 105030 Dealer LB Honda
7 3291 Cherry Ave
8 Long Beach CA 90807

9 99. As with the sending receipt for NOIT-1, the form for sending NOIT-2 has no postmark in
10 the area that has printing reading "Postmark Here". There are also two numbers there – 105030 and 30.
11 As above, the first number is likely the Honda Dealer number for "Long Beach Honda". The second
12 number could refer to the "30" in "30 days to file a protest". There is also the name "Ridings" written
13 vertically.

14 100. No evidence was presented as to the identity of the person who completed the forms or
15 who did the mailing in behalf of Honda.

16 101. All of the above on the two forms are in "long hand" or cursive, not printed, including
17 what appear to be the signatures of "Thomas Ridings". However, as stated, these two forms appear to be
18 the forms retained by the sender of the certified mail. Thus what appear to be the signatures "Thomas
19 Ridings" are not likely that of Ridings but rather that his name had been written in by the person mailing
20 the notices. In any event, nothing was produced before the Board to establish the identity of the person
21 who wrote the name "Thomas Ridings" on the forms.

22 *The Postal Service Forms indicating receipt of the two notices*

23 *Receipt of NOIT-1 and NOIT-2*

24 102. There are also two Postal Service Forms which are the forms indicating receipt by the
25 addressee and return of the receipts to the sender.

26 ///

27 ///

28 ///

///

1 These forms have typed addresses both showing they were addressed to:

2 Thomas G. Ridings
3 California Motorcycle Assessories, Inc. (sic) (This has been stamped over and may not be
4 accurate.)
5 3251 Cherry Ave.
6 Long Beach, CA 90807
7 Dealer #105030 (Illegible) Long Beach CA (Illegible)

8 103. To the right of this, and under the heading "Complete This Section on Delivery", both of
9 these contain an illegible signature but with the spaces for "Printed Name" and "Date of Delivery" left
10 blank. It is not disputed that the signatures are those of an employee of CMA who signed for the notices.
11 No information was presented as to the identity of this person. Both forms also show a U.S. Postal
12 Service postmark indicating they were received in Long Beach on September 18, 2008.

13 104. Across the typed address (as indicated two paragraphs above), each form has a stamped
14 "Received - September 19, 2008" with what appears to be "Motorcycle Sales Network Admin" (which is
15 part of Honda as this appears in some of Honda's letters), which would indicate that the "Return Receipt"
16 card was received back by Honda on September 19, 2008, with the cards indicating delivery on
17 September 18 in Long Beach and signed for by someone presumably at the dealership address. CMA
18 admits that the signatures are that of an employee of CMA.

19 105. Based upon the above, Honda claims that because both notices were received by "Long
20 Beach" (CMA) on September 18, that the time to file a protest challenging the notices had expired before
21 the protest was filed, more than a month later, on October 31.

22 106. If this is correct, whether CMA is a franchisee or not, there is no right in CMA³³ to a
23 hearing before the Board. The time to file a protest had expired and the franchises terminated upon the
24 passage of either 15 days from the date of receipt of NOIT-1, or upon the passage of 60 days from the
25 date of receipt of NOIT-2.

26 ///

27 _____
28 ³³ It is noted that, although Honda claims that Ridings is the "franchisee", Honda's focus is on when the notices were received
by CMA, rather than by Ridings. See also for example Paragraph 90. As Ridings is also a franchisee, he too would have had a
right to file a protest. Although it is uncontested by CMA that Ridings did receive the notices, Ridings is not a party to this
protest and the representations of CMA, King, or counsel for CMA would not be effective as to Ridings. However, no protest
has been filed by Ridings or in his behalf and it is likely that the time for Ridings to file such a protest, as a franchisee, has
lapsed.

1 "pursuant to a franchise." This is dependent upon the definition of "Dealer" under the terms of the
2 franchises. Whether CMA is a "franchisee" under the Vehicle Code definition has been discussed above
3 and is a combined legal/factual question that cannot be decided by this motion. It is a legal question
4 because it would require analysis of the parol evidence rule³⁴ to determine if extrinsic evidence can be
5 introduced to assist in determining the capacity in which the Agreements were signed by Ridings. If
6 extrinsic evidence is to be admitted, it will then become a factual question of determining whether the
7 signature "Thomas G. Ridings" operated to make CMA a party to the contracts.

8 115. If extrinsic evidence is admitted and it is factually established that the signature of
9 "Thomas G. Ridings" on the three Agreements operated as the signature of CMA, then CMA is a
10 "Dealer" under the franchises and would be a "franchisee" under Section 331.1. However, if extrinsic
11 evidence is admitted and it is factually established that the signature "Thomas G. Ridings" operated to
12 bind only Ridings, then CMA is not a "dealer" and is not a "franchisee".

13 116. However, if the extrinsic evidence is not admitted it is possible that the signature of
14 "Thomas G. Ridings" was effective only to bind him personally, then CMA is not a "Dealer" under the
15 franchise and CMA cannot be a "franchisee" under the statutory definition.

16 117. Alternatively, CMA may have rights "pursuant to a franchise" and thus be a franchisee if
17 CMA is an intended third-party beneficiary of the franchises. This cannot be determined by what has been
18 presented to the Board.

19 118. If it is determined that CMA is a "franchisee", the next issue would be whether the notices
20 were "received" by CMA.

21 **To Recap as to Ridings being a Franchisee**

22 119. The discussion above concluded that, regardless of the status of CMA, Ridings would be a
23 "Dealer", as defined in the franchises, and a "franchisee", as defined in the Vehicle Code.

24 120. The issue would then be whether Ridings "received" the notices.

25 ///

26 _____
27 ³⁴ The parol evidence rule is undisputedly a matter of law that may be raised by the tribunal at any level of the proceedings.
28 The contract and its terms have been put in issue here but the issue the parties have not had an opportunity to address is the
effect of the rule upon whether CMA is a party to the Agreements despite the only signatures being that of Ridings in what
appears to be his own capacity as "Dealer" and "Owner" of CMA.

CMA'S ALLEGATIONS

"Notices Never Effectively Given to or Received by the Dealership" (Opposition, page 4, lines 5-6)

121. Legally, CMA is correct that Section 3060 precludes termination of a franchise unless the "franchisee" has "received written notice".

122. CMA asserts that "as a result of misaddressing both NOIT-1 and NOIT-2, "the Dealership never received notice of Honda's intent to terminate...". (Opposition, page 4, lines 6-9) This is the factual conclusion sought to be reached.³⁵

123. This factual contention as to the misaddressing is based upon the claim that the notices were "...addressed to Mr. Ridings, and not the Dealership or one of its agents, such as Mr. King or Mr. Veglia..." (Opposition, page 4, lines 18-20).

