

January 28, 2014

Via Email

California New Motor Vehicle Board
Attn: Robin Parker, Senior Staff Counsel
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**Re: Opposition to Yamaha's Request for Amicus Brief;
Powerhouse v. Yamaha San Luis Obispo Superior Court No.
CV098090; Court of Appeal No. B236705; Supreme Court
S215677**

Dear Members of the Board:

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

Yamaha has made two prior requests for an amicus brief and both were rejected by this Board (May 22, 2012 and August 23, 2012). This latest request is much like the prior requests, but in this instance we have the benefit of the Court of Appeal's decision which confirms the jury's verdict against Yamaha finding, among other items, that Yamaha committed intentional torts and also violated Vehicle Code section 11713.3. As I stated in my response to Yamaha's prior requests, this dispute between Powerhouse and Yamaha primarily involves factual issues, not unique or important statewide legal issues that need input from amicus.

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

Yamaha's purpose in its Petition for Review is to set aside the jury verdict. In addition to finding that Yamaha violated 11713.3 the jury found that Yamaha breached the implied covenant of good faith and fair dealing, committed the tort of interference with contractual relations and acted with malice, oppression or fraud justifying an award of \$200,000 in punitive damages. The Court of Appeal found substantial evidence to support and confirm the jury's finding.

Even though the evidence presented to the jury shows that Yamaha acted wrongfully and with pretext to interfere with the pending sale of Powerhouse's dealership, Yamaha continues to argue that *as a matter of law*, it should be absolved of responsibility. Yamaha's arguments regarding section 3060 fall flat because Yamaha fully presented its position regarding section 3060 and the jury had the opportunity to consider Yamaha's evidence and argument along with *all* of the other evidence and it came to a very different factual conclusion than what Yamaha attempts to portray.

Yamaha was allowed to introduce evidence of section 3060 and the protest process. Robin Parker testified at Yamaha's request; and she explained the protest process, how the process worked in this case, the 10-day protest limitation, your Board's dismissal of Powerhouse's protest as untimely and the fact that this decision was upheld in court. Apparently this evidence did not compel the jury to rule in Yamaha's favor; most likely, because there was other very substantial evidence showing Yamaha's culpability and misconduct.

Yamaha's factual review in its letter to this Board dated January 23, 2014 requesting an amicus letter does no justice to the evidence presented to the jury. The actual evidence was far more complete and very different in character than that which Yamaha has purported to summarize. The Court of Appeal Opinion contains a good recount of the evidence, and an even more detailed recount, with citations to the record, is contained in Plaintiffs' Answer to Yamaha's Petition for Review (the Answer attached hereto as Exhibit "A").

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2. The NMVB Retains Jurisdiction to Hear Protests and that Authority is Unaffected by the Court of Appeal Decision.

As I pointed out in my letter to you of August 13, 2012, Powerhouse does not contend, argue or suggest that this Board lacks jurisdiction to hear protests. Powerhouse's claims are damage claims, required to be filed in court, based on Yamaha's violation of section 11713.3 and related common law tort theories.

Vehicle Code section 3050(e) states that notwithstanding this Board's jurisdiction to hear protests (i.e. subdivision (d) of 3050) the courts have jurisdiction over all common law and statutory claims originally cognizable in the courts.¹ Section 11726 expressly provides a judicial damage remedy for a violation of 11713.3. And sub-section (d)(3) of section 11713.3 expressly states that a distributor/manufacturer's obligation to act reasonably pursuant to section 11713.3 is a question of fact requiring consideration of *all* facts and circumstances.

Thus, the NMVB retains full jurisdiction to hear protests, and it has the authority to determine whether a protest is timely or untimely, just as it did in this case. But a party who has a statutory or common law damage claim cognizable in the courts is not precluded from pursuing that remedy simply because a protest was filed late, or not at all.

The Court of Appeal Opinion makes the same point. Following is a quote from the Opinion (p. 10)

¹ The Legislative purpose of subdivision (e) was to clarify "that the *courts*, not the [NMVB], have primary jurisdiction over all common law and statutory claims originally cognizable in the courts (*italics original*)."
South Bay Creditors Trust v. General Motors Acceptance Corporation (1999) 69 Cal.App.4th 1068, 1080. In *South Bay Creditors*, the Court of Appeal explained that subsection (e) "reflects the Legislature's disapproval of the *Yamaha* cases." *South Bay Creditors v. General Motors, supra* at pp.1079-1080. The "*Yamaha*" cases to which the *South Bay* Court referred are *Yamaha Motor Corp. v. Superior Court* (1986) 185 Cal.App.3d 1232 and *Yamaha Motor Corp. v. Superior Court* (1987) 195 Cal.App.3d 652. In both these cases the Court of Appeal held that prior to pursuing a judicial damage remedy a dealer was required to file an administrative protest with the NMVB under section 3060. The necessity of filing a protest as a prerequisite to filing a damage claim in court is what the Legislature rejected when it adopted sub-section (e).

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

Despite these authorities, Yamaha's argument in this case was that Powerhouse was required to file a timely protest in order to keep its franchise "active," in order to keep Yamaha's obligation to consider the sale to MDK alive, in order to pursue a civil action under section 11713.3 for Yamaha's failure to reasonably consider the sale of the dealership to MDK. That is the argument that the Court of Appeal found inconsistent with Sections 3050, subd. (e) and 11713.3. However, although the Court of Appeal rejected Yamaha's argument that Powerhouse's claims were precluded as a matter of law, it did not rule that the NMVB lacked jurisdiction to consider protests. Rather it ruled that, on the facts of this case, Yamaha remained bound by the mandate of section 11713.3 to act reasonably even though the protest period had elapsed. As the Court of Appeal stated, contrary to what Yamaha argues, section 3060 does not trump all judicial and statutory claims that might arise out of the franchise.

Yamaha's January 23, 2014 letter to this Board argues that the Court of Appeal Opinion is contrary to the "plain text" of section 3060. The relevant sections of 3060 do not mention or address the obligation of a manufacturer/distributor in connection with a sale of the dealership. The text of section 3060 is limited addressing franchise termination, not dealership sales. Section 3060 has no text addressing dealership sales; that is a topic addressed in section 11713.3.

Yamaha argues that the Court of Appeal Opinion cannot be reconciled with *Sonoma Subaru v. New Motor Vehicle Board* (1987) 189 Cal.App.3d 13. However, both the trial court and the Court of Appeal rejected that argument because *Sonoma Subaru* simply does not apply to the facts of this case. The only issue addressed in *Sonoma Subaru* was whether there should

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be a "good cause" exception that would allow the NMVB to consider a late filed protest under certain equitably driven circumstances. The issue of dealership sale was never addressed and the decision never mentions section 11713.3 or the court's jurisdiction to hear common law and statutory claims. Its language regarding the finality of franchise termination was used solely in the context of considering whether a dealer's protest could be considered by the NMVB where the protest was untimely. *Sonoma Subaru* is of no relevance whatsoever in deciding what conduct is or is not reasonable under section 11713.3, or in resolving what claims can be decided by the jury versus being determined "as a matter of law" as Yamaha advocates.

