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STATE OF CALIFORNIA
NEW MOTOR VEHICLE BOARD

In the Matter of the Protests of)

CHAMPION MOTORCYCLES, INC., dba)
CHAMPION HONDA YAMAHA,)

Protestant,)

vs.)

YAMAHA MOTOR CORPORATION, U.S.A.,)

Respondent.)

RENIX CORPORATION, dba)
NEWPORT VESPA-RIVA,)

Interested Individual.)

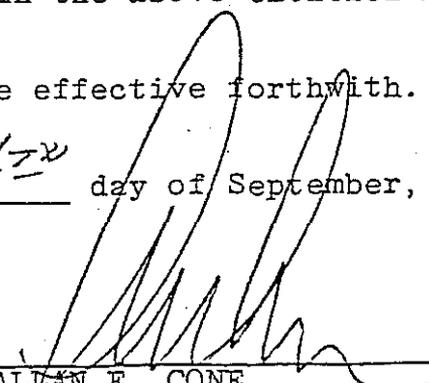
Protest Nos. PR-498-83
PR-506-83

DECISION

The attached Proposed Decision After Remand of the
Administrative Law Judge is hereby adopted by the New Motor
Vehicle Board as its Decision in the above-entitled matter.

This Decision shall become effective forthwith.

IT IS SO ORDERED this 4th day of September, 1985.



ALLAN E. CONE
President
New Motor Vehicle Board

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PROPOSED DECISION
AFTER REMAND

PROCEDURAL BACKGROUND

1. Protestant is Champion Motorcycles, Inc. (Champion), dba Champion Honda Yamaha (Champion Honda Yamaha), 1590 Newport Boulevard, Costa Mesa, California.

2. On September 27, 1982, Respondent Yamaha Motor Corporation, U.S.A. (YMC), enfranchised Renix Corporation, dba Newport Vespa-Riva (Newport), to sell Yamaha RIVA products at 2906 West Coast Highway, Newport Beach, California.

3. On November 23, 1983, Champion filed a protest with the New Motor Vehicle Board (Board) pursuant to Vehicle Code

section 3062.^{1/} The protest alleged failure by YMC to give notice of the establishment of Newport as an additional Yamaha dealership and the existence of good cause to preclude the establishment and continued existence of Newport as an additional franchisee. On December 7, 1983, Champion filed an additional protest with the Board pursuant to section 3060. This protest alleged that, without good cause, YMC modified its franchise agreement by mandating additional requirements as a prerequisite for a dealer's procurement of the RIVA motor scooter and products, and that YMC refused to allow Champion to market RIVA scooter products.

4. The proceedings before the Board were suspended pursuant to stipulation of counsel for the parties pending resolution of Sports Cycle Center, Inc. dba Bill Krause Sports Cycle Center et. al. vs. Yamaha Motor Corporation, U.S.A., Protest Nos. PR-467-83, et. al. The Board issued its order in the Sports Cycle protests on June 8, 1984.

5. On September 25, 1984, the Board issued an order consolidating the Champion protests.

6. Newport requested and was granted "interested individual" status pursuant to section 3066.

7. A hearing was held on February 21, 22, 25, 26 and 27, 1985 before Anthony M. Skrocki, Administrative Law Judge for the Board.

^{1/} All references are to the California Vehicle Code unless otherwise indicated.

8. Champion was represented by Cris C. Vaughan of the Law Offices of Robert C. Maddox. YMC was represented by Bruce L. Ishimatsu of the law firm of Kelley Drye and Warren. Newport was represented by Michael J. Flanagan of the law firm of Pilot and Spar.

PRELIMINARY FINDINGS OF FACT

9. Since 1977, Champion has been a franchisee of Kawasaki and has been doing business at 1980 Harbor Boulevard, Costa Mesa as Champion Kawasaki.

10. In the summer of 1982, Champion, desiring to expand, began negotiations with Award Motors Inc. (Award) to purchase the Honda/Yamaha retail motorcycle business of Award which was located at 1680 Newport Boulevard, Costa Mesa.