124. The problems with this contention are two fold.

125. First, even if the notices were addressed only to Ridings, they would not be "misaddressed" but would be properly addressed to a "franchisee" as Ridings is a franchisee as discussed above (regardless of whether CMA is also a "franchisee"). The notices were also delivered to the dealership address which was the proper place for Ridings and CMA to "receive" the notices.

126. Second, even if the notices were misaddressed, this would not preclude the notices from being effective under the statute if they were nonetheless "received" by CMA (assuming CMA is the franchisee as claimed in its protest and pleadings). In other words, even if they were "misaddressed", once the notices arrived or were "delivered", per the UCC, the fact they may have been misaddressed is irrelevant. Being "misaddressed" did not prevent receipt here. Further, perhaps more important is not what the notices stated as to the addressees but rather what they did not state in regard to the addressees. Nothing was introduced to show that the notices were marked "Personal" or "Personal to Mr. Ridings" or

³⁵ Which side should have the burden of proof as to whether the notices were "received" or "not received" was not raised. However, Honda has established that it sent the notices (as described herein) and it is undisputed that the notices arrived at the dealership and were signed for by an employee of CMA. From that point on, to the extent that it is relevant, the burden of proving that neither CMA nor Ridings "received" the notices should be shifted to CMA and Ridings. This is because only CMA and Ridings know, or are in the best position to know or learn, those facts that would be needed to prove what had happened to the notices once they were in the possession of an employee of CMA. Despite the contentions of counsel for CMA, it may be that the delivery to the dealership address is sufficient for the notices to be "received" by both Ridings and CMA.

1 "To be Opened only by Mr. Ridings" or "Confidential", or "To be signed for by Mr. Ridings Only". The
2 Return Receipt could be and was signed by an employee of the business addressee, CMA, dba Long
3 Beach Honda.

4 127. CMA also asserts that "... although the return receipts for the mail containing NOIT-1 and
5 NOIT-2 were both allegedly signed for by employees of the Dealership, the Dealership received no notice
6 of the contents of the envelopes as the mail would have been set aside for Mr. Ridings, the addressee,³⁶ in
7 accordance with standard Dealership practice." (Opposition, page 4, lines 21-24, King Declaration,
8 paragraph 16, Veglia Declaration, paragraph 7).

9 128. CMA is correct that Division 2 and some sections of Division 1 of the California Uniform
10 Commercial Code apply to these franchises. However, CMA's claim that the Vehicle Code and UCC
11 section 2102(d) regarding an obligation to "notify" or "give" notice would be applicable is off the mark.
12 (Opposition, page 6, lines 3-20) The Vehicle Code does not merely require the franchisor to "notify" the
13 franchisee. The Vehicle Code requires that the notice be "received", not merely "given". "Notification"
14 or "giving notice" could occur even though the notice is not received. Notice "given" is not the same as
15 notice "received" and Section 3060 requires that the notices be "received" not just "given".

16 129. More on point however is CMA's reference to UCC section 1202(e) and (f) pertaining to
17 when a notice is "received". These sections state:

18 (e) Subject to subdivision (f), a person "receives" a notice or notification when:

19 (1) it comes to that person's attention; or
20 (2) it is duly delivered in a form reasonable under the circumstances at the place of
21 business through which the contract was made or at another location held out by that
22 person as the place for receipt of such communications.

23 (f) Notice, knowledge, or a notice or notification received by an organization is effective
24 for a particular transaction from the time it is brought to the attention of the individual
25 conducting that transaction and, in any event, from the time it would have been brought to
26 the individual's attention if the organization had exercised due diligence. An organization
27 exercises due diligence if it maintains reasonable routines for communicating significant
28 information to the person conducting the transaction and there is reasonable compliance
with the routines. Due diligence does not require an individual acting for the organization
to communicate information unless the communication is part of the individual's regular
duties or the individual has reason to know of the transaction and that the transaction

³⁶ This is perhaps an overstatement. Based upon what is before the Board, Mr. Ridings at best is "an addressee" not "the addressee".

1 would be materially affected by the information.

2 130. As can be seen, subsection (e) is expressly made subject to subsection (f). Subsection (f)
3 does apply to a notice "received by an organization" as here. However, subsection (f) is limited to notices
4 pertaining to a "particular transaction" in which there is already an "individual conducting that
5 transaction" in behalf of the organization.

6 131. CMA urges that the "...particular transaction involved the ongoing discussions,
7 negotiations, communications, and submissions of materials between Honda and the Dealership regarding
8 the Dealership's continuing franchise with Honda." And that "Honda had been in discussions with Mr.
9 King regarding the continuation of the franchise between it and the Dealership." (Opposition, page 7,
10 lines 22-26)

11 132. The notices here do not relate to the prior "particular transaction" which pertained to the
12 approval of the buy/sell submitted by Mr. King. The notices relate to the termination of the franchise
13 agreements which were between Honda and CMA/Ridings. They appear to be the first communications
14 to do so, and there is no "individual" at CMA "conducting that transaction".

15 133. Even if subsection (f) would apply, the language of the statute does not favor the
16 contention of CMA. The statute requires that the organization exercise "due diligence" which would
17 occur "...if it maintains reasonable routines for communicating significant information to the person
18 conducting the transaction and there is reasonable compliance with the routines." The "person conducting
19 the transaction" as claimed by CMA is King. There were no "reasonable routines for communicating
20 significant information to the person conducting the transaction" (claimed to be King).

21 134. The only routine shown by CMA, which it claims is "reasonable" is that the person who
22 signed for the notices followed CMA's "ordinary practice of setting the letters addressed to a non-
23 agent/non-employee of the dealership aside for him..." (Opposition, page 8, lines 11-12) (If anything, if
24 the letters were addressed to a "non-agent/non-employee of the dealership", one would think that the
25 "reasonable" routine would be to refuse delivery of the letters rather than sign a receipt for them or, if one
26 did sign a receipt for them because the name of the dealership was there, the "reasonable" routine should
27 be that the letters be given to "dealership" management, not the "non-agent/non-employee".)

28 135. As stated on page 4 in the Declaration of King, the "routine" was as follows:

1 If mail is received, but it is addressed to a former employee of the dealership, it is set aside
2 for that person to pick up if, based upon the form of the envelope and return address, it
3 appears to be of a personal or legal nature. Moreover, the dealership never opens certified
4 mail to a former employee, but sets it aside for the former employee to pick up. However,
5 if from an envelope it appears that a correspondence relates to marketing material or a bill
6 or invoice from a vendor, the dealership will open the envelope and review its contents.

