

**ATTORNEY GENERAL OF THE STATE OF NEW YORK
ANTITRUST BUREAU**

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In the Matter of
:
TOWNE BMW, INC.
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**ASSURANCE OF DISCONTINUANCE
PURSUANT TO EXECUTIVE LAW SECTION 63(15)**

Pursuant to the provisions of the Donnelly Act, New York Gen. Bus. Law § 340, and New York Exec. Law § 63(12), ELIOT SPITZER, Attorney General of the State of New York (hereinafter, the “Attorney General”), caused an investigation to be made into the business practices of Towne BMW, Inc.’s BMW dealership. Based upon his investigation, the Attorney General has made the following findings:

1. Towne BMW, Inc. (“Towne”) is a New York corporation with its principal place of business located at 8215 Main Street, Williamsville, New York 14221. Towne owns and operates franchised automobile dealerships in Erie County, New York.

2. A former salesperson of Towne in Buffalo, New York had communications with the then general manager at the Holtz House of Vehicles, Inc.’s BMW dealership in Rochester, New York (“HHOV BMW”) that violated provisions of New York and federal antitrust law.

3. Specifically, beginning in or about January 1999, and continuing to or about December, 2002, the then salesperson, Michael Monteith, of Towne communicated with the then general manager, Kurt Matthews, of HHOV BMW, from time to time, concerning prices and potential customers that the two BMW dealerships were competing for.

4. These communications included verifications of prices quoted by HHOV BMW to customers from the Buffalo area who were seeking, or had received a price quote from HHOV BMW. They also included verifications of prices quoted by Towne to customers from the Rochester area. These communications further concerned whether a particular customer was quoted a certain price, or had inquired about a particular BMW model, as well as complaints by the then Towne salesperson, Michael Monteith, that a sale was made by HHOV BMW to a potential Towne Buffalo customer.

5. Such communications about price and customers usually arose in the context of a customer inquiry. A customer or potential customer asked either Towne or HHOV BMW for the price of a BMW vehicle or sought to determine whether one BMW dealership would beat a price quoted or supposedly quoted by the other.

6. In response to the customer contact, the then salesperson, Michael Monteith, at Towne or the then general manager, Kurt Matthews, at Holtz BMW, would ask the other to confirm whether such price was actually quoted, or whether a particular customer had sought a price quote.

7. In many other instances, the then Towne salesperson, Michael Monteith, called the then general manager at HHOV BMW and complained about a sale to a customer or potential customer Towne had been working with, and tried to discourage such competitive sales in the future. The then general manager, Kurt Matthews, from HHOV would do likewise.

8. Towne states that it did not authorize any of Michael Monteith's conduct and that Michael Monteith is no longer employed by Towne.

9. The practices described above violated the Donnelly Act, New York Gen. Bus.

Law § 340, § 1 of the Sherman Act, 15 U.S.C. § 1, and New York Executive Law § 63(12).

10. When Towne learned of the investigation being conducted by the Attorney General, it cooperated with such investigation.

11. It appears now that Towne is willing to enter into this Assurance of Discontinuance (“Assurance”) for purposes of settlement only, and does not admit to any violation of law nor admit to any factual findings or legal conclusions contained herein; and the Attorney General accepts this Assurance pursuant to Executive Law § 63(15) in lieu of commencing a statutory or other proceeding against HHOV pursuant to Section 63(12) of the Executive Law.

AGREEMENT

IT IS HEREBY UNDERSTOOD AND AGREED by and between Towne and the Attorney General that:

A. CONDUCT

1. As used in this Assurance, the following terms shall have the meanings specified below:

- a. “Agreement” means any contract, agreement, understanding, arrangement, or combination which would violate to General Business Law § 340 (1).
- b. “Assurance” means this Assurance of Discontinuance.
- c. “BMW Dealership” means any incorporated business, including all partially or wholly owned divisions and subsidiaries, that sell or offers for sale, BMW Vehicles to the general public.
- d. “BMW Vehicle” means new and used passenger cars of the BMW brand

manufactured by BMW or one of its manufacturing subsidiaries and sold by BMW of North America, Inc. and/or BMW of North America, LLC, including BMW Sports Activity Vehicles (light trucks).

e. "Communication" means any conversation, discussion, letter, memorandum, meeting, note, or other transfer of information, whether written, oral, or by any other means, including email or other electronic media, which communication would violate General Business Law § 340.

f. "Person" means any individual, partnership, corporation, or other legal, business or governmental entity.