Yamaha's companion argument that the Court of Appeal Opinion improperly deprives a franchisor of the right to treat a franchise as being terminated once the protest period elapses, again ignores the facts of this case. If, as was found to be true in this case, franchise termination and the protest process is used as a pretext to evade responsibilities under the law and a distributor such as Yamaha engages in deceit and unreasonable conduct to sabotage a legitimate and viable sale, a jury should be allowed to consider all of these facts, and not be precluded from doing so for the sole reason that a timely protest was not filed. Such a position would violate the mandate of section 11713.3 and a dealer's right to directly seek judicial remedies under section 3050(e).

Contrary to Yamaha's characterization, the Court of Appeal's discussion of *Hardin Oldsmobile v. New Motor Vehicle Bd.* (1997) 52 Cal.App.4th 585, and other cases, is hardly superfluous. *Hardin* was discussed in the context of addressing the interplay between the court's jurisdiction to address statutory and common law remedies and the NMVB's jurisdiction to address administrative remedies. Because Yamaha's arguments are based on the premise that an untimely protest determines as a matter of law the outcome of statutory and common law claims pursued in court, this interplay goes to the heart of the debate. The outcome of the Court of Appeal's discussion of *Hardin* was to confirm that the NMVB has jurisdiction to consider protests but that such jurisdiction did not (does not) preempt a court from adjudicating claims under 11713.3 and common law remedies; and, in doing so, the court may consider all facts and circumstances. And more specifically, the Court of Appeal properly used *Hardin* to discuss and support its conclusion that *Sonoma Subaru* did not preclude the trial court from considering all of the facts relevant to the monetary claims in this case.

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The most relevant and operative law in this case are sections 11713.3 and 3050(e) which state that a distributor such as Yamaha must not prevent a sale and must act reasonably, that a dealer can pursue a statutory and common law claim in court notwithstanding this Board jurisdiction to hear protests, and that the jury must consider all facts and circumstances in determining reasonableness.

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

Because of the significance of the facts to the outcome of this case, and the incomplete facts presented by Yamaha, I will provide you with a very brief summary, even though the Court of Appeal Opinion summarizes the facts, and Powerhouse's Answer to Yamaha's Petition for Review provides a more detailed review of the evidence. This summary is based on the evidence outlined in Powerhouse's Answer (which includes citations to the record), and I refer you to the Answer if you would like to review the facts in more detail.

a. Yamaha Represents It Will Consider a Sale Even Though the Dealership is Closed and Engages in the Sale Process.

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

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

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

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

Yamaha's legal counsel testified that at the time he prepared the termination notice he was aware of the pending sale, and he was aware and considered Yamaha's obligations under section 11713.3. He knew that the pending sale would take 30 to 60 days to process, far longer than the 10-day protest period for the 15-day notice that he prepared. He believed that once the 10-day protest period lapsed, Yamaha would have no further obligation to even consider the proposed buyer. When asked how he could reconcile Yamaha's obligation to reasonably consider a proposed sale that would take 30 to 60 days to process, with a 10-day protest period that Yamaha planned to use to cease considering the sale, he coined a phrase "Protest Bridge;" meaning Powerhouse would have to file a protest in order for Yamaha to remain obligated to reasonably consider the pending sale.

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

A second 15-day notice was issued, and this notice was received by Powerhouse's owner, Tim Pilg, on a Saturday. He was confused by the notice because, until this point in time, Yamaha had never even suggested that there was an issue with the dealership being closed during the pending sale and Yamaha had represented it would assist the smooth processing of the sale. Mr. Pilg discussed the notice with his business consultant and he, his business consultant

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and the prospective buyer believed the termination must be part of the sale process; terminating the old franchise in preparation for the buyer's new franchise. At trial, Yamaha's witnesses confirmed that, during the ordinary course of approving the "transfer" of a franchise, the franchise itself is not actually "transferred." Yamaha terminates the seller's franchise and enters into a new agreement with the buyer. Nonetheless, to be certain, the following Monday Mr. Pilg called Yamaha's legal counsel.

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

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

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

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

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d. Yamaha Immediately Aborts Processing Causing Financial Ruin.

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

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

e. Summary of Yamaha's Wrongdoing.

The evidence shows that Yamaha adopted a plan to evade its obligations under section 11713.3 *before* the termination notice was even issued. The termination notice was pretextual. It was not legitimately intended to resolve the issue presented by the closure of the dealership, but rather to create an obstacle to the pending sale. The concept of a "protest bridge" was fundamentally unreasonable under section 11713.3. Worse yet, Yamaha acted intentionally to keep Powerhouse in the dark, and at times made false statements. It refused to respond to Powerhouse's questions knowing the harm that Powerhouse faced. This evidence fully supports the jury's verdict, including its finding that Yamaha acted with malice, oppression or fraud.

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

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

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

Thank you.

Very truly yours,

A handwritten signature in black ink, appearing to read "Dennis D. Law". The signature is stylized with a large initial "D" and a long horizontal stroke at the end.

Dennis D. Law

DDL/ru
Enclosure

cc: (w/enclosure)
Diane Matsinger
Timothy Pilg
Jerry Namba
Maurice Sanchez
Theodore J. Boutrous

EXHIBIT A

Case No. S215677

**IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA**

POWERHOUSE MOTORSPORTS
GROUP, INC., et al.,

Plaintiffs, Respondents and Cross
-Appellants,

v.

YAMAHA MOTOR CORPORATION,
U.S.A.,

Defendants, Appellants and
Cross-Respondents.

**ANSWER TO PETITION FOR REVIEW
FILED BY YAMAMA MOTOR CORPORATION, U.S.A.**

After a Published Decision by the Court of Appeal,
Second Appellate District, Division Six, B236705,
Filed November 26, 2013,
Modified on Denial of Rehearing, December 24, 2013.

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Plaintiffs and Respondents Powerhouse Motorsports Group, Inc. (“Powerhouse”) and Timothy L. Pilg respectfully submit this Answer to the Petition for Review filed by Defendant and Appellant Yamaha Motor Corp. U.S.A. (“Yamaha”). Yamaha filed a Petition for Rehearing in the Court of Appeal on December 11, 2013. Powerhouse and Mr. Pilg filed an Answer to that Petition on December 23, 2013. The Court of Appeal denied rehearing and ordered a modification of its Opinion on December 24, 2013.