7 136. The "routine" of CMA in regard to handling such mail is not reasonable for the following
8 reasons:

9 (a) The notices were sent Certified Mail, Return Receipt Requested;

10 (b) They were not addressed only to Ridings but they were also addressed to CMA along with
11 the dba name Long Beach Honda. (Which name came first on the envelope is unknown.) The letters
12 themselves show:

13 California Motorcycle Assessories, Inc. (Sic) #105030
14 Attention: Thomas G. Ridings
15 dba Long Beach Honda
16 3291 Cherry Avenue
17 Long Beach, California 90807

18 It is likely that the addresses on the envelopes, if prepared by computer, would track the format of the
19 letters. However, the Certified Mail forms show Thomas G. Ridings as the first name of the address, and
20 then the corporate name and the dba name.

21 (c) Ridings was not a mere "former employee";

22 (d) If CMA was the first name on the envelope, the letter was addressed to CMA;

23 (e) Even if Ridings was the first name on the envelope, it was followed by CMA and the dba
24 name and the likelihood is great (even though unopened) that such letters would contain "significant
25 information" intended for Mr. Ridings in his former capacity with CMA and that related to CMA
26 especially as they came from Honda and were Certified Mail, Return Receipt Requested;

27 (f) The letters were obviously not usual correspondence to Ridings of a personal or junk-mail
28 nature;

(g) Opening an envelope and reviewing a letter that contains marketing material or an invoice
from a vendor but not opening letters from the franchisor is an unreasonable distinction;

(h) There was nothing submitted by CMA as to what CMA's "routine" or instructions would

1 be, in its relationship with Ridings, as to communications received by Ridings if they contained
2 "significant information" pertaining to CMA. Was it the routine of CMA not to inquire of Ridings as to
3 the content of letters sent by a franchisor via Certified Mail, Return Receipt Requested? For all CMA
4 may have known, it may have been a large check (if such things are still used for payment) rightfully
5 owed to the dealership for some unknown reason. Surely, King and Ridings must have had an agreement
6 in place with Ridings as to how any communications would be handled if they related to CMA and were
7 received by Ridings. (The absence of any information as to this point is most curious as is the lack of
8 any declaration at all from Ridings or the unknown employee of CMA who signed for the notices.)

9 (i) Allowing a former owner unrestricted access to unopened letters from the franchisor sent
10 via Certified Mail, Return Receipt Requested, addressed to the former owner and the corporation, signed
11 for by another agent of the corporation, is far worse than merely unreasonable.

12 (j) If the addressee is a "former employee" it would be strange and perhaps risky for a
13 "current employee" to sign for it and hold it until the former employee picked it up. If the address
14 includes the name of the "former employee" and the dealership, it would be even more risky to sign for
15 the letters and hold them unopened for the former employee to pick them up. There was no indication
16 that King or other management had instructed anyone to ascertain the content of the envelopes at the time
17 they turned over the unopened envelopes to the former employee. It would not be reasonable to sign for
18 and hold an envelope that contains the name of the dealership as well as the former employee without
19 making some other attempt to learn its content. If anyone has created the risk and assumed the risk of a
20 lack of knowledge of the content of a notice it was King.

21 137. Honda had not been informed of the "routine" established by CMA for the handling of
22 mail addressed to CMA and Ridings. To say that Honda should bear the consequences of the result that
23 occurred under these circumstances is shifting those consequences from the party not only responsible for
24 establishing such a "routine", and fully aware of what was occurring as a matter of "routine", to a party
25 that fully complied with the terms of the contract and the requirements of the statute and who was
26 unaware of the routine.

27 138. It is inconceivable that a franchisor, who has complied with the terms of the franchise and
28 the statute, should be told that, as a result of an internal routine of the dealership of which the franchisor

1 had no knowledge, that Certified Mail, Return Receipt Requested, addressed to the person who under the
2 terms of the franchise, is the "Dealer", "Owner" and "General Manager", sent in his name, along with the
3 name of the corporation and its dba name, signed for by an agent of the corporation at the proper address,
4 is not effective as notice "received" by the corporation because the notices should also have been sent to
5 the corporation in its name only and/or sent to the new owners of the corporation who are not "Dealer",
6 "Owner" or "General Manager" under the terms of the franchise, and who are not "franchisees" entitled to
7 notice under the Vehicle Code. (As Ridings is a "franchisee", the receipt by Ridings, which would have
8 occurred upon delivery at the dealership address, would be sufficient to satisfy the requirements of
9 Section 3060 and start the time running within which a protest must be filed.)

10 139. When Honda received back the signed "Return Receipt" forms, it correctly believed that
11 the notices had been delivered to the dealership address as evidenced by the signature of someone at that
12 address establishing that delivery had occurred. From that point on, what became of the envelopes and
13 who learned of their contents should not be a concern of Honda so as to establish any further duty on the
14 part of Honda.

15 140. It is undisputed that the notices were delivered to the dealership and signed for by a
16 dealership employee. However, the UCC, for section 2303(f) to be applicable, requires not only that the
17 established routine be reasonable but also that there be "reasonable compliance with the routines". No
18 information was produced as to the identity of that employee who signed for the notices and there was no
19 declaration from that employee that he or she was aware of the "routine" or that the routine practice was
20 followed or when the notices were "picked up" by Ridings.

21 141. CMA's "routine" may have been reasonable: (a) If the envelopes were addressed to a
22 lower level employee (as compared to Ridings, the former owner); and, (b) May even have been
23 reasonable as to Ridings if the envelopes were from someone other than Honda; and, (c) If the envelopes
24 did not also bear the name of CMA; and (d) Were not Certified Mail, Return Receipt Requested from a
25 franchisor with the name of CMA as an addressee.

26 142. There is nothing to indicate whether the employee who signed the receipts and took
27 custody of the notices had been instructed to make inquiry of Ridings or if Ridings had been requested or
28 instructed to notify King of the contents of any correspondence given to Ridings unopened, but which had

1 been delivered to the dealership with the dealership's name on it.

2 143. CMA admits that the envelopes were received by Ridings. How or when this occurred is
3 unknown.

4 144. Although it was stated that Ridings is available, there was no declaration from Ridings as
5 to when he received the notices, when he opened the notices, whether he did or did not inform King of the
6 contents of the envelopes, and if not, why not. Nor, was there any information as to why Ridings did not
7 file a protest in his own behalf or in behalf of CMA.

