

New Motor Vehicle Board  
1507 - 21st Street, Suite 330  
Sacramento, California 95814  
Telephone: (916) 445-1888

STATE OF CALIFORNIA

NEW MOTOR VEHICLE BOARD

In the Matter of the Protest of )  
ED-WEST COMPANY dba COSTA MESA ) Protest No. PR-1417-94  
HONDA, )  
Protestant, )  
vs. )  
AMERICAN HONDA MOTOR CO., INC., )  
Respondent. )

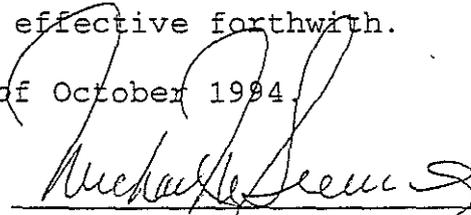
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DECISION

At its regulary scheduled meeting of October 12, 1994, the public members of the Board met and considered the administrative record and proposed decision in the above-entitled matter. After such consideration, the Board adopted the proposed decision as its final Decision in this matter.

This Decision shall become effective forthwith.

IT IS SO ORDERED THIS 13th day of October 1994.

  
MICHAEL M. SIEVING  
Assistant Executive Secretary/  
Administrative Law Judge

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vs. ) **Protest No. PR-1417-94**  
AMERICAN HONDA MOTOR CO., INC., ) **PROPOSED DECISION**  
Respondent. )  
\_\_\_\_\_ )

PROCEDURAL BACKGROUND

1. By letter dated May 6, 1994, American Honda Motor Co., Inc., ("Honda"), 1919 Torrance Boulevard, Torrance, California, gave notice pursuant to Vehicle Code section 3060<sup>1</sup> to Ed-West Company dba Costa Mesa Honda ("Costa Mesa Honda"), 2888 Harbor Boulevard, Costa Mesa, California, of Honda's intention to terminate the Honda franchise held by

<sup>1</sup> All references are to the Vehicle Code unless otherwise noted.

Costa Mesa Honda. The notice of termination was received by the New Motor Vehicle Board ("Board") on May 11, 1994.

2. On June 2, 1994, Costa Mesa Honda filed a Protest No. 1417-94 with the Board pursuant to section 3060.

3. A hearing on the protest was held on Monday, August 29, 1994, before Douglas H. Drake, Administrative Law Judge.

4. Honda was represented by Wallace M. Allan, of O'Melveny and Myers, 400 South Hope Street, Los Angeles, California, and Catherine M. McEvelly, Honda North America, Inc., 700 Van Ness Avenue, Torrance, California.

#### ISSUES PRESENTED

5. Section 3066 imposes upon Honda the burden of establishing the existence of good cause to terminate or refuse to continue the franchise of Costa Mesa Honda.

6. In determining whether good cause has been established for terminating or refusing to continue a franchise, section 3061 requires the Board to take into consideration the existing circumstances, including, but not limited to:

(a) Amount of business transacted by the franchisee, as compared to the business available to the franchisee.

(b) Investment necessarily made and obligations incurred by the franchisee to perform its part of the franchisee.

(c) Permanency of the investment.

(d) Whether it is injurious or beneficial to the public welfare for the franchise to be modified or replaced or the business of the franchisee disrupted.

(e) Whether the franchisee has adequate motor vehicle sales and service facilities, equipment, vehicle parts,

and qualified service personal to reasonably provide for the needs of the consumers for the motor vehicles handled by the franchisee and has been and is rendering adequate services to the public.

(f) Whether the franchisee fails to fulfill the warranty obligations of the franchisor to be performed by the franchisee.

(g) Extent of franchisee's failure to comply with the terms of the franchise.

#### CONTENTIONS OF THE PARTIES

7. Honda contends that it need submit evidence on only two of the seven factors of section 3061, namely (d) and (g) because evidence on these two factors, no matter how favorable to protestant, could not change the result that is compelled by the criminal convictions of the two principals of Costa Mesa Honda.

8. Honda further contends that the criminal convictions of the two principals of Costa Mesa Honda, wherein they were convicted of defrauding Honda, are sufficient in themselves to substantiate a termination of the franchise.

9. Costa Mesa Honda contends that Honda has the burden of proof of establishing the good cause factors for terminating a franchise and in the absence of any evidence the Board must infer that the evidence on any factors not submitted by Honda must be inferred to be adverse to Honda.

10. Costa Mesa Honda further contends that it was precluded by a prior Board order from conducting discovery on the knowledge of certain Honda employees of the criminal acts of the two

principals. By offer of proof, Costa Mesa Honda attempted to show that these Honda employees' knowledge and participation would be a defense to the termination.

