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STATE OF CALIFORNIA  
NEW MOTOR VEHICLE BOARD

In the Matter of the Protest of )  
MARQUIS MOTORS, INC., ) Protest No. PR-234-79  
Protestant, )  
vs. )  
TOYOTA MOTORS DISTRIBUTORS, INC., )  
Respondent. )

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PROPOSED DECISION

Procedural Background

1. Respondent Toyota Motor Distributors, Inc., (Toyota) informed Marquis Motors, Inc., (Marquis) by a letter dated April 5, 1979, that it intended to establish a new Toyota dealership near the junction of the San Diego and Santa Ana Freeways in the Irvine Auto Center at Irvine, California.

2. Marquis, a dual line dealership selling both Toyota and Volvo products, located at 28802 Marguerite Parkway, Mission Viejo, California 92675, near the intersection of Avery Parkway and Highway 5, filed a protest with the New Motor Vehicle Board (Board) on April 13, 1979, requesting a hearing.

3. Pursuant to California Vehicle Code section 3066<sup>1/</sup>, a hearing was held before Administrative Law Judge Aaron S. Resnik,

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1. Unless otherwise stated, all references are to the California Vehicle Code.

beginning July 23, 1979, and continuing intermittently at various southern California locations for eighteen days ending on September 21, 1979. Marquis was represented by Sidney I. Pilot and A. Albert Spar, of Sidney I. Pilot, a Professional Corporation. Toyota was represented by Robert G. Lane, Michael Lindsey, and John P. Howitt of the law firm of Paul, Hastings, Janofsky and Walker.

#### Issues Presented

4. Marquis contends that good cause exists for not establishing the proposed new dealer in the Irvine Auto Center for the following reasons:

a. The additional franchise will jeopardize the permanent investment of Marquis (3063(1));

b. The additional franchise will adversely affect the retail motor vehicle business and the consuming public in the relevant market area (3063(2));

c. It would be injurious to the public welfare for the additional franchise to be established (3063(3));

d. Franchisees of the same line make are providing adequate service and convenient care for Toyota owners and buyers in the relevant market area (3063(4));

e. The establishment of the additional franchise would not materially increase competition, but on the contrary, it would dilute and subdivide the relevant market area so that the dealers would be unable to adequately stock and serve the Toyota owners and buyers; and accordingly, it would not be in the public interest (3063(5)).

### Preliminary Matters

5. Respondent has conceded that the proposed dealership would not be operational until two years after the Board acts with respect to this protest, assuming arguendo that the protest is overruled. A question thus arises whether the "existing circumstances" postulated in section 3063 must prevail at the time of the hearing and decision by the Board, or whether it is sufficient that they will be extant at the time that the proposed franchise becomes operational. In our view, the "existing circumstances" must exist in praesenti, but in evaluating their present existence, projections and evidence of future conditions are to be considered.

### FINDINGS OF FACT

#### Facts Relating to Permanency of Investment (3063(1))

1. Marquis has been a franchised Toyota dealer since 1966 and has been located at its present location, immediately adjacent to Interstate 5 in the southerly portion of the unincorporated community of Mission Viejo, since 1974.
2. Melvin Curland owns 100% of the stock of Marquis.
3. Marquis leases the property on which it is located. The lessors are Melvin Curland and his sister, Betty Curland Pratt. The lease expires in 1984.
4. Rental payments by Marquis to the lessors for the first six months of 1979 amounted to \$48,117.00.
5. Marquis has a corporate investment in facilities and inventory (not including cars and trucks, but including approxi-

mately \$140,000 in parts and service inventory) as of December 1978, of \$248,454.00, and a contingent liability of \$2,500,000 on recourse contracts for automobiles sold and financed. A deduction of \$66,559.00 in depreciation expenses which has been charged against the foregoing investments is not reflected in these figures.

6. The four individuals who propose to be the owners of the Irvine dealership are Salvatore Cerrito, Stephen Cerrito, Roy Cerrito (brothers) and Jack Hilleary, brother-in-law to the Cerritos (the Cerrito group). They own the Datsun dealership at the Irvine Auto Center. They have made no financial investment in the new dealership, have not disclosed any plans for a Toyota facility, have not retained an architect, and have not made any application for permits.