2. From the Effective Date of this Assurance, and for four (4) years thereafter, Towne shall not enter into any Agreement or have Communications with any other BMW Dealer:

a. Concerning the price at which Towne is selling its BMW Vehicles to its customers or potential customers.

b. Concerning whether Towne is selling to or dealing with a particular customer or potential customer.

c. Confirming or denying the price at which Towne is selling its BMW Vehicles.

d. Confirming or denying whether Towne is selling to or dealing with a particular customer.

e. To encourage, suggest, advise, pressure, induce, or otherwise attempt to secure any person to engage in any action that would be prohibited by subparagraphs (a) through (d) of this section.

3. From the Effective Date of this Assurance, and for four (4) years thereafter, Towne

shall report to the Attorney General, in writing, any Communication initiated by any other BMW

Dealer:

- a. Concerning the price at which it is selling its BMW Vehicles to its customers or potential customers.
 - b. Concerning whether it is selling to or dealing with a particular customer or potential customer.
 - c. Confirming or denying the price at which it is selling its BMW Vehicles.
 - d. Confirming or denying whether it is selling to or dealing with a particular customer.
 - e. To encourage, suggest, advise, pressure, induce, or otherwise attempt to secure any person to engage in any action that would be prohibited by subparagraphs (a) through (d) of this section.
4. Nothing in this Assurance shall:
- a. Prohibit unilateral action on the part of Towne; or
 - b. Prohibit discussion of price related solely to vehicle trades among BMW Dealers in the ordinary course of business; or
 - c. Authorize any conduct otherwise prohibited by law.

B. ANTITRUST COMPLIANCE

1. Towne has incorporated into its Employee Handbook an Antitrust Compliance Policy. In implementing this policy, Towne shall, without limitation, cause such policy to be reviewed annually by the general manager at each of its franchises and shall review the same

whenever a new general manager is appointed.

2. On each of the next four (4) anniversary dates of the Effective Date, Towne shall certify to the Attorney General, in writing, that Towne has maintained and reviewed its Antitrust Compliance Policy.

3. For four (4) years following the Effective Date:

a. Towne shall report, in writing, to the Attorney General any act prohibited by this Assurance within seven (7) days of acquiring knowledge of the act.

b. On each anniversary date of the Effective Date of this Assurance, Towne shall certify to the Attorney General, in writing, that upon information and belief, there has been no act prohibited by this Assurance.

c. Towne shall notify the Attorney General in writing, within seven (7) days of: (1) any change in its principal address; (2) any change in corporate name and any merger, dissolution, or sale of all or substantially all of the corporation's assets; and (3) any other change that may affect the ability of HHOV to comply with the obligations of this Assurance.

4. For four (4) years and sixty (60) days following the Effective Date, for the purpose of determining or securing compliance with this Assurance, and subject to any legally recognized privilege, Towne shall permit any duly authorized representative of the Attorney General:

a. On reasonable written notice, access during office hours and in the presence of counsel to inspect and copy all records and documents in the possession, custody, or control of Towne relating to Towne's obligations under this Assurance; and

b. On reasonable written notice, and without restraint or interference from Towne, to interview, under oath and on a transcribed record, any person employed by Towne, who may

have counsel present, relating to Towne's obligations under this Assurance.

C. VIOLATIONS OF THE ASSURANCE

If Towne shall violate any material provision of this Assurance and fails to cure said violation within ten (10) business days of receipt of written notice from the Attorney General:

1. Evidence of a violation of this Assurance by Towne shall constitute prima facie proof of violation of the Donnelly Act, the Sherman Act, and Executive Law § 63(12) in any civil action or proceeding hereafter commenced by the Attorney General.

2. The Attorney General may commence any action authorized by law against Towne for anti-competitive conduct it has engaged in, or for any crime it has committed, as authorized by law, relating to this Assurance.

3. As to any action brought pursuant to Violations of the Assurance for any act or offense committed within three (3) years prior to the Effective Date of this Assurance, Towne shall not assert as a defense the statute of limitations, laches, or any other defense based on the timeliness of suit.

4. As to any action brought pursuant to violations of this Assurance, service on David R. Pfalzgraf, Jr., Esq., Rupp, Baase, Pfalzgraf, Cunningham & Coppola LLC, 1600 Liberty Building, Buffalo, NY 14202 of the summons and complaint, the accusatory instrument, and any other document required or permitted to be served by New York State law shall constitute good and sufficient service of process on HHOV in such action.