#### FINDINGS OF FACT

a. Facts relating to the amount of business transacted by the franchisee, as compared to the business available to the franchisee. (sec. 3061(a))

11. No evidence was presented to establish that the amount of business transacted by the franchisee was inadequate as compared to the business available to the franchisee.

b. Facts relating to investment necessarily made and obligations incurred by the franchisee to perform its part of the franchise. (sec. 3061(b))

12. No evidence was presented to establish that the investment necessarily made and obligations incurred by the franchisee were insufficient to enable it to perform its part of the franchise.

c. Facts relating to permanency of the investment. (sec. 3061(c))

13. No evidence was presented regarding the permanency of Protestant's investment.

d. Facts relating to whether it is injurious or beneficial to the public welfare for the franchise to be modified or replaced or the business of the franchisee disrupted. (sec. 3061(d))

14. The two principals of Costa Mesa Honda were each convicted of a federal felony of defrauding Honda in the United States District Court, District of New Hampshire. In these proceedings, it was determined that Edward A. Temple defrauded Honda of \$162,500.00 and Mark Benson defrauded Honda of \$500,000.00.

- e. Facts relating to whether the franchisee has adequate motor vehicle sales and service facilities, equipment, vehicle parts, and qualified service personal to reasonably provide for the needs of the consumers for the motor vehicles handled by the franchisee and has been and is rendering adequate services to the public. (sec. 3061(e))

15. No evidence was presented on the issue of whether the franchisee has adequate motor vehicle sales and service facilities, equipment, vehicle parts, and qualified service personal to reasonably provide for the needs of the consumers for the motor vehicles handled by the franchisee and has been and is rendering adequate services to the public.

- f. Facts relating to whether the franchisee fails to fulfill the warranty obligations of the franchisor to be performed by the franchisee. (sec. 3061(f))

16. No evidence was presented to establish that the franchisee failed to fulfill the warranty obligations of the franchisor to be performed by the franchisee.

- g. Facts relating to the extent of franchisee's failure to comply with the terms of the franchise. (sec. 3061(g))

17. The two principals of Costa Mesa Honda were each convicted of a federal felony of defrauding Honda. The Automobile Dealer Sales and Service Agreement, Standard Provisions, provides in pertinent part as follows:

9.4.H Any conviction in any court of original jurisdiction of Dealer or any employee of the Dealership Operations for any crime or violation of any law if, in the opinion of American Honda, such conviction or violation may adversely affect the conduct of the Dealership Operations or tend to be harmful to the goodwill of American Honda or to the reputation of Honda Products ....

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18. The conviction of the dealer principals of Costa Mesa Honda of defrauding Honda certainly meets this standard.

DETERMINATION OF ISSUES

19. Honda needs to submit evidence on only two of the seven factors of section 3061 (d) and (g) because evidence on these two factors, no matter how favorable to protestant, could not change the result that is compelled by the criminal convictions of the two principals of Costa Mesa Honda.

20. The criminal convictions of the two principals of Costa Mesa Honda, whereby they were convicted of defrauding Honda, are sufficient in themselves to substantiate a termination of the franchise. It is injurious to the public welfare to have felons convicted of defrauding their franchisor operating a Honda dealership (see § 3061(b)). Furthermore, it is a complete breach of the franchise agreement for the principals of the franchise to be convicted of the Federal felony of defrauding their franchisor.

21. Honda has established good cause to terminate the franchise of Costa Mesa in that:

- a) Honda failed to establish that the amount of business transacted by the franchisee was inadequate as compared to the business available to the franchisee.
- b) Honda failed to establish that the investment necessarily made and obligations incurred by the franchisee were insufficient to enable it to perform its part of the franchise.
- c) Honda failed to establish that the Protestant's investment was not permanent.

d) Honda established that it was beneficial and that it would not be injurious to the public welfare for the franchise to be modified or replaced or the business of the franchisee disrupted.

e) Honda failed to establish that the franchisee did not have adequate motor vehicle sales and service facilities, equipment, vehicle parts, and qualified service personal to reasonably provide for the needs of the consumers for the motor vehicles handled by the franchisee and has not been rendering adequate services to the public.

f) Honda failed to establish that the franchisee failed to fulfill the warranty obligations of the franchisor to be performed by the franchisee.

g) Honda established that the franchisee failed to comply with the terms of the franchise.

22. Costa Mesa Honda's preclusion from submitting evidence of the knowledge of certain Honda employees of the criminal acts of the two principals and that these Honda employees' knowledge and participation would be a defense to the termination is proper.

23. The criminal convictions in Federal court of the felony defrauding of Honda are res judicata between the two principals and Honda, which was the victim of the criminal conduct. As such, Costa Mesa Honda is precluded from litigating these two issues again before this Board.

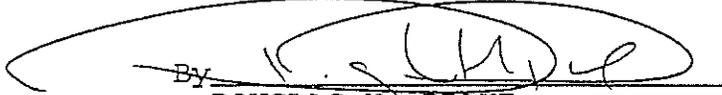
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PROPOSED DECISION

American Honda Motor Co., Inc. shall be allowed to terminate the franchise of Ed-West Company dba Costa Mesa Honda.

I hereby submit the foregoing which constitutes my proposed decision in the above-entitled matter, as a result of a hearing before me on the above dates and recommend the adoption of this proposed decision as the decision of the New Motor Vehicle Board.

DATED: October 11, 1994

By 

DOUGLAS H. DRAKE  
Administrative Law Judge