8 145. There is no dispute that the notices were delivered to the CMA facility at the correct
9 address and that they were both signed for by an agent/employee of CMA in his or her status as an agent
10 of CMA. The primary effect of the signature of this unknown employee of CMA is to establish that the
11 notices were delivered at that address of CMA and Ridings on that date. However, the claim is that
12 CMA should not be held to have received the notices. It is unlikely that this unknown employee of CMA
13 was signing for the letters as an agent of Ridings (in Ridings' individual/personal capacity). For this
14 person to be an agent of Ridings in signing for the letters, there would be the need for Ridings to have
15 given his consent to this person (in advance or by ratification) to have this person act as Riding's agent
16 (subject to the control of Ridings), and this person would have had to consent to act as Riding's agent in
17 signing for Ridings' mail. There was nothing to evidence this had occurred. Therefore, the employee of
18 CMA was apparently acting as an agent of CMA in signing for receipt of the notices and thereafter acting
19 in accordance with what he or she had been instructed and authorized by CMA to do.

20 146. There are too many gaps and questions as to the handling of these envelopes to conclude
21 that the routine of CMA was reasonable as to the handling of these notices and that the routine was
22 followed.

23 147. And, again, it is undisputed that Honda was not aware of the "routine" that has been
24 determined to be unreasonable.

25 148. As the envelopes were delivered to the CMA dealership, as evidenced by the signatures of
26 an agent of CMA, to accept the arguments of CMA would be to require Honda to have ensured that it was
27 King and Veglia personally who received the notices, essentially treating King and Veglia as the
28 franchisees. This is far beyond what is required of a franchisor by Section 3060.

WHETHER THE NOTICES WERE RECEIVED BY A "FRANCHISEE" AS REQUIRED BY SECTION 3060

149. It is not disputed by CMA that Ridings took physical possession of the notices at some time after they were delivered to the dealership.³⁷ As indicated above, Ridings is still the "Dealer" under the terms of the franchise and is a "franchisee" under the Vehicle Code definition of "franchisee".

150. It is therefore concluded as to Ridings that: The notices were received by Ridings, the franchisee, in accordance with UCC section 1202(e) as the notices were "duly delivered in a form reasonable under the circumstances at the place of business through which the contract was made or at another location held out by that person as the place for receipt of such communications."

151. The same conclusion would apply as to whether the notices were received by CMA in accord with the standards established by UCC section 1202(e). The notices were admittedly delivered at the place of business of CMA which was the place held out by CMA as the place for receipt of such communications.

152. CMA admits the notices were signed for by an unidentified employee/agent of CMA in the apparent scope of that agent's authority to do so (the "routine"). What that agent of CMA did afterwards does not negate the fact that the notices were delivered to the CMA address, and that an agent of CMA took physical possession of the notices in accordance with the instructions given to that agent by CMA. Therefore, as a corporation can act only through its agent, and the acts of the agent in the scope of authority are deemed the acts of the principal, when the unknown agent of CMA received the notices, the knowledge that the notices were received would be imputed to the principal, CMA. The fact that the unknown agent may not have known their contents does not negate the fact that the notices were "received" by CMA.

153. As to UCC section 1202(e)(2), the notices were delivered at the place of business of CMA which was also likely to be one of the places "through which the contract was made".

154. However, even if the CMA place of business was not the place through which the contract was made, the notices were delivered at the "location held out by that person as the place for receipt of

³⁷ Nothing was presented to evidence when this occurred. However, this would not be necessary for the notices to be "received". The delivery of the notices at the dealership address would be sufficient for them to be received by Ridings as well as CMA.

1 such communication". This conclusion is supported by the language in the Standard Provisions of the
2 Agreements which state:

3 15.3 TERMINATION BY AMERICAN HONDA

4 A. American Honda may terminate this Agreement, at any time, by serving on
5 Dealer³⁸ a written notice of such termination by certified or registered mail to
6 Dealer at the Dealership Location...³⁹

7 155. CMA also asserts that, "Moreover, any notice sent to Mr. Ridings is ineffective as to the
8 Dealership as the Dealership, and not a former shareholder who is not an employee or authorized as a
9 (sic) agent of the Dealership for any purpose, is the franchisee..." (Opposition, page 4, lines 25-27, page
10 5, line 1)

11 156. This assertion has been discussed above. Ridings is a "franchisee" as defined in the
12 Vehicle Code and it is conceded that he received the notices.⁴⁰ (Ridings has the rights of a "Dealer"
13 "pursuant to a franchise", thus satisfying the Vehicle Code definition of a franchisee.)

14 157. Even if Ridings is considered not to be a dealer, the notices were in fact physically
15 received and signed for by another employee of CMA who was authorized by CMA to do so. And, even
16 if the employee had been instructed by CMA to hold the letters for Ridings "unopened" (a very risky act),
17 that should not negate the fact that the notices had been "received" by CMA.

18 **CONCLUSION AS TO WHETHER THE NOTICES WERE RECEIVED BY RIDINGS**

19 158. It has been determined that Ridings is a "franchisee" and that the notices were received by
20 him as of the date they arrived at the dealership address.

21 **CONCLUSION AS TO WHETHER THE NOTICES WERE RECEIVED BY CMA**

22 159. It has been determined that whether CMA is a franchisee or not cannot be determined
23 based upon what has been submitted in connection with this Motion to Dismiss.

24 160. However, assuming that CMA is a "franchisee" as alleged by CMA, either because the
25 signature of Ridings was effective as that of CMA under the law of agency and the law of contracts, or

26 ³⁸ As discussed above, "Dealer", by the terms of the franchise, includes Ridings and perhaps CMA.

27 ³⁹ The "Dealership Location" is stated in the Agreement to be "3291 Cherry Ave., Long Beach CA 90807", which is where the
28 notices were delivered by U.S. Postal Service, Certified Mail, Return Receipt Requested.

⁴⁰ As there was no declaration from Ridings or the agent of CMA who signed the receipts for the notices, it is unknown when
physical delivery to Ridings occurred. However, the date of such physical delivery should be no more important as to the date
of receipt by Ridings than the date that the envelopes were opened and read by Ridings.

1 because CMA was an intended third-party beneficiary under the law of contracts, the notices were
2 received by the “franchisee” (CMA) as of the date they were signed for by the CMA employee at the
3 dealership address. CMA received the notices when they were delivered at the place of business held out
4 by CMA as the place for receipt of such communications. (See UCC section 1202(e)(2) and Section 15.3
5 of the Standard Provisions of the Agreements)

6 **PROTESTANT’S CONTENTION THAT “HONDA’S MOTION DID NOT ESTABLISH THAT**
7 **THE DEALERSHIP’S TIME TO FILE A PROTEST HAD EXPIRED”**

8 161. CMA contends that Honda did not allege and establish that the time to file a protest had
9 expired based upon an alternative time period other than the number of days from receipt of the notices.
10 This alternative time period is provided by Section 3060(a)(2) which states that: “The franchisee may file
11 a protest with the board within 30 days after receiving a 60-day notice, satisfying the requirements of this
12 section, or within 30 days after the end of any appeal procedure provided by the franchisor, or within 10
13 days after receiving a 15-day notice, satisfying the requirements of this section, or within 10 days after the
14 end of any appeal procedure provided by the franchisor.” (Underline added.)