11. In early August 1982, Champion submitted a franchise application to YMC.

12. On August 17, 1982, credit approval was given to Champion by YMC.

13. Escrow for the purchase and sale of Award opened on August 24, 1982. Close of escrow was conditioned on the approval of Champion as a Honda franchisee.

14. On September 2, 1982, Champion and Award entered into a contract for the purchase and sale of the business of Award. Champion did not purchase the Award corporation or any of its stock. The contract provided that Champion would assume and

operate the Award business under a management agreement commencing on September 2, 1982, at 7:00 p.m.

15. By letter dated September 10, 1982, YMC announced to its dealers the introduction of a motor scooter which it had named RIVA. As a result of an extensive market study, YMC reached the decision that potential consumers of RIVA products were such that RIVAs should be marketed through facilities separate and distinct from traditional motorcycle facilities.

16. Upon inquiry, YMC notified both Award and Champion that neither of them would be entitled to receive the RIVA scooters. YMC had determined that separate franchises were required for RIVA scooters and further that YMC intended to appoint Newport as the RIVA dealer for the Costa Mesa area.

17. On September 15, 1982, YMC sent a letter of intent to Champion. The letter notified Champion that the intent to enfranchise Champion as a Yamaha motorcycle dealership was conditioned on Champion's purchase of the Award business by January 1, 1983 and upon the signing of a Motorcycle Dealer Agreement and other credit and security forms upon completion of the purchase.

18. On September 15, 1982, Newport signed a Yamaha RIVA Scooter Dealer Agreement.

19. The Newport RIVA franchise, by its terms, became effective on September 27, 1982.

20. At the time Newport received its RIVA franchise, Newport was located at 2906 West Coast Highway, Newport Beach.

21. On September 30, 1982, Champion signed a motorcycle franchise with American Honda. The Champion/Award escrow closed on that date or shortly thereafter.

22. On October 5, 1982, a Yamaha Motorcycle Dealer Agreement was signed by Champion. The franchise became effective October 13, 1982 upon the signatures of YMC representatives.

23. At the time Champion received its Yamaha franchise its Honda-Yamaha business was located at 1680 Newport Boulevard, Costa Mesa. In February of 1983, Champion Honda Yamaha moved to a temporary facility at 1777 Newport Boulevard.

24. In November of 1983, Newport moved to its present facility at 1880 Newport Boulevard, Costa Mesa.

25. In September of 1984, Champion Honda Yamaha moved to its present location at 1590 Newport Boulevard. The distance between Champion and Newport is now 7/10 of a mile.

26. On June 24, 1984, the Board, in Sports Cycle Center, Inc., determined that the RIVA is a "motorcycle" for the purpose of determining the effects of sections 3060 and 3062. On February 14, 1985, the parties herein stipulated that the record of the Sports Cycle matter would be incorporated into the record of the present protest.

ISSUES PRESENTED

- A. WHETHER YMC HAS MODIFIED THE FRANCHISE BETWEEN YMC AND CHAMPION BY REFUSING TO ALLOW CHAMPION TO MARKET RIVA SCOOTERS. [SECTION 3060] (SEE PAGE 10 HEREIN)
- B. ASSUMING THAT A MODIFICATION OF THE FRANCHISE DID OCCUR, WHETHER THE MODIFICATION HAD A SUBSTANTIAL EFFECT ON CHAMPION'S SALES OR SERVICE OBLIGATIONS OR INVESTMENT. [SECTION 3060] (SEE PAGE 14 HEREIN)
- C. ASSUMING THAT A MODIFICATION OF THE FRANCHISE OCCURRED, WHICH HAD A SUBSTANTIAL EFFECT ON CHAMPION'S SALES OR SERVICE OBLIGATIONS OR INVESTMENT, WHETHER YMC HAD GOOD CAUSE FOR MODIFYING CHAMPION'S FRANCHISE. TO DETERMINE WHETHER GOOD CAUSE EXISTS FOR THE MODIFICATION, IF ANY, SECTION 3061 PROVIDES THAT THE BOARD SHALL CONSIDER THE EXISTING CIRCUMSTANCES, INCLUDING, BUT NOT LIMITED TO, ALL OF THE FOLLOWING: (SEE PAGE 16 HEREIN)
- 1) Amount of business transacted by the franchisee, as compared to the business available to the franchisee [section 3061(a)]; (See page 16 herein)