I

THERE ARE NO GROUNDS FOR REVIEW

Yamaha's Petition is remarkable in both its selective recount of the facts and its omission of the pertinent legal considerations. There are no grounds for review of the issues presented by Yamaha because this is not a “franchise termination” case. This case involves garden variety fraud. Yamaha expressly stated one thing and -- behind the scenes -- did something quite the contrary. The jury found Yamaha liable for common law torts, including intentional interference with contract, and also found that Yamaha violated Vehicle Code¹ provisions that expressly prohibit distributors such as Yamaha from unreasonably preventing dealers from selling their dealerships (sec.11713.3, subd. (d)(1)). Section 11713.3 expressly confirms that, like the common law tort claims, the trier of fact *shall* consider *all* facts and circumstances in its determination of whether a distributor has violated the statute (*Id.*, subd. (d)(3)).

The Court of Appeal Opinion includes a substantial review of the facts that support the jury's verdict for Powerhouse and Mr. Pilg, and the appellate court's legal conclusions are unassailable in light of those facts.²

¹ All statutory references herein are to this Code unless otherwise noted.

² On February 25, 2011, after the trial court denied Yamaha's motion for summary judgment, Yamaha sought review by this Court. This Court denied the Petition on April 13, 2011 (Case No. S190950).

Powerhouse was a motorcycle and sport vehicle dealership owned by Tim Pilg and located in Paso Robles California and it was one of Yamaha's franchisees. In 2008, like many businesses in California, Powerhouse fell victim to the bad economy and was forced to close. However, within days after closing, Tim Pilg received verbal confirmation from Yamaha that he could sell the dealership even though it was closed. Based on that representation, Powerhouse negotiated and executed a binding purchase and sale agreement with MDK, another Yamaha franchisee. On multiple occasions during the course of the ensuing approximately six weeks, Yamaha executives acted as if they were facilitating the sale. No one from Yamaha ever mentioned that there was a problem with the dealership remaining closed. In fact, Yamaha told Mr. Pilg that it was not necessary to reopen the dealership under an operating agreement with the buyer. Instead, Yamaha promised that it would expedite the processing of MDK's application.

Unbeknownst to Powerhouse and Mr. Pilg, Yamaha executives were working behind the scenes to terminate the Powerhouse franchise. They apparently thought that, if they did so, they could ignore Yamaha's obligation to reasonably consider MDK as a purchaser (sec. 11713.3, subd. (d)(1)). When Mr. Pilg finally received notice of Yamaha's intent to terminate the franchise, he made numerous attempts to gain an explanation from Yamaha about how, if at all, the franchise termination would impact the pending sale to MDK. He reasonably believed that one would not affect the other because he had no desire to keep the Powerhouse franchise and, when Yamaha consents to the sale of a dealership, Yamaha terminates the seller's franchise and enters into a new franchise agreement with the buyer. Yamaha avoided most of Mr. Pilg's inquiries. When Yamaha executives did respond, they affirmatively misled him. Then, shortly after the lapse of the period in which Yamaha claimed Powerhouse would have

been required to file an administrative challenge (i.e. a "protest") to the franchise termination, Yamaha aborted its processing of the buy-sell agreement. The only reason given by Yamaha for that action was its contention that Powerhouse's franchise had lapsed.

At trial, Yamaha attempted to defend its actions by arguing that it could lawfully terminate the Powerhouse franchise under section 3060 because the dealership had closed. According to Yamaha, if Powerhouse wanted to sell the Yamaha franchise, Powerhouse was required to file an administrative protest with the New Motor Vehicle Board in order to keep the franchise "alive." The defense was incorrect as a matter of law (sec. 3050, subd. (e); Op., pp. 7-11 and cases cited therein), and the jury rejected the defense on overwhelming evidence that Yamaha used the franchise termination as a pretext in an attempt to evade the obligations imposed upon it by the Legislature under section 11713.3.

The Court of Appeal properly affirmed the jury's verdict in all respects. On the facts of this case, Yamaha's hyperbolic claims of "uncertainty" in the industry and "harm" to consumers are not only unworthy of review, they are utterly without merit.

II

STATEMENT OF FACTS

Yamaha's summary omits all of the facts upon which the jury found that Yamaha committed common law torts and violated section 11713.3. Therefore, Powerhouse and Mr. Pilg offer this statement to facilitate the Court's consideration of Yamaha's petition in the context of this case.

In June of 2008, Powerhouse's financial struggles came to a head. It did not have sufficient cash to pay its flooring payment, employees and other expenses (5RT1248:23-28). On June 16th, Mr. Pilg called each of his employees and explained why he was forced to close; he changed the recorded message on the phone, and put a sign on the door providing

information for customers who had repairs in progress (5RT1248:17-1249:11). He was resigned to the loss of Powerhouse because he knew that the closure was a breach of his dealer/franchise agreements; he also believed that he had lost the ability to sell the dealership (5RT1251:3-1252:6; 7AA1989). He contacted each of his distributor representatives, advised them that he had been forced to close, and set in motion plans to liquidate the business and sell or lease the building (7AA1955-1890; 5RT1249:14-20; 5RT1253:14-1256:23).

Three days later, on June 19th, during a conversation with another dealer, Mr. Pilg learned that certain parties might be interested in buying Powerhouse even though it was closed (5RT1257:1-1258:22). He immediately called each of his distributor representatives and asked whether he could sell Powerhouse even though it was closed (5RT1259:11-24). Each of the distributors agreed that he could do so (5RT1258:25-1259:24). There was conflicting evidence about what Yamaha manager Rod Stout told Mr. Pilg, and Yamaha's Petition recounts only Yamaha's version of the conversation (Yamaha Pet. Rev., p. 10) – which the jury rejected. Mr. Pilg testified that he “called Rod [Stout] point blank and said, Rod, I have an offer for my dealership. I have interested parties. Can I sell my dealership? And he said, ‘absolutely’” (5RT1259:15-18).

Through his business consultant, Mr. Pilg contacted MDK and a meeting was arranged for the following Saturday, June 21st (5RT1260:11-24). At that meeting, MDK verbally agreed to purchase essentially the entire Powerhouse dealership for \$700,000 and also to lease from Mr. Pilg the real property occupied by Powerhouse (5RT1260:22 - 1261:24). They signed a Term Sheet on June 25th (5RT1260-1262; 7AA1748-1754). Mr. Pilg immediately left a voice mail message with his Yamaha representative, Luke Dawson, advising Dawson that he had come to an agreement to sell the dealership (5RT1262:21-1263:11; 7AA1758).

On June 27th, Mr. Pilg connected with Dawson and described the essential terms of the sale (6RT1781). He told Dawson that MDK would acquire all of the product lines, that the sale would help Powerhouse reduce its debt, that MDK would lease the real property from him, and that MDK was interested in hiring Powerhouse's employees (5RT1268:11-1269:13). Dawson said that, because the credit application process for MDK could take some time, MDK could enter into an "operating agreement" by which MDK could re-open immediately and operate under Powerhouse's dealer number while Yamaha processed MDK's application (7AA1781). Dawson also urged Mr. Pilg to work with MDK "immediately" to order vehicles for the new model year (7AA1781; 5RT1269:14-1270:8; 7RT1740-1741).