15 162. CMA alleges that the Motion to Dismiss “leaves unaddressed the possibility that the (sic)
16 regardless whether the notices are deemed received, the protest could still be timely.” (Opposition, page
17 10, lines 13-22) Technically, CMA may be correct. However, CMA does not assert that there was such
18 an “appeal procedure” or that an appeal has been filed and that the appeal is still pending. This would be
19 within the knowledge of CMA and as simple for CMA to allege affirmatively as it would be for Honda to
20 do negatively.

21 163. If there were such an appeal procedure, there is no doubt that CMA would be shouting its
22 existence from the rooftops. The silence of CMA as to the existence of any appeal procedure is taken to
23 mean that none exists or that the additional time that might be available has expired.

24 **PROTESTANT’S CONTENTION THAT “IT IS INEQUITABLE TO DEEM NOTICE GIVEN OR RECEIVED**
25 **SINCE HONDA KNOWINGLY AND WITHOUT JUSTIFICATION ADDRESSED NOIT-1 AND NOIT-2 TO**
26 **MR. RIDINGS WHILE THE TERMINATION WAS EFFECTIVELY CONCEALED FROM THE DEALERSHIP’S**
27 **OWNERS” (OPPOSITION, PAGE 8, LINES 21-23)**

28 164. This claim appears to be based upon the premise that Honda is required to treat the new
owners of the shares of stock as the “Dealer” or “franchisee” by providing notice to them individually.

1 165. It is stated by CMA that, "In essence, the statutory notice of a right to protest termination
2 was concealed⁴¹ from the Dealership by the conduct of Honda." ⁴² (Opposition, page 9, lines 3-4)

3 166. The problem with this argument is that there is no "right to protest" by anyone other than a
4 "franchisee" and Ridings and CMA, the only two possible franchisees, received the notices as required by
5 the Vehicle Code. The assertion is that there was concealment "from the Dealership", but that is not so as
6 the "Dealership" is CMA and notice was received by CMA. What is being urged under this heading must
7 be that the statutorily required notice of intent to terminate the franchise and the statutorily required notice
8 that a franchisee has the right to file a protest were "concealed" from King and Veglia. As to the notice of
9 termination, Honda was not required by the franchise or by the Vehicle Code to be certain that King or
10 Veglia received the notices of intended termination. As to the notice of a right to file a protest, finding
11 that King and Veglia had a right to receive notices that they had a right to file a protest would not only be
12 requiring Honda do something not required by the statutes but would also be untrue. King and Veglia do
13 not have a right to protest.

14 167. If the contention is that King and Veglia were entitled to receive the notices of intended
15 termination and that CMA had the right to file a protest, this too would be imposing a duty upon Honda
16 beyond that called for by the legislature. The legislature clearly made at least three policy decisions here.
17 One was to burden the franchisor with the responsibility that the notices be "received" rather than just
18 "given". It is much easier to accomplish and establish that a notice was "given" (usually meaning just
19 "sent") than it is to accomplish and establish that a notice was "received".

20 168. It would not be burdensome for a franchisor to "give" notices to a large number of people
21 at the "dealership" with the risks of delay and non-receipt placed upon the intended recipients. But if the
22 notice must be "received" the risk of delay and non-receipt is upon the sender, here the franchisor. By
23 requiring that the notices be "received" the legislature allocated the risks of delay in transmission or mis-
24 delivery to the franchisor. Requiring that notices be "received" results in a greater likelihood that a

25 _____
26 ⁴¹ If there was any "concealment", it was the failure of Ridings and King and Veglia to communicate to Honda that there was
27 an intended buy/sell and then to consummate the sale of the stock without notice to Honda.

28 ⁴² In the caption, CMA is asserting that the termination was concealed whereas this language is asserting that Honda concealed
the "statutory notice of a right to protest termination", meaning that Honda concealed from the Dealership not the intended
termination but that there was a right to protest the intended termination. Both will be addressed.

1 franchisee would have actual knowledge⁴³ of the contents of the notices (assuming the mail is properly
2 handled upon delivery) and an opportunity to file a protest to preserve its investment and continue to be
3 available to the public as a source of service, employment, and revenue.

4 169. Secondly, the legislature gave franchisees very short time frames within which to file their
5 protests (10 days and 30 days), but measured from the time the notices were "received" rather than from
6 the time they were "given" or sent.

7 170. Thirdly, the combination of the first two is a "trade-off" as it includes: (a) The franchisor
8 must be sure that the notices are "received"; but (b) Only by those "persons" who are "franchisees". The
9 franchisor should not be subject to the requirement that the notices be received by all of the stock holders
10 of a corporate franchisee or individual "owners" of the franchisee. (Some franchisees are entities which
11 are owned by 10 or 20 or more other persons. Some corporate franchisees may have hundreds of share
12 holders.) Limiting the requirement that notices be "received" only by the "franchisee" is a significantly
13 more efficient way to implement the administration of the statutory scheme. This has the effect of
14 preventing an undue burden on the franchisor without increasing the risk of uncertainty as to receipt by a
15 large number of persons but yet still protects the franchisee by requiring the notices be "received" rather
16 than just "sent".

17 171. If the contention is that King and Veglia were entitled to "receive" the notice of
18 termination and "receive" the notices as to the right of King or Veglia to file a protest in behalf of CMA,
19 the result would be expanding the definition of a "franchisee" and imposing a greater duty and risk on
20 Honda than that imposed by the legislature. This is somewhat evident here. The claim is that the duty to
21 give notice of termination and notice of the right to file a protest should include two shareholders who
22 became such when they bought all of the shares of stock. Would the same arguments be made by a
23 shareholder who bought 10% of the stock, or a person who became a partner with a 10% ownership
24 interest? Or, that notices must be received by all of the beneficiaries of the Pablo and Veronica Veglia
25 Trust?

26 172. To conclude that notices must be given to shareholders because they are "owners" (but not
27

28 ⁴³ Of course, actual knowledge of the franchisor is not necessary for the notices to be "received". Once they are delivered at
the correct address, the risk shifts to the franchisee to be prompt in opening and reading its mail.