7. Toyota's parent company, Toyota Motor Sales Corporation (TMS), owns the land where Toyota proposes to establish the new dealership. TMS purchased the land in 1977 for \$479,160.00 and now proposes to sell it to the prospective new dealership for \$850,000.00. The entire profit will belong solely to TMS.

8. As a condition to purchasing the property from the Irvine Company, TMS was required to grant the Irvine Company an "Option to Repurchase" the property at the original cost thereof (plus the cost of any improvements which may have been made) in the event construction of a facility thereon is not commenced.

by December 31, 1979, and completed and in operation by December 31, 1980<sup>2/</sup>.

9. One of Toyota's predominant reasons for selecting the Irvine Center to locate a new dealer, rather than Newport Beach, was to make the profit on the resale of the land.

10. Toyota could, without injury to Marquis, locate a dealer in Newport Beach to cover the same market as that which would be covered from the Irvine Auto Center.

Facts Relating to the Effect  
on the Consuming Public (3063(2))

11. The proposed dealership will be located in the Irvine Auto Center, which is located immediately to the south of the intersection of Orange County's two main highways, Interstate 5 and 405 in Irvine, California. This is the only location in the city of Irvine at which the establishment of an automobile dealership or independent automobile service and body repair facility (not affiliated with a gasoline service station) is now permitted.

12. The Toyota dealers which are presently located in closest proximity to Marquis to the north are Santa Ana Toyota, approximately 17.8 miles away; Earl Ike Toyota, approximately

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2. TMS can protect its investment in the land by (1) seeking extensions, which have been generally granted as sought by Toyota, or (2) by building on the land and selling or leasing the facility to a dealership at such time as it becomes economically feasible and legally possible to open such dealership.

18.8 miles away; Toyota of Orange, approximately 20.8 miles away; and to the south, Carlsbad Toyota, approximately 20 to 30 miles away.

13. The distances between the proposed dealership in the Irvine Auto Center and the four Toyota dealers surrounding the location of the proposed dealership are 7.6 miles to Marquis, 10.2 miles to Santa Ana Toyota, 11.2 miles to Earl Ike Toyota (Costa Mesa), and 13.2 miles to Toyota of Orange.

14. Toyota divides the various marketing areas in the United States into twelve regional areas. There are a number of metropolitan multiple points within the Los Angeles area, one of which is the Santa Ana Metro Multiple which includes Orange County.

15. Toyota dealers in the Santa Ana market area make the majority of their sales within 5 to 7 miles of their places of business.

16. Three of the top Toyota dealers in the country are in the Santa Ana Metro area. Two of them, Toyota of Orange and Santa Ana Toyota, presently serve the territories sought to be served by the proposed Irvine dealership. This area is also served by Marquis and Earl Ike Toyota.

17. Marquis' claimed primary market area for vehicle and service sales is from north of the Woodbridge area in Irvine to San Clemente in the south, bordered on the west by the Pacific Ocean and on the east by the mountains.

18. An auto dealer, such as Marquis, located in Mission Viejo generally competes for the same customers as an auto dealer located in the Irvine Auto Center. 75 to 80% of Marquis' sales of repair service are to customers residing to the north of its dealership. Marquis' sales of new Toyota vehicles generally follow the same pattern as to source as do its sales of service and parts.<sup>3/</sup>

19. Orange County is generally divided into a northerly and southerly portion. The northerly portion is the area to the northwest of the Newport freeway and Culver Drive. The area to the south and east of these arteries is the southerly portion. The Orange County (John Wayne) Airport may be considered a prominent dividing point between these two portions. The northerly portion is an older, more settled, more developed, and more densely populated area than the southerly portion. Within the southerly portion the most northerly and easterly territory is an area of mountains, hills, and sparse population. There is a range of hills in the southerly portion of Orange County to the north of the ocean and to the south of the balance of the southerly portion of Orange County which is sparsely populated except for areas along major arteries.

20. Projected population for the Irvine open point as of 1983 is 178,700; for the Mission Viejo point (Marquis) 242,528.

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3. Toyota expects that the new dealership would sell 1,000 to 2,000 new cars in its first year of operation.

Each of these figures represents more than a 100% increase over 1976 figures.