On June 25th, before Dawson and Mr. Pilg actually connected, another direction was emerging behind the scenes in email traffic between and among Dawson and Yamaha's executives (7AA1758, 1781-1782). Yamaha executive Jason Bishop asked: "Do we need to get legal involved? If his doors are closed he's in violation of his dealer agreement. I'm not a huge fan of MDK...Keep us posted." (7AA1781).

After speaking with Mr. Pilg on June 27th and encouraging the sale and MDK's order for inventory, Dawson e-mailed management, asking: "Should I contact legal or has Jason already done so? I would like to discuss with both of you if supporting this buy/sell is in our best interest and formulate *a game plan* for moving forward" (7AA1781, emphasis added). At no time during Dawson's June 27th conversation with Mr. Pilg did Dawson mention that Yamaha was concerned about either MDK or Powerhouse's "closed" status, nor was anything said about "legal" (7RT1942:8-1944:17, 1270:9-21- 1271:18). The only "game plan" of which Mr. Pilg was aware was Yamaha's cooperation with the pending sale to MDK.

The sale of Powerhouse to MDK moved forward. The sign on the dealership door was changed to inform customers that the dealership was being sold and would reopen, Mr. Pilg's lease to MDK was drafted, and an onsite meeting was scheduled for July 10th for Yamaha representative Dawson and representatives from Powerhouse and MDK (5RT 1264-1265, 1271:20-1272:6; 7RT1945:18-1946:11; 7 AA1761-1779).

Yamaha's Petition describes this meeting in a single sentence, stating simply that a Yamaha employee agreed to send MDK a dealer application and to get the approval process started (Pet., pp. 10-11). In fact, the meeting lasted several hours, and Dawson was an active participant; he assured the parties that he was present as a "*facilitator*" to ensure that the sale and transition process went *smoothly and expeditiously* (5RT1272:14-1274:21 (emphasis added); 7RT1947:11-1948:5; 12RT34351-5). The group discussed every aspect of the sale, including MDK's business plan, the need to reopen the dealership as soon as possible, the possibility of doing so under an operating agreement while Yamaha processed MDK's application, hiring employees, the process for Yamaha's approval of MDK and plans to finish a formal buy/sell agreement (5RT1272:14-1274:17; 7RT1948:8-23; 12RT3435:1-3439:2).

Not once during the July 10th meeting did Dawson mention any potential problem with the dealership being closed, nor did he describe the impact of closure, if any, on the pending sale (5RT1274:22-24; 7RT1946:12-26, 1952:1-14; 12RT3436:24-3437:8). Dawson also failed to mention that he had been directed by Yamaha management to attend the meeting to confirm Powerhouse's actual closure because Yamaha was considering terminating the Powerhouse franchise (7RT1946:5-1947:10; 8RT2120:17-22). Driving home from the meeting, Dawson called Bishop, confirmed the closure, and gave Bishop the information required to fill out an internal form called a Dealer Cancellation Request that is used to

commence termination (7RT1788, 1953:12-1954:23, 2196:13-24). The evidence strongly suggested that someone “walked” the form through the Yamaha headquarters in order to obtain the required management signatures as soon as possible, including that of in-house counsel Richard Tilly (7RT1867:7-1868:13, 1875:15-1876:21, 2191:8-2191:13; 8RT2199:9-2200:18).

On July 11th, Attorney Tilly sent Powerhouse a Notice of Termination (7AA1807). Tilly testified that when he prepared the Notice he was aware of the pending sale and he knew that, even if Yamaha expedited its consideration of MDK, there would not be sufficient time for Yamaha to complete that process and for the parties to close escrow before the expiration of the time required to file a termination protest to the New Motor Vehicle Board (7RT1867:7-1868:16, 1893:21-1896:12).³ Tilly was also aware that the law prohibited Yamaha from unreasonably withholding its consent to MDK as a new franchisee (sec. 11713.3, subd. (d)(1)) (7RT1855:13-1856:5, 1889:1-1892:26). Neither Powerhouse nor Mr. Pilg received the July 11 termination notice (AA1807-1808; RT 1514:28-1515:17).

The sale of Powerhouse moved further forward. Powerhouse and MDK considered the option of re-opening immediately under an “operating agreement,” but operating agreements are complicated and Mr. Pilg was concerned that careful drafting of that agreement would consume too much time (5RT1275:17-1279:21; 6RT1506:20-1509:6). On July 18th, Mr. Pilg

³ When asked how Yamaha could comply with section 11713.3 and at the same time issue a termination notice to Powerhouse before Yamaha completed its consideration of MDK, he said that Powerhouse was required to build a “protest bridge” with the New Motor Vehicle Board (7RT1892:27-1897:22, 1856:28-1858:20, 1914-1925). By that he meant that Powerhouse would have to file a protest in order for Yamaha to continue considering the MDK sale. He admitted that a protest involved a sometimes complicated and lengthy administrative lawsuit (7RT1845:3-17, 1857:19-1857:26; 12RT3376:2-3384-24).

called Mr. Stout for his input. Stout told Mr. Pilg that, because MDK was an existing Yamaha franchisee, MDK could “submit the paperwork without the management [operations] agreement and [Yamaha would] *expedite the dealer packet*” (5RT1278:3-6 (emphasis added); 6RT1507:15-22). Even though Stout had firsthand knowledge of the pending franchise termination, he did not mention any problem with the dealership being closed, nor did he mention the pending termination of the Powerhouse franchise (5RT1278:24-1279:21; 6RT3330:12-3332:11, 3334:25-3338:15).

That same day, July 18th, Powerhouse and MDK executed an Asset Purchase Agreement that provided for Powerhouse to sell the dealership to MDK and for MDK to lease the location from Mr. Pilg (7AA1792-1805). The next day, Saturday July 19th, Mr. Pilg e-mailed the executed Asset Purchase Agreement to all of Powerhouse’s manufacturer representatives, including Dawson at Yamaha (7AA1790). The following week, MDK hosted a job fair at the Powerhouse facility; escrow opened on Tuesday July 29th and MDK paid its \$70,000 deposit (7AA1884; 6RT1508:3-1514:3, 1654:8-1655:1).