1 franchisees) to avoid “concealment” of the intent to terminate, would be going far beyond what the
2 legislature has mandated must be done by a franchisor.

3 173. There can be no “concealment” of a “statutory notice of a right to protest” if there is no
4 statutory duty to give the notice and there is no statutory right to protest.

5 174. The class of persons “with standing” to file protests has been established by the legislature
6 to be those statutorily defined as “franchisees” and do not include any person other than a “franchisee”.
7 The Board is not empowered to expand that class.

8 175. Honda had been communicating with King for over a year (at times by letters addressed to
9 him alone, at times by letters to King with a courtesy copy to Ridings, at times with letters to Ridings with
10 a courtesy copy to King.) It is true that it would have been a simple matter to send a separate notice to
11 King and to Veglia as was done regarding communications as to the buy/sell (but it was King and Veglia
12 who were the parties to the proposed buy/sell). And it is true that there was one letter to King that made
13 a brief reference to a possible termination of the franchises.

14 176. This letter (dated March 24, 2008), addressed to Mr. Scott King, California Motorcycle
15 Assessories, Inc., at the dealership address, and sent Federal Express, stated in part:

16 Please be advised that AHM has not approved, and may not necessarily approve, the
17 proposed buy-sell, and if it does not approve the buy-sell it will thereafter commence
18 proceedings to terminate LBM’s (sic – Long Beach Honda’s?) status as an authorized
Honda motorcycle, ATV, and motor scooter dealer. (Exhibit A to Scott King Declaration)

19 The only “cc” copies shown were to Honda representatives. However, this and all of the communications
20 from Honda (that were provided to the Board) related to the buy/sell and the application for approval of
21 the already-consummated transaction with King and Veglia. Honda was aware that King and Veglia were
22 the owners of the shares of the corporation, but Honda did take pains to include in these letters that the
23 buy/sell had not been approved. Some of the letters, including the letter quoted from above, indicated that
24 the transfer that had already occurred was illegal and constituted a violation of the Vehicle Code.⁴⁴

25 _____
26 ⁴⁴ One of the sections cited by Honda in its letters to King and CMA states in part:

27 11713.3. “It is unlawful and a violation of this code for any manufacturer, manufacturer branch,
28 distributor, or distributor branch licensed under this code to do any of the following:

...

1 177. To hold that Honda under the Vehicle Code or the franchise had a duty to King and Veglia
2 that they receive the notices of termination of the franchise rights of CMA and Ridings would be to
3 require Honda to treat the buyers as being within the definition of "franchisees" even though they had
4 knowingly entered into and consummated a transaction which has been declared illegal by the legislature.
5 The legislature has created special and extraordinary rights and powers in "franchisees", and has made it
6 illegal for franchisors to withhold consent to a transfer of those rights if it would be unreasonable for the
7 franchisor to do so. However, the legislature has also proscribed limitations not only upon who may be a
8 franchisee, but also what must be done so that those extraordinary rights and powers held by a franchisee
9 will pass to a third-party enabling that third-party to now become a party to the "franchisor-franchisee
10 relationship" with all that such entails.

11 178. As will be discussed more fully below, counsel for CMA argues that it would be
12 inequitable to exclude King and Veglia from those that have the right to "receive" the notices and that the
13 equitable principle of estoppel should operate to preclude Honda from exercising its right to terminate the
14 franchises because King and Veglia did not receive the notices. The Protest states in part that Protestant
15

16 (d) (1) Except as provided in subdivision (t), to prevent or require, or attempt to prevent or require, by
17 contract or otherwise, any dealer, or any officer, partner, or stockholder of any dealership, the sale or
18 transfer of any part of the interest of any of them to any other person. No dealer, officer, partner, or
19 stockholder shall, however, have the right to sell, transfer, or assign the franchise, or any right
20 thereunder, without the consent of the manufacturer or distributor except that the consent shall not
21 be unreasonably withheld.

22 (2) (A) For the transferring franchisee to fail, prior to the sale, transfer, or assignment of a franchisee
23 or the sale, assignment, or transfer of all, or substantially all, of the assets of the franchised business
24 or a controlling interest in the franchised business to another person, to notify the manufacturer or
25 distributor of the franchisee's decision to sell, transfer, or assign the franchise. The notice shall be in writing
and shall include all of the following:...

(Emphasis added.)

26 Although the beginning of Section 11713.3 states it is "unlawful", the licensees listed do not include "dealers". However, there
27 is an omnibus or "catchall" provision which states:

28 Section 40000.1. Except as otherwise provided in this article, it is unlawful and constitutes an infraction
for any person to violate, or fail to comply with any provision of this code, or any local ordinance
adopted pursuant to this code. (Emphasis added.)

It is undisputed that the stock transfer occurred without prior notice to or approval of Honda which would be a violation of
Section 11713.3 quoted above. Although the statutes restrict the right (and maybe the power) of the transferor, here Ridings,
there is no doubt that King and Veglia, were aware that Ridings did not have the consent of Honda to sell his shares. See
Declaration of King, in which he describes himself and Veglia as "experienced motorcycle dealership operators", that
"regrettably we closed the stock transaction before approval by Honda was obtained" and that "Honda learned of the stock
sale soon after it took place...". (King Declaration, page 2, lines 1-13)

1 "...further avers that respondent may not legally rely upon (and should be equitably estopped from)
2 relying on any such purportedly given notice." (Protest, page 2, lines 17-19)

3 179. As stated above, to agree with these contentions would be to impose upon Honda the duty
4 to be certain that King and Veglia "received" the notices, effectively treating them as "franchisees" for
5 purposes of determining whether Honda is permitted to terminate the franchise of CMA (or Ridings). If
6 these contentions are correct, that would mean that the time within which to file a protest has not yet
7 commenced to run (as the time begins when the notice of termination is "received" by a "franchisee"). If
8 King and Veglia must receive notice, and their receipt is needed to start the time to file a protest, would
9 that mean King and Veglia would also have the right to file a protest? Why else would they be entitled to
10 notice and why else would receipt by them start the time to file the protest unless they were entitled to file
11 a protest? If they must receive notice, and the time to file a protest does not run until they do, it would be
12 senseless to state that they can't file a protest. If King and Veglia are franchisees for one purpose, would
13 they be franchisees for all purposes? If so, the application of an equitable principle (estoppel) would
14 result in creating de facto "franchisee" status in King and Veglia and give them the rights of de jure
15 franchisees when they have been knowing participants in an illegal transaction. Treating them as having
16 the rights of franchisees would be in derogation of the contract provisions, in derogation of the statutory
17 definition of a "franchisee", and would be using an equitable principle to contravene and make legal what
18 the legislature has declared illegal.