21. An area of land immediately surrounding, and within a 1 1/2 to 2 mile radius of the Irvine Auto Center is zoned and is to be developed commercially and industrially. Consequently there will be little or no population growth in this area in the next three years.

22. Substantial population growth is expected to take place to the south of Marquis and in Irvine north and west of the Irvine Auto Center by 1983.

23. About 50% of the land in the City of Irvine is still zoned agricultural.

Facts Relating to the Public Welfare (3063(3))

24. Toyota concedes that as of the present time a dealership at Irvine is not necessary.

25. Toyota's officials recommended the closing of the open point at Irvine in 1979 on the basis that a dealer would be operational there in 1981.

26. In an effort to create viable marketing areas for Marquis and the proposed dealership in Irvine, Toyota seeks to bisect the communities of Mission Viejo (a principle source of business for Marquis), and Laguna Beach. This becomes necessary because of a lack of population immediately surrounding the Irvine Auto Center and areas northward.

27. No other franchisor has a facing dealer within 7.6 miles of the Irvine Auto Center.

28. The primary market area for the sale and service of new Toyotas by the proposed Irvine dealer would be essentially the market area now served by Marquis. 50% of the proposed Irvine dealer's first year sales would be within a 7 1/2 mile radius of the new dealership, a substantial portion of which is close to Santa Ana Toyota and a lesser portion of which is close to Earl Ike Toyota in Costa Mesa.

29. The proposed dealer (the Cerrito group) is an experienced automobile dealer, owning Toyota and Datsun franchises in San Jose, California. There is a distance of 7 1/2 miles between these facilities.

30. The Cerrito group owns and operates the Datsun dealership in the Irvine Auto Center which has just recently opened for business in a large modern facility.

31. The nearest Datsun dealers to Irvine Datsun are Barwick (about 10 miles to the south) and Newport Datsun (about 9 miles to the north and west).

32. The San Jose Toyota franchisee has been awarded the highest honors by Toyota, having been made a member of the Board of Governors of the President's Club; this award is made to dealers who sell more than 1,000 cars per year. There are only 42 dealerships in the United States so honored.

33. Three facing dealers to Marquis - Toyota of Santa Ana, Toyota of Orange, and Earl Ike Toyota of Costa Mesa - have received similar awards.

34. The Toyota facility in Irvine would be next door to the Datsun showroom and would share some common real estate.

35. If the Cerrito group were to build the type of facility presently contemplated for a Toyota dealership at Irvine, its cost for land and improvements would exceed \$2 million.

36. The Cerrito group intends to undertake a vigorous and intensive advertising campaign utilizing electronic and print media as well as aggressive sales techniques, but not including a "T-O" system<sup>4/</sup>.

37. The Toyota facility planned for Irvine would be approximately 30,000 sq. feet, split block construction with tile roof, with 30 service stalls and approximately 50 employees.

38. The Cerrito group anticipates that its Toyota sales of cars and trucks in its first year of operation would approximate 1800, with heavy emphasis on fleet and credit union sales.

39. The Cerrito group does not intend to advise the public that it would be operating both the Datsun and Toyota franchises at Irvine.

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4. In the parlance of the industry the "T-O" or turn over system describes a highly aggressive technique of retail selling by turning the prospective buyer over from one "sales person" to another in an effort to break down buyer resistance.

Facts Relating to Adequate Competition  
and Convenient Consumer Care (3063(4))

40. Marquis' service facilities include 14 service stalls, 13 lifts (four of which are used for Volvo) with adequate room to increase its show room, if necessary, and room to construct additional service facilities if needed.

41. Marquis employs, in addition to its sales and clerical employees, 10 technicians (6 for Toyota, 4 for Volvo), 2 service writers, one dispatcher, a parts manager, three counter men, a stock man, a delivery boy, and a service cashier. No service appointments are necessary and the service department is open from 7:30 a.m. to 5:30 p.m. All Marquis technicians attend the Toyota training schools. The service facilities are not used to full capacity and Marquis could do 30% more work.

42. Marquis has been the recipient of numerous awards including Toyota's Quality Dealer Award, Toyota Sales Acceleration awards (given for the performance of excellent promotional work), an Up, Up and Away Award, and has been a member of Toyota's 1000 PRESIDENT'S CLUB.