On July 24th, Attorney Tilley sent the Notice of Termination a second time, this time to Mr. Pilg’s home address where Mr. Pilg received it on Saturday July 25th (7RT1839:10-1841:24). Mr. Pilg was confused because the notice did not mention the pending sale and no one from Yamaha had indicated that the closure was a problem (6RT1514-1617). Mr. Pilg also knew, and Yamaha’s witnesses confirmed, that a Yamaha franchise is not technically “transferred” to the purchaser of a dealership. Instead, Yamaha terminates the sellers’ franchise and enters into a new franchise with the buyer (6RT1517:6-15, 1629:19-1631:19; 7RT1864:3-13, 1950:4-9; 12RT3414:9-20). Thus, the fact that the Powerhouse franchise might be terminated did not concern Mr. Pilg because he did not plan on continuing to do business.

However, because he was unsure of how the termination notice related to the sale, Mr. Pilg called Attorney Tilley the following Monday, July 28th (6RT1514:26-1519:9). Tilley told Mr. Pilg that he was *not aware* of the pending sale and Mr. Pilg understood that Tilley was going to look into the matter and get back to him (6RT1519:10-20). Later that day, Mr. Pilg's business consultant told Mr. Pilg that the principals at MDK also believed that the purpose of the Notice was to terminate Powerhouse's existing franchise as a part of the sale and the creation of a new franchise for MDK (6RT3401:3-6; 12RT3433:7-3434:20).

On Tuesday July 29th, Mr. Pilg received a faxed letter from Mr. Tilley stating that Yamaha was not amending, withdrawing or delaying the effectiveness of the *termination notice* (7AA1810). The letter did not mention the sale, and Mr. Pilg was still unclear about the relationship between the two (6RT1520:21-1522:20).

Mr. Pilg called Dawson to get an explanation, because Dawson was the point person facilitating the sale (6RT1522:27-1523:26; 8RT2147:14-2148:19). When he could not reach Dawson by phone, Mr. Pilg sent him an e-mail which asked: "The reason I was calling was to find out why Powerhouse received a termination letter from Yamaha. Is this a standard thing to do when there is a buyout?" (7AA1816). Mr. Pilg also called and left a message for Rocky Aiello, Dawson's superior (10RT2704:10-17).

Within moments of his receipt of the e-mail from Mr. Pilg, Dawson forwarded it to Rocky Aiello and Bishop, stating: "I want to be extra careful that I proceed cautiously here. Would you please advise me how to respond?" (7AA1810). Dawson refused to testify to further communications regarding this e-mail claiming the attorney/client privilege (8RT 2166:18-2167:22). Dawson knew that Yamaha's position was that the franchise termination could defeat the sale (7RT1966:24-25). Rocky Aiello testified that he knew from Mr. Pilg's e-mail that Mr. Pilg did not

understand how the franchise termination might impact the pending sale and that Mr. Pilg was asking for direction (9RT2426:20-23; 9RT2428:19-26). *No one* from Yamaha responded to Mr. Pilg's emails or returned his phone calls (6RT1523:27-1524:14; 7RT1965-1968; 9RT2426-2444, 2449; 10RT2704:10-17, 2725:1-6). The following week Mr. Pilg sent another e-mail to Dawson, but he did not receive a response (9RT 2436:16-2437:11).

In its Petition, Yamaha simply states that Yamaha's in-house counsel advised Mr. Pilg that Yamaha was "not amending, withdrawing, or delaying the effectiveness of its termination notice" and should seek counsel's assistance (Pet., p.11). The Petition ignores all of the evidence that Yamaha violated section 11713.3, subdivision (d)(1) *well before* the franchise "terminated" by conduct that included, *inter alia*, Mr. Stout's representations to Mr. Pilg on July 18, Mr. Tilly's statement that he did not know about the sale (when he did) and that he would look into it and get back to Mr. Pilg, Mr. Dawson and Mr. Aiello's refusal to respond to Mr. Pilg's inquiries about the effect of the termination notice, even though they knew that Mr. Pilg was confused and did not know how the termination might impact the sale. These critical facts, and many more, are omitted from Yamaha's sanitized version of the evidence and these facts constitute the substantial evidence upon which the appellate court affirmed the jury's verdict.

On August 5th, MDK delivered its credit application package to Yamaha (7AA1818-1831, 1949:20-27; 8RT2153:13-2154:23). Dawson reviewed the application and prepared a summary; he did not find anything negative (7RT1969:14-1970:15). Dawson delivered the application package, including his summary, to Bishop in the credit department; Bishop reviewed the material, found it to be complete and ready for further review, and delivered it to manager Rocky Aiello (8RT2207:20-2208:13). There

was no evidence that MDK's credit application was processed beyond Aiello's desk (8RT2207:11-2209:23; 9RT2437:12-2438:4).

On Friday August 8th, Mr. Pilg received another letter from Attorney Tilley. For the first time, Tilley addressed the pending sale and the Notice of Termination (7AA1939-1940). Tilly's letter stated that the submission of a buy/sell agreement "did not prevent or stay the effectiveness of the termination notice" and that Powerhouse would cease being a dealer as of August 9th (a Saturday) because Mr. Pilg had not filed a protest with the NMVB by August 4th (7AA1939-1940). Tilly's "termination" date and his calculation of the last day upon which to protest were both wrong. MDK submitted the credit application form, which Yamaha had promised to expedite, *before* the Powerhouse franchise terminated pursuant to the Notice.⁴

At trial, Tilley acknowledged that Yamaha was not obligated to terminate Powerhouse's franchise, nor was Yamaha obligated to stop considering MDK once the protest period lapsed (7RT1878:2-1879:16, 1902:24-1903:6). Yet, on Monday, August 11th, Tilley wrote a final letter stating that Yamaha was "not interested" in MDK (7AA1835). On August 26th, Yamaha returned MDK's credit application (7AA1839; 8RT2209:5-12). *The only reason given by Yamaha for its return was "Powerhouse's termination"* (7AA1839; 8RT2209:14-23). When MDK received the package, it cancelled the Asset Purchase Agreement (7AA1837).

Powerhouse was liquidated (6RT1538:12-17). Ultimately, in March of 2010, Mr. Pilg and his wife lost the property in foreclosure (6RT1552:9-

⁴ Tilly's calculation was based on a 10-day protest period, rather than the 15-day effective period stated in the Termination Notice (7AA1807). Mr. Pilg received the 15-day Notice on July 26th; the 15th day ran on Sunday August 10th and, because that date fell on a weekend, the deadline was extended to the next business day – August 11th (Code of Civ. Proc., sec. 12a).

15). Evidence of the value of the building ranged from \$5 million to \$6.5 million (7AA1955; 5RT1254:21-22; 10RT2780:2-28). On October 5, 2009, Mr. Pilg and his wife filed a Chapter 7 bankruptcy petition (8AA2138).