- 2) Investment necessarily made and obligations incurred by the franchisee to perform its part of the franchise [section 3061(b)]; (See page 17 herein)
- 3) Permanency of the investment [section 3061(c)]; (See page 18 herein)
- 4) Whether it is injurious or beneficial to the public welfare for the franchise to be modified or the business of the franchisee disrupted [section 3061(d)]; (See page 19 herein)
- 5) Whether the franchisee has adequate motor vehicle sales and service facilities, equipment, vehicle parts, and qualified service personnel 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 [section 3061(e)]; (See page 20 herein)
- 6) Whether the franchisee fails to fulfill the warranty obligations of the franchisor to be performed by the franchisee [section 3061(f)]; (See page 21 herein)
- 7) Extent of the franchisee's failure to comply with the terms of the franchise [section 3061(g)]. (See page 21 herein)

D. WHETHER CHAMPION HAS STANDING UNDER SECTION 3062 TO PROTEST THE ESTABLISHMENT BY YMC OF NEWPORT AS A RIVA DEALER. SPECIFICALLY, WHETHER CHAMPION WAS A YMC DEALER AT THE TIME NEWPORT WAS ESTABLISHED AS A RIVA DEALER. (SEE PAGE 21 HEREIN)

E. ASSUMING THAT CHAMPION HAS STANDING UNDER SECTION 3062 TO PROTEST YMC'S ESTABLISHMENT OF NEWPORT AS A RIVA DEALER, WHETHER GOOD CAUSE EXISTS FOR NOT ALLOWING YMC TO ESTABLISH NEWPORT AS A RIVA DEALER. SECTION 3063 PROVIDES THAT IN DETERMINING GOOD CAUSE NOT TO ESTABLISH THE ADDITIONAL FRANCHISE, THE BOARD SHALL CONSIDER THE EXISTING CIRCUMSTANCES, INCLUDING, BUT NOT LIMITED TO, ALL OF THE FOLLOWING: (SEE PAGE 23 HEREIN)

1) Permanency of the investment [section 3063(a)];
(See page 23 herein)

2) Effect on the retail motor vehicle business and the consuming public in the relevant market area^{2/} [section 3063(b)]; (See page 23 herein)

3) Whether it is injurious to the public welfare for an additional franchise to be established [section 3063(c)]; (See page 23 herein)

^{2/} Vehicle Code section 507 defines the "relevant market area" as "any area within a radius of 10 miles from the site of a potential new dealership."

4) Whether Yamaha franchisees in that relevant market area are providing adequate competition and convenient consumer care for the owners of Yamaha products within the relevant market area which shall include the adequacy of motor vehicle sales and service facilities, equipment, supply of vehicle parts and qualified service personnel [section 3063(d)]; (See page 25 herein)

5) Whether establishment of an additional franchise would increase competition and therefore be in the public interest [section 3063(e)]. (See page 26 herein)

F. ASSUMING THAT CHAMPION HAS STANDING UNDER SECTIONS 3060 OR 3062, WHETHER THE DOCTRINE OF LACHES BARS THESE PROTESTS. (SEE PAGE 26 HEREIN)

BURDEN OF PROOF

27. Prior to commencement of the hearing, it was agreed by the parties that Protestant had the burden of proving that there was a modification of its franchise and that the modification would substantially affect its sales or service obligations or investment. Section 3066 places the burden of proof as to good cause for any such modification on Respondent. Section 3066 places the burden of proving good

cause for not entering into an additional franchise on Protestant.

FINDINGS OF FACT

A. FACTS RELATING TO WHETHER YMC HAS MODIFIED THE FRANCHISE BETWEEN YMC AND CHAMPION BY REFUSING TO ALLOW CHAMPION TO MARKET RIVA MOTOR SCOOTERS.

28. At the time of issuance by YMC of the September 10, 1982 letter introducing the RIVA scooter, Champion had not yet signed a Yamaha motorcycle franchise.