43. Marquis operates a free pickup and delivery service for its customers and has been approved by the Automobile Club of Southern California as an authorized service facility for Toyota repairs.

44. The development of the Irvine Mall Shopping Center about 2 1/2 miles north of the Irvine Auto Center has had a history

of difficulty and delay. It has been planned since 1966 and has not yet been opened, nor have any structures been placed upon it. It is now planned by the Irvine company to be operational in 1982-1983. Some of the reasons for the delays have been the need to install an off ramp and a flood control channel thru the center, and the fact that it lies in the flight path of military airplanes at the El Toro Marine Base. The base is contiguous to the site of the mall and residential development is restricted. Large prospective lessees of the Irvine Mall have announced that they are locating elsewhere due to the serious problems and delays, and its opening time is still indefinite.

45. There is unused service capacity for Toyotas in Southern Orange County.

46. Datsun, Chevrolet, and Ford are acknowledged to be Toyota's primary competition. Datsun, Chevrolet, and Ford as well as Honda, Dodge, Lincoln-Mercury, and British Leyland all have dealerships in the Irvine Auto Center. Volkswagen is attempting to establish a dealership in the Irvine Auto Center.

47. Toyota has fewer dealerships in southern Orange County and in Orange County in general than Datsun, Ford, or Chevrolet.

48. Toyota's percentage of total import sales in the southern Orange County area for the year 1978 was approximately 21.12% as compared to 24.90% for Orange County in general for the same period.

49. Toyota automobile sales in southern Orange County as a percent of Datsun automobile sales for year to date, June 1979, in the same area was 89.6%, as compared to 124.50% for Orange County in general for the same period.

50. Toyota automobile sales in southern Orange County as a percent of Datsun automobile sales for 1978 in the same area was 125.86% as compared to 134.09% for Orange County in general for the same period.

51. Toyota's market penetration in Irvine as well as other locations in southern Orange County would have been higher had it been able to supply dealers with the requested model mix of cars and trucks.

52. Toyota's market penetration in Orange County, and in the southern portion thereof, has exceeded its Los Angeles region performance.

53. For the first six months of 1979, Marquis has spent fewer dollars per car on advertising than the average Toyota dealer of the same size in the Southern California area.

54. Marquis advertises in a newspaper of general Orange County circulation two days a month, and in a newspaper circulating in Mission Viejo one to two days a month.

55. Marquis does not advertise in the Irvine area on a regular basis.

Facts Relating to Increased Competition in the  
Public Interest (3063(5))

56. The addition of another Toyota dealer in Irvine at this time would have an adverse impact on the four facing dealers, and would cause a loss of sales to Marquis of 25%.

DETERMINATION OF ISSUES

1. The protestant has established that good cause exists for not establishing the proposed franchise for the following reasons:

- (a) Marquis' permanent investment would be jeopardized by the present establishment of the new franchise.
- (b) The proposed franchisee has no permanent investment.
- (c) Toyota's investment in the land is protected in many ways, including the option agreement, probable extensions thereof, and possible construction on the land.
- (d) The proximity of the proposed dealer would adversely affect existing dealers' ability, under existing circumstances, to render convenience, service, and sales to the public.
- (e) The present market for sales and service would be diluted by the addition of another franchise, and such dilution would not be beneficial to the public.

- (f) The operation of a Toyota franchise by the same group which operates a franchise of its principal competition (Datsun) in adjoining premises, without public disclosure, could cause the public to be misled and could curtail interbrand competition in the market area.
- (g) The establishment of the proposed franchise would not be in the public interest.

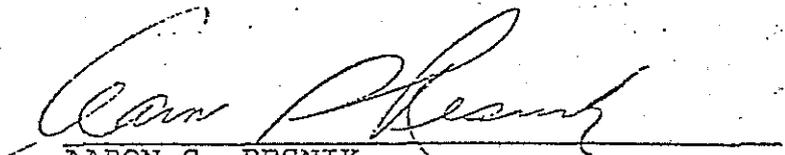
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Wherefore the following order is made:

The protest is sustained.

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

Dated: January 11, 1980.



AARON S. RESNIK  
Administrative Law Judge  
New Motor Vehicle Board