Powerhouse argued and the jury agreed that Yamaha could not avoid its obligation to reasonably consider MDK as the buyer/franchisee (sec. 11713.3, subd. (d)(1)) by terminating the Powerhouse franchise in the midst of the sale (sec. 3060), and then using the termination as a pretext for killing the Powerhouse/MDK deal (1RA1-9). The jury heard testimony in two phases over the course of 15 days (1RA118-143). The jurors deliberated approximately 10 hours on the first phase and 2 hours on the second phase (1RA135-143). The jury found Yamaha liable on every cause of action submitted to it,⁵ and awarded compensatory and punitive damages to both Powerhouse and Mr. Pilg (1RA1-9).

III

DISCUSSION

The Opinion correctly explains the governing statutes and judicial precedent (Op., pp. 7-10). The central issue involves Yamaha's conduct regarding the proposed sale to MDK, and the laws governing such conduct -- notably section 11713.3. By its express terms, section 11713.3 prohibits unreasonable conduct on the part of a distributor such as Yamaha when considering a dealer's proposed sale. Section 11713.3 also expressly provides that reasonableness is a question of fact "requiring consideration of all existing circumstances" (*Id.*, subd. (d)(3)). The Court of Appeal correctly found that the trial court properly applied section 11713.3.

⁵ The trial court, on its own motion, granted nonsuit on Mr. Pilg's individual claim for Yamaha's violation of section 11713.3, and the Court of Appeal affirmed that ruling. On January 7, 2014, Mr. Pilg filed a Petition for Review of the issues presented by the nonsuit (Case No. S215677).

A. The Court of Appeal Correctly Applied Clear Statutory Provisions and Settled Case Law.

In 1973, the California Legislature enacted a “dealers’ rights bill” in order to “regulate relationships within the vehicle industry, with emphasis on the dealer’s interests.” (AB 225, Stats. 1973, ch. 996, Assemb. Transp. Comm. Analysis). The legislation expressly defines prohibited acts by manufacturers and distributors, provides for damages and other remedies, and confirms the jurisdiction of the courts over common law and statutory claims.

Section 11713.3 protects the rights of dealers to sell their dealerships, by prohibiting distributors from preventing sales and by requiring franchisors to act reasonably in approving purchasing franchisees. In pertinent part, section 11713.3 states:

“It is *unlawful* and a violation of this code for a manufacturer, manufacturer branch, *distributor*, or distributor branch licensed pursuant to this code to do, directly or indirectly through an affiliate, *any of the following*: . . .

(d)(1) . . . *to prevent* or require, or attempt to prevent or require, by contract or otherwise, *a dealer*, or an officer, partner, or stockholder of a dealership, *the sale or transfer* of a part of the interest of any of them to another person. A dealer, officer, partner, or stockholder shall not, however, have the right to sell, transfer, or assign the franchise, or a right thereunder, without the consent of the manufacturer or distributor except that the *consent shall not be unreasonably withheld*. . .” (Emphasis added.)

The Legislature expressly mandated that the reasonableness of a distributor’s⁶ conduct is a question of fact requiring consideration of *all* circumstances:

(d)(3) “In an action in which the manufacturer’s or distributor’s withholding of consent under this subdivision or subdivision (e) is an issue, whether the withholding of

⁶ The parties agreed that Yamaha is a “distributor” (4AA914). Powerhouse is a “dealer” (see sec. 285).

consent was unreasonable is a question of fact *requiring* consideration of *all the existing circumstances.*" (Emphasis added.)

The legislation also expressly grants parties the right to pursue actions in court *notwithstanding* the fact that certain administrative remedies are also available. Section 3050(e) states:

"Notwithstanding subdivisions (c) and (d) [administrative remedies], the courts have jurisdiction over all common law and statutory claims originally cognizable in the courts. For those claims, a party may initiate an action directly in any court of competent jurisdiction."

These statutory provisions leave no uncertainty in the law and they provide a solid foundation for the Court of Appeal's decision in this case – as does the judicial and legislative history of section 3050, subdivision (e). Section 3050, subdivision (e) was a late comer to the Dealer Bill of Rights, having been added in 1997. The Legislative purpose of subdivision (e) was to clarify "that the *courts*, not the [NMVB], have primary jurisdiction over all common law and statutory claims originally cognizable in the courts." *South Bay Creditors Trust v. General Motors Acceptance Corporation* (1999) 69 Cal.App.4th 1068, 1080 (emphasis in original). In *South Bay Creditors*, the Court of Appeal explained that subsection (e) "reflects the Legislature's disapproval of the *Yamaha* cases." *South Bay Creditors v. General Motors, supra* at pp.1079-1080. ⁷

The Court of Appeal properly rejected Yamaha's arguments because the Legislature has confirmed that common law and statutory remedies are available *in addition to* the administrative remedies provided by section

⁷ The "*Yamaha*" cases to which the *South Bay* Court referred are *Yamaha Motor Corp. v. Superior Court* (1986) 185 Cal.App.3d 1232 and *Yamaha Motor Corp. v. Superior Court* (1987) 195 Cal.App.3d 652. In both these cases the Court of Appeal held that prior to pursuing a judicial damage remedy a dealer was required to file an administrative protest with the NMVB under section 3060. This issue is discussed further in section III, D, *infra*.

3060. For that same reason, Powerhouse and Mr. Pilg respectfully submit that there are no grounds for review. A dealer's right to pursue damage remedies in court is plain, and the obligation of the trier of fact to examine Yamaha's conduct considering all circumstances is in lock step with a typical common law tort remedy.

For these fundamental reasons, Yamaha's interjection of section 3060 and *Sonoma Subaru, Inc. v. New Motor Vehicle Board* (1987) 189 Cal.App.3d 13 in the context of this case seems more odd than unique. Section 3060 does not address conduct related to the sale of a dealership. So far as is pertinent here, section 3060 relates solely to franchise termination. Section 3060 is not concerned with judicial remedies. Instead, it simply provides an administrative remedy for franchisees who seek to have the New Motor Vehicle Board ("NMVB") make a determination as to whether a franchisor had "good cause" to terminate a franchise as that term is defined under section 3061. The NMVB's jurisdiction is limited. Most pertinent here, the NMVB has no jurisdiction to consider damage claims, claims under 11713.3, or common law claims. *Hardin Oldsmobile v. New Motor Vehicle Board* (1997) 52 Cal.App.4th 585, 588, 595; *Mazda Motor of America, Inc. v. California New Motor Vehicle Board* (2003) 110 Cal.App.4th 1451.

Yamaha's persistent reference to the "protest" remedy in the context of this case involves a fundamental mischaracterization of the very nature of and purpose for a "protest." A "protest" is the means by which a dealer may invoke the NMVB's administrative jurisdiction to hear the dealer's claim that a distributor lacked good cause for terminating a franchise (sec. 3061). The administrative remedy simply allows for the Board's determination of whether there is, or is not, good cause; if there is no good cause, then the franchise cannot be terminated (sec. 3060(a)(2)). As explained above, the Board has no jurisdiction to award damages – the

remedy resembles declaratory relief. The tradeoff for the limited remedy is an expedited administrative procedure to address a distributor's attempt to terminate a franchise.