19 180. Although it may have been wiser in hindsight for Honda to have sent at least a "courtesy
20 copy" of NOIT-1 and NOIT-2 to King and Veglia (or as argued by counsel – sending a copy to CMA
21 without the name of Ridings), Honda's conduct (or lack thereof) even if deemed "inequitable" cannot
22 expand the scope of the statutes or make an illegal transaction legal.

23 181. To the extent that King and Veglia believe that there has been some breach of duty owed to
24 them by Honda, whether it be in contract, tort, or other principle of law or equity, the appropriate forum

25 ///

26 ///

27 ///

28 ///

1 for pursuing their claims would be Superior Court.⁴⁵ Protest rights under Section 3060 are limited to
2 “franchisees”. As King and Veglia have no standing to pursue claims of any kind before the Board,
3 finding that there was an obligation on the part of Honda to be sure they received notices would be a futile
4 act as they could not file protests in their own names. The conclusion is the same if the claim is that King
5 and Veglia were entitled to receive notices so that they could file a protest in behalf of CMA. It has been
6 found that CMA did receive the notices and any agent of CMA could have filed the protest in behalf of
7 CMA, as was done when it was filed by its attorney.

8 182. King and Veglia were not statutorily nor contractually entitled to the notices of termination
9 as they were not franchisees. To the extent that King or Veglia believe that CMA has some cause of
10 action against Honda due to the failure of Honda to be sure that King and Veglia received the notices, the
11 proper forum for such a claim would also be the Superior Court.

12 **PROTESTANT’S REQUEST THAT “LIMITED DISCOVERY BE ALLOWED TO**
13 **ASSIST IN DETERMINING THE TIMELINESS OF THE PROTEST”**
14 **(OPPOSITION, PAGE 10, LINES 23-28)**

15 **CMA’S CLAIM THAT “EQUITABLE DEFENSES MUST BE CONSIDERED IN DECIDING**
16 **WHETHER TO DISMISS A PROTEST AS UNTIMELY” (OPPOSITION, PAGE 3, LINES 12-14)**

17 183. CMA asserts that there must be a hearing as to the possibility that Honda may be estopped
18 from asserting that the protest was not timely filed and that at the least, the protest should not be
19 dismissed until CMA has had an opportunity to engage in discovery to determine if there are any facts
20 that would support a claim of estoppel that would operate in CMA’s favor.

21 184. CMA has not provided any information as to how the theory of estoppel should operate to
22 preclude Honda from asserting that the protest was not timely filed by CMA. In general, for estoppel to
23 operate there would have to be: (a) Some communication of fact or promise made by Honda to CMA (or
24 to King or Veglia); (b) That it was foreseeable to Honda that CMA/King/Veglia would rely upon that
25 statement of fact or promise; (c) That CMA/King/Veglia did rely upon the statement of fact or promise;
26 (d) That it was reasonable for CMA/King/Veglia to have so relied; (e) That the reliance by CMA/King/
27 Veglia involved a substantial change of position or loss of economic value; and, (f) That injustice can be

28 ⁴⁵ Also, as stated earlier, whether the claim be that of Ridings, or King and Veglia, the Board has no jurisdiction as to whether Honda’s consent to the buy-sell was unreasonably withheld.

1 avoided only by precluding Honda from establishing that the statement of fact was false or that the
2 promise was unenforceable.

3 185. While discovery may be needed to prove whether or not any of the above elements in fact
4 existed, discovery is not needed to allege that they existed, if the facts needed for the allegations are
5 already within your knowledge. Certainly CMA/King/Veglia would know (without discovery) if (a)
6 existed – that CMA/King/Veglia had been recipients of a communication of fact or promise made by
7 Honda; and that (c) existed – that CMA/King/Veglia relied upon that statement of fact or promise; and
8 that (d) existed – that it was reasonable for CMA/King/Veglia to so rely; and that (e) existed – that the
9 reliance by CMA/King/Veglia involved a substantial change of position or loss of economic value to
10 them. With the possible exception of (b), the other usual factors needed for estoppel, (d) and (f) are more
11 in the nature of judgment calls or evaluations that must be made by the decider (court/Board) after the
12 other elements had been established and to determine if estoppel is appropriate.

13 186. The opposition to the Motion to Dismiss contained no allegations as to any of the above.
14 At best, perhaps it could be claimed by King and Veglia that the long-time continuation of the business
15 relationship between Honda and CMA, conducted by Honda even after Honda became aware of the sale
16 of the stock, was sufficient to constitute communication to King and Veglia by Honda that Honda
17 considered King and Veglia as “franchisees” under the Vehicle Code (which would include King and
18 Veglia being entitled to that status for the purpose of giving notice of intent to terminate). However,
19 Honda, before it knew that the stock transfer had already occurred, told Ridings, King, and Veglia that to
20 do so without Honda’s consent would violate the terms of the contracts with CMA as well as the statutes,
21 and, after Honda learned of what was a fait accompli, Honda continued to advise CMA and King and
22 Veglia that the stock transfer was not permitted by the franchise, was illegal, and that the requirements for
23 approval by Honda had not been met. Even if this could constitute the needed element of a
24 communication from the person sought to be estopped, there is no proffered showing of a change of
25 position in reliance, by King and Veglia. The only possible change of position that could preclude Honda
26 from asserting the lack of a timely protest is the fact that King and Veglia chose not to open a Certified
27 Mail, Return Receipt Requested letter addressed to CMA and Ridings at the business address of CMA,
28 which had been signed for by an employee of CMA. Instead the employee had been instructed to hold the

1 unopened letters for Ridings to pick up at some time in the future. There was no showing of any attempt
2 by King/Veglia or other employees of CMA to make any attempt to learn of their contents at the time the
3 letters were turned over to Ridings. Even if this were a "detrimental change of position" needed for
4 estoppel, as discussed above, this is not considered "reasonable" reliance by King and Veglia. Nor would
5 it be foreseeable by Honda that King and Veglia would turn the unopened letters over to Ridings without
6 at least obtaining any information from Ridings as to their contents.

7 187. Denying the motion to dismiss for the purpose of allowing discovery as to the possible
8 issue of estoppel, as requested by CMA, is not warranted. As stated above, the facts that relate to these
9 circumstances are within the knowledge of King and Veglia, other CMA employees, and Ridings.