D. COSTS

1. Towne shall pay the Attorney General the sum of \$5,000.00 as costs incurred by the Attorney General in the course of its investigation of Towne. The costs to be paid to the State of New York shall be delivered within seven (7) days of the Effective Date of this Assurance to the Office of the Attorney General, State of New York, Antitrust Bureau, 120 Broadway, Suite 26C, New York, NY 10271, Attention: James Yoon, Esq.

E. TERMINATION

1. This Assurance of Discontinuance will terminate, without any further action by the parties, four (4) years and sixty (60) days from the Effective Date.

F. GENERAL PROVISIONS

1. This Assurance shall not be construed or interpreted to signify express or implied approval by the Attorney General, or any of its agencies, departments or divisions, of any of acts, practices, policies or agreements carried out or entered into by Towne.

2. This Assurance shall not be construed as binding on any person not a signatory, or as resolving any issue of law not specifically addressed in this Assurance.

3. The Attorney General shall not institute any proceeding or take any action against Towne under antitrust statutes for any conduct prior to the Effective Date of this Assurance based on any practice that is addressed in this Assurance, except as allowed by law to enforce this Assurance in the event of a violation.

4. No failure or delay by the Attorney General in exercising any right, power or privilege hereunder shall operate as a waiver thereof nor shall any single or partial exercise

thereof preclude any other or further exercise thereof or the exercise of any other right, power or privilege. The rights and remedies provided herein shall be cumulative.

5. This Assurance shall be governed by and construed in accordance with the laws of the State of New York applicable to an agreement negotiated, executed, entered into and performed solely within the State of New York.

6. Towne represents and warrants that it has fully read and understands this Assurance, that it understands the legal consequences of signing this Assurance, and that there are no other representations or agreements not stated in writing in this Assurance.

7. This Assurance may be signed in counterparts, each of which shall be deemed an original.

8. This Assurance contains the entire agreement of the Parties and shall not be modified except in writing, signed by all the Parties to this Assurance or by their authorized representatives.

9. Towne enters into this Assurance voluntarily and represents that no threats, offers, promises, or inducements of any kind have been made by the Attorney General or any member, officer, employee, agent, or representative of the Attorney General to induce Towne to enter into this Assurance.

10. The parties represent that an authorized representative of each has signed the Assurance with full knowledge, understanding and acceptance of its terms and that this person has done so with authority to legally bind the respective party.

11. Towne agrees not to take any action or to make or permit to be made any public statement denying that this Assurance is without factual basis. Nothing in this paragraph shall

affect Towne's: (1) testimonial obligations; or (2) right to take legal or factual positions in defense of litigation or in defense of other legal proceedings.

12. Except in an action by the Attorney General to enforce Towne's obligations in this Assurance or as otherwise provided by law, neither this Assurance nor any acts performed or documents executed in furtherance of this Assurance (1) may be deemed or used as an admission of, or evidence of, the validity of any alleged wrongdoing, liability or lack of wrongdoing or liability; or (2) may be deemed or used as an admission of or evidence of any such alleged fault or omission of Towne in any civil, criminal, or administrative proceeding in any court, administrative agency, or other tribunal.

13. All of the obligations of this Assurance that are binding on any party or parties shall be binding upon their successors, assigns and legal representatives.

14. Any notice or other writing required or permitted to be given under this Assurance shall be sufficient if made as follows:

To the Office of the Attorney General:

Bureau Chief
Antitrust Bureau
Office of the Attorney General
120 Broadway, Suite 26C
New York, NY 10271
Fax: (212) 416-6015

To Towne BMW, Inc.:

David R. Pfalzgraf, Jr., Esq.
Rupp, Baase, Pfalzgraf, Cunningham & Coppola LLC
1600 Liberty Building
Buffalo, NY 14202
Fax: (716) 332-0336

WHEREFORE, the following signatures are affixed hereto on this 3rd day of August, 2005 and such date shall constitute the "Effective Date" of this Assurance of Discontinuance.

STATE OF NEW YORK
ELIOT SPITZER
Attorney General

By: Robert L. Hubbard

ROBERT L. HUBBARD
Director of Litigation
Antitrust Bureau

TOWNE BMW, INC.

By: David R. Pfalzgraf Jr.

David R. Pfalzgraf Jr, Esq.
Rupp, Baase, Pfalzgraf, Cunningham & Coppola LLC
1600 Liberty Building
Buffalo, NY 14202