There are strict time limits that govern the filing of a protest. Some protests, as was the case here for a fifteen day notice, must be filed within ten days (sec. 3060 (a)(1)(C)). However, in the context of this case, Yamaha's argument that Powerhouse was required to file a "protest" in order to keep its franchise "alive" in order to sell the franchise *was a fiction* – because the evidence established that a Yamaha franchise is not "sold" or "transferred" during the sale of a dealership. Instead, as a matter of course, Yamaha terminates the franchise of the seller of the dealership, and enters into a new franchise agreement with the buyer.

A body of case law has developed addressing the question presented by the situation – not present here -- where a dealer wants to retain its franchise, and whether any grounds will allow grace to extend the deadline where a protest was not timely filed.⁸ One such case is *Sonoma Subaru*, *supra*, 189 Cal.App.3d 13, upon which Yamaha has premised the arguments in its Petition. The Court of Appeal properly concluded that *Sonoma Subaru* was not relevant here and Powerhouse and Mr. Pilg respectfully submit that this Court should reach the same conclusion.

In *Sonoma Subaru*, a dealer who wanted to retain its franchise had failed to file a timely protest challenging the termination. The dealer argued for a good cause exception; that is, an equitable extension of the deadline. *Sonoma Subaru v. New Motor Vehicle Board*, *supra* at p. 20. The Court of Appeal refused to create such an equitable extension. The court explained that the protest process is dependent on a timely protest. "In the absence of a protest, the termination of the franchise is

⁸ See, e.g., *Automotive Management Group v. New Motor Vehicle Board* (1993) 20 Cal.App.4th 1002.

accomplished wholly by private action." *Sonoma Subaru v. New Motor Vehicle Board*, *supra* at 23. The *only* issue decided in *Sonoma Subaru* was whether there were exceptions to the protest deadline that would allow an administrative hearing on good cause for termination, even though a timely protest had not been filed. The *Sonoma Subaru* Court did not discuss section 11713.3 or section 3050, subdivision (e). The dealer in *Sonoma Subaru* was not attempting to sell its dealership. The dealer in *Sonoma Subaru* was not attempting to bring a judicial action for damages based on statutory or common law remedies.

Sonoma Subaru is the *only* California decision relied on by Yamaha in its Petition for Review. Therefore, Powerhouse and Mr. Pilg respectfully submit that neither section 3060 nor *Sonoma Subaru* provide any basis whatsoever upon which this Court might question the Opinion in this case.

B. Yamaha's Reliance on Opinions From "Other States" is Misplaced.

Yamaha's attempt to create an issue for review by citing to the decisions of "other states" is equally unavailing. There is no "state" decision cited by Yamaha. All six of the cases cited by Yamaha are federal court cases, and all but one are district court cases. All of the cases appear to rely on statutory constructs that are materially different from the California Vehicle Code, and Yamaha has not presented any argument indicating that statutory schemes comparable to California's were at play. Most importantly, none of the cases cited by Yamaha involves a factual scenario remotely close to the facts of this case.

For example, the lead case cited by Yamaha, one that Yamaha characterizes as involving claims "identical" to the claims in this case, turned on the fact that a buyer was proposed *one week* prior to a scheduled franchise termination. *South Shore Imported Cars, Inc. v. Volkswagen of Am., Inc.* (1st Cir. 2011) 439 Fed.Appx. 7. South Shore lost its line of

credit, which constituted a violation of the franchise agreement. For over six months, Volkswagen and South Shore addressed the issue of the franchise violation. Then Volkswagen issued a 60 day notice to terminate the franchise. Approximately one week before the 60-day period expired, South Shore proposed to sell the dealership and asked Volkswagen to approve a transfer of the franchise. Volkswagen refused on the basis that by that time the franchise was effectively terminated. South Shore filed a lawsuit seeking an injunction prohibiting Volkswagen from terminating the franchise and ordering Volkswagen to consider the proposed buyer. The following quote demonstrates that *South Shore* was decided on facts materially different than those involved in this case:

"This appeal can be resolved fairly simply on V.W.'s argument that its obligation under the franchise agreement to consider a buyer at South Shore's behest did not extend to a buyer *proposed a week* before the scheduled termination of the franchise itself." *South Shore v. Volkswagen, supra* at p. 9.

There is no indication in the *South Shore* opinion that Volkswagen represented that it would facilitate and expedite the processing of an application for approval of the prospective new franchisee as took place in this case.

Yamaha also characterizes the claims in *Mt. Clements Auto Center, Inc. v. Hyundai Motor Am.* (E.D.Mich. 2012) 897 F.Supp.2d 570 as "similar" to those asserted by Powerhouse and Mr. Pilg. The facts in the *Clements* decision are dramatically different because, in *Clement*, the initial issue was the loss of a credit line which triggered a franchise termination which lingered for months due to the dealer's injunction. At the eleventh hour, the dealer proposed a buyer. There is no evidence that, in the meantime, Hyundai did anything to encourage the dealer, nor did Hyundai promise to facilitate processing of sale. It therefore involved very different factual allegations than this case.

All of the remaining cases cited by Yamaha involve divergent fact patterns and different and varied statutory provisions. Not one of the cases involves facts or legal principles comparable to those discussed by the Court of Appeal in this case. In fact, if the Court is concerned about the holdings of other state courts on facts and statutes similar to this case, the Court is invited to examine a Florida District of Appeal case which was discussed in a case cited by Yamaha. In *Maple Shade Motor Corp. v. Kiea Motors Am., Inc.* (D.N.J. Aug. 8, 2006, No. Civ. A. 04-2224 (JEI)) 2006 WL 2320705, the Court cited and discussed *Mercedes-Benz of North Am. v. Dep't of Motor Vehicles of the State of Fla.*, 455 So.2d 404 (Fla. Dist. Ct. App. 1984). *Mercedes-Benz* involved circumstances similar to those involved in the case at bar, and the court held that the manufacturer acted unlawfully.

In *Mercedes-Benz*, a dealer sent a letter to Mercedes-Benz notifying it that the dealer wished to sell the dealership to a buyer that appeared qualified. The next day, Mercedes-Benz issued a telegram stating that Mercedes-Benz was terminating the franchise. Over the course of the next couple of years the dealer and the prospective buyer attempted to persuade Mercedes-Benz to approve of the sale, but Mercedes-Benz refused. The Florida court applied Florida statutes enacted to protect the dealer's right to uninhibited transfers, and prohibited Mercedes-Benz from using franchise termination as a means of preventing the proposed sale. As in this case, the holding in *Mercedes-Benz* is premised on facts dominated by legislation that protects the rights of dealers to sell their dealerships.