10 **ANOTHER CLAIM BY CMA WAS "THAT THE COMMERCIAL CODE**
11 **ESTABLISHES THAT HONDA IS ESTOPPED BY ITS CONDUCT TO CLAIM**
12 **IT GAVE NOTICE TO THE DEALERSHIP" (OPPOSITION, PAGE 4, LINES 9-11)**

13 188. Part of the discussion under this claim involved the application of the definitions of
14 notifying and giving notice and whether Honda complied with these definitions. This has been discussed
15 above. None of it has anything to do with the concept of estoppel.⁴⁶

16 189. A third claim which mentions "equitable" is that "It is Inequitable to Deem Notice Given
17 or Received Since Honda Knowingly And Without Justification Addressed NOIT-1 and NOIT-2 to Mr.
18 Ridings While the Termination Was Effectively Concealed from the Dealership's Owners". (Opposition,
19 page 8, lines 21-23) The text under this heading concludes with "In light of the above, Honda has waived
20 or should be deemed estopped from relying upon its mechanical interpretation of (sic) Vehicle Code's
21 requirements as to a due and proper notice of intent to terminate, notice of a right to protest, and
22 timeliness of the protest." (Opposition, page 9, lines 8-11)

23 190. This too has been addressed above and the contentions made by CMA under this heading
24 have nothing to do with estoppel, equitable or promissory (nor whether Honda "waived" any of its rights).

25 ⁴⁶ CMA is correct that estoppel is a principle recognized by the "Commercial Code". UCC Section 1103(b) states: "(b) Unless
26 displaced by the particular provisions of this code, the principles of law and equity, including the law merchant and the law
27 relative to capacity to contract, principal and agent, estoppel, fraud, misrepresentation, duress, coercion, mistake, bankruptcy,
28 and other validating or invalidating cause supplement its provisions." (Underline added.) The problem is not whether the
principle is recognized, the problem is whether there has been any showing that the elements of the principle are or may be
present here. The UCC may recognize and include estoppel as a principle to apply to transactions that are within its scope but
the UCC does not and cannot "establish" that the elements of estoppel exist.

1 191. The question by the ALJ at the hearing on the Motion to Dismiss and the reply by CMA as
2 to the claim of estoppel was as follows:

3 ADMINISTRATIVE LAW JUDGE SKROCKI: Okay. And
4 your estoppel argument, Mr. Rasmussen, what would you hope
5 to prove by discovery in regard to your estoppel claim? (RT page 56, lines 23-25)

6 MR. RASMUSSEN: I think that the estoppel -- the
7 language of estoppel that I mentioned earlier, really ties
8 in with the same theory of receipt, in the sense that in
9 lieu of the -- it was unreasonable for Honda to act by
10 placing Mr. Ridings' name on the envelope, in terms of
11 both the legal concept of receipt and as well an
12 unreasonable approach, in that regard, under the law of
13 estoppel. (RT page 57, lines 1-8)

14 192. Again, this is referring to the lack of proper notice required by the Vehicle Code and does
15 not relate to any of the elements needed for estoppel which would be establishing that CMA/King/Veglia
16 in any way relied upon a representation of Honda. Placing Ridings' name on the envelope is not a
17 representation of fact or promise by Honda. There has been no showing that it would be appropriate to
18 deny the Motion to Dismiss due to the need for discovery as to the potential issue of whether Honda
19 should be estopped from claiming that the protest was not timely filed.

20 **DETERMINATIONS**⁴⁷

21 193. It is determined that:

22 A. Ridings is a franchisee as he has rights "pursuant to a franchise".

23 B. Ridings received the notices as a "franchisee" as required by Section 3060. The notices
24 were received by Ridings on September 18, 2008, as required by Section 3060, when they were delivered
25 to the correct business address as required by the UCC and the franchise. Alternatively, at the very latest,
26 the notices were received by Ridings when he took physical possession of them. (The date of which is

27 _____
28 ⁴⁷ The determinations as to Ridings are limited to their effect upon the parties to this Protest. They cannot be binding upon
Ridings personally as he is not a party to the Protest or this Motion and has not made any appearance before the Board.

1 unknown).

2 C. Ridings has not filed a protest as a “franchisee”.

3 D. CMA had a protest filed in its behalf. Who filed the protest is irrelevant as long as it was
4 filed by an agent with authority to do so.

5 E. CMA may or not be a franchisee.

6 F. Whether CMA is or is not a franchisee cannot be determined in connection with this
7 motion.

8 (i) CMA may be a franchisee if the signature of Ridings was effective to give CMA
9 rights “pursuant to a franchise” either as a party to the franchise or as a third-party intended beneficiary of
10 the contracts between CMA and Ridings.

11 G. The issue of whether CMA is or is not a franchisee is moot because the outcome of this
12 motion is the same. This is so because:

13 (i) If CMA is not a franchisee, the protest should be dismissed because only a
14 “franchisee” has the right to file a protest and have a hearing before the Board;

15 (ii) If CMA is a franchisee (under either of the two theories above or any other theory),
16 CMA received the two notices of termination on September 18, 2008, as required by Section 3060, and
17 did not file a timely protest. The notices were “received” by CMA within the definition of UCC section
18 1202(e) and (f), either because: They were delivered at the correct address on September 18, 2008, as
19 evidenced by the signature of the authorized agent of CMA who signed for them at the CMA location;⁴⁸
20 or, They were received by CMA at the very latest when Ridings took physical possession of them in his
21 roles of “Dealer” and “Owner” as well as “franchisee”. The date Ridings took physical possession of
22 them is unknown.

23 H. Neither King nor Veglia are “franchisees” as defined in the Vehicle Code and thus there is
24 no statutory obligation on the part of Honda that they receive notice.

25 _____
26 ⁴⁸ CMA’s claim that Ridings was no longer an agent or employee of CMA and had no authority to receive the notices in behalf
27 of CMA is irrelevant. There is no question that the notices were delivered to CMA at the proper address. This constitutes
28 “received” as defined in the UCC relied upon by CMA. And there is no question that the unknown employee of CMA who
signed for the notices was authorized by CMA to take delivery of the notices in accordance with instructions from CMA’s
management.

1 I. There is nothing to indicate that the Motion to Dismiss should be denied because Honda
2 should be estopped from asserting the lack of timely filing of the protest.

3 J. There is nothing to indicate that the Motion to Dismiss should be denied to allow CMA
4 additional time to engage in discovery to attempt to establish whether Honda should be estopped from
5 asserting the lack of timely filing of the protest.

6 **PROPOSED ORDER**

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

9
10 I hereby submit the foregoing which constitutes my
11 proposed order in the above-entitled matter, as the
12 result of a hearing before me, and I recommend this
13 proposed order be adopted as the decision of the New
14 Motor Vehicle Board.

15 DATED: January 16, 2009 .

16 By: 
17 ANTHONY M. SKROCKI
18 Administrative Law Judge
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26

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