In this case, the trial court allowed Yamaha to fully present to the jury its contentions regarding franchise termination. Yamaha was allowed to argue that it did not act unreasonably (sec. 11713.3) because it was genuinely concerned about Powerhouse's closure, legitimately terminated the franchise because of the closure, and honestly believed it no longer had

an obligation to consider MDK once the section 3060 protest period lapsed. On the evidence, the jury rejected Yamaha's defense, and the Opinion properly affirms the jury's verdict.

C. The Court of Appeal Has Not "Disrupted" the Legislative Scheme.

The statutory scheme explained in section III, A, *supra*, dispels Yamaha's contention that the Opinion threatens the Legislature's plan. The legislative purpose of the Dealers' Bill of Rights was to grant a trier of fact in a judicial proceeding the right and power to consider all facts and circumstances and then sort out what conduct was lawful, and what was not. Yamaha's franchise termination arguments under section 3060 were properly considered in that context, and there are no unique or compelling concerns that would justify review by this Court.

D. The Court of Appeal Correctly Perceived Yamaha's Argument as an Attempt to Revive the "Exhaustion" Doctrine.

The gist of Yamaha's argument in this case was that Powerhouse was required to file a timely protest in order to keep its franchise "active," in order to keep Yamaha's obligation to consider the sale to MDK alive, in order to pursue a civil action under section 11713.3 for Yamaha's failure to reasonably consider the sale of the dealership to MDK. That is plainly an exhaustion of remedies defense because it would require an administrative protest *in order to preserve* claims under section 11713.3 and the common law. The argument does not warrant review by this Court because it is contrary to the plain language of applicable statutes, the Legislature's express intent and the support of settled case law.

As discussed above, sections 11713.3 and 3050, subdivision (e) allow a dealer to file a civil action for damages suffered as a result of a distributor's violation of its statutory duty to act reasonably in connection with a proposed sale of the dealership. There is no requirement that every

dealer address the issue of franchise termination by pursuing a protest with the NMVB or forever lose its judicial remedies. In fact, that is precisely the issue that the Legislature clarified when it enacted section 3050, subdivision (e). Subsection (e) of 3050 grants a party the right to "initiate an action directly in any court of competent jurisdiction," *notwithstanding* a party's right to file a protest. As explained in *South Bay Creditors Trust v. General Motors Acceptance Corporation*, *supra*, 69 Cal.App.4th 1068, 1080, when it enacted section 3050, subdivision (e), the Legislature was reacting to two decisions involving Yamaha where Yamaha had successfully argued that judicial action was barred because the dealer had not filed and litigated a protest (see fn. 7, *supra*). The import of section 3050, subsection (e), is evident from a plain reading of the statute, and the Court of Appeal properly followed the legislative mandate. Therefore, there is no cause for review.

E. There is No Cause for Review of the Punitive Damage Award.

The jury awarded punitive damages for Yamaha's intentional interference with the MDK Asset Purchase Agreement – which is a tort (*Applied Equipment Corp. v. Litton of Saudi Arabia Limited* (1994) 7 Cal.4th 503). The jury also awarded punitive damages for violation of Vehicle Code section 11713.3 – which is both a tort and a crime (sec. 40000.11(a)); *Stop Youth Addiction, Inc. v. Lucky Stores, Inc.* (1998) 17 Cal.4th 553, 572). Yamaha did not question the propriety of the punitive damage award in the trial court – the issue was first raised by Yamaha on appeal. The Court of Appeal examined the award under the substantial evidence test and properly affirmed it (Op., pp. 16-17).

There is no constitutional issue presented, and there is no cause for review, because Yamaha's claim that it was punished for conduct that was "required" and "authorized" by the Vehicle Code borders on specious. Section 3060 does not "require" a franchisor to terminate a franchise if the

dealership is forced to close. Yamaha conceded at trial that termination is a discretionary decision. No statute “authorized” the conduct in which Yamaha engaged in this case. To the contrary, section 11713.3 expressly prohibits Yamaha’s conduct.

The record conclusively demonstrates that Yamaha’s “two tracks” were not “required” as Yamaha contends. Instead, the artifice was created by Yamaha’s own choosing, and the Yamaha management and executives who made each of the choices along the way were, and are, sophisticated, informed and knowledgeable about the industry and about the law. The jury’s verdict confirms that Yamaha’s executives knew exactly what they were doing, and that they acted with malice, oppression and fraud (Civ. Code, sec. 3294).

IV

CONCLUSION

For all the reasons discussed herein, Powerhouse and Mr. Pilg respectfully request that the Court deny Yamaha’s Petition for Review.

Date: January 27, 2014

Respectfully submitted,

DIANE M. MATSINGER
and

ANDRE, MORRIS & BUTTERY
A Professional Corporation

By: 
Dennis D. Law
Collette A. Hillier
Attorneys for Plaintiffs/
Respondents/Cross-Appellants

CERTIFICATE OF COMPLIANCE

Counsel of Record hereby certifies that pursuant to Rule 8.204(c)(1) or 8.360(b)(1) of the California Rules of Court, the enclosed Petition for Review of Plaintiff, Cross-Appellant and Petitioner Timothy L. Pilg is produced using 13-point Roman type including footnotes and contains approximately 6557 words, which is less than the total words permitted by the rules of court. Counsel relies on the word count of the computer program used to prepare this brief.

Dated: January 27, 2014

Signed:



Dennis D. Law
Attorneys for Plaintiffs/
Respondents/Cross-Appellants

PROOF OF SERVICE

1. I am employed in the County of San Luis Obispo, State of California. I am over the age of 18 and not a party to the within action.
2. My business address is 1102 Laurel Lane, San Luis Obispo, CA 93401.
3. On January 27, 2014, I served the **ANSWER TO YAMAHA'S PETITION FOR REVIEW** on the interested parties and/or their attorney(s) of record to this action by placing a true copy thereof in a sealed envelope as follows:

SEE ATTACHED LIST

- BY MAIL:** I placed a true copy of the foregoing document in a sealed envelope, addressed to each interested party as set forth above, with postage fully prepaid, for collection and mailing pursuant to the ordinary business practice of this office, which is that correspondence for mailing is collected and deposited with the United States Postal Service on the same day in the ordinary course of business.
- BY PERSONAL SERVICE:** I caused such envelope to be delivered by hand to the offices of the addressee(s).
- BY OVERNIGHT DELIVERY:** I caused such envelope(s) to be delivered to the above parties within 24 hours by GOLDEN STATE OVERNIGHT with delivery fees paid or provided for.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on January 27, 2014, at San Luis Obispo, California.



Robyn Lara-Faure

SERVICE LIST

Appeal of Powerhouse Motorsports Group, Inc., et al., vs. Yamaha Motor Corp., U.S.A.;
Supreme Court Case No. S215677
Court of Appeal 2d Civil No. B236705
San Luis Obispo Superior Court No. CV098090

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