29. During the month of September 1982, Champion was operating Award under a management agreement with Award owner, Mark Cherry. The management agreement was provided for in the contract for sale between Champion and Award signed on September 2, 1982. Under the agreement, Champion acquired "the status of an assignee of all of seller's rights in the business operation of Award Motors, Inc. until the formal transfer of title is consummated as provided herein".

30. The rights and obligations transferred by Award to Champion were confined to the operation of the business. Champion did not acquire any right, title or interest in the corporate entity of Award. The terms of Award's Yamaha sales and service agreement provided that "the relationship created between Yamaha and Dealer is intended to be personal in nature, . . ."

31. Champion's president, Lee Fleming, and vice-president, Whitney Blakeslee, were aware that a new franchise between Champion and YMC was required to be signed and that YMC would issue a new dealer number to Champion. The franchise was signed by Whitney Blakeslee for Champion on October 5, 1982.

32. During the time the operating agreement was in effect, Cherry was on the premises of Award almost daily. Cherry was present at the dealership to protect the interests of Award due to the fact that escrow had not closed.

33. Both Cherry and Fleming were at the dealership when the September 10 letter announcing the introduction of RIVA was received. The letter specifically stated that a separate dealer agreement would be required to obtain the right to market RIVA products.

34. Soon after receipt of the September 10 letter, Fleming and Cherry contacted Ron Knapp, the YMC district manager, to discuss the contents of the letter. During this conversation, Knapp informed Fleming and Cherry that Champion would not be receiving the RIVA product line. They were informed that YMC intended to establish Newport as the RIVA dealer in the area.

35. At the time of the signing of the franchise by Champion, Fleming was out of the country. Before leaving, he instructed Blakeslee to sign the franchise and to be certain he did not sign anything that excluded the RIVA product.

36. At the time he signed the YMC franchise on October 5, 1982, Blakeslee reasonably believed that the Yamaha Motorcycle Dealer Agreement entitled Champion to receive the RIVA products. The dealer agreement did not by its terms expressly exclude RIVAs, and YMC's representatives were told by Champion's representatives that it was Champion's position that the dealer agreement included RIVAs.

37. The Board determined on June 8, 1984 in the Sports Cycle protests that RIVA is a "motorcycle" within the terms of the YMC franchise.

38. Had Award continued to be the YMC franchisee, the Award franchise would have included the right to receive the RIVA products.

39. The Champion franchise was by its terms virtually identical to the Award franchise. Having purchased the Award business with the approval of YMC, Champion should have been entitled to receive what Award was entitled to receive, i.e., Yamaha motorcycles, including RIVA.

40. The buy-sell between Champion and Award had progressed to the point that the closing of escrow was awaiting only the formal execution of documents by the two franchisors.

41. YMC had the opportunity to exclude RIVAs specifically from the express terms of the franchise but for whatever reasons did not do so. What the effect of such exclusion would have been under these circumstances, however, is not before the Board.

42. To allow a franchisor to carve out a portion of the product line as a condition to receipt of the signed franchise could lead to abuse and overreaching by a franchisor which, under these circumstances, would have overwhelming bargaining power.

43. YMC had adopted a corporate policy of first offering a separate RIVA franchise to its existing motorcycle dealers before appointing non-Yamaha dealers in the same market. YMC had established varying additional requirements for receipt of the RIVA product. Although it is unknown whether Champion would have agreed to meet YMC's standards, the point is moot in that YMC, contrary to its own policy, refused to offer the separate RIVA franchise to either Award or Champion but instead appointed Newport as a RIVA-only^{3/} dealer.

44. Champion was franchised by Honda to sell Honda motorcycles on September 30, 1982.

45. Honda introduced its motor scooters in early 1983. At that time, Champion signed a separate Honda Motor Scooter Dealer Sales and Service Agreement in order to sell and service the Honda Aero motor scooter.

46. Although YMC in good faith believed it was entitled to withhold RIVA products from Award and Champion, the position of Champion that the franchise included RIVA products was vindicated by the Board's ~~later~~ holding that RIVA is a motorcycle within the terms of the Yamaha franchise. Therefore

^{3/} As used herein, "RIVA-only" means a YMC franchisee selling RIVA scooters but not other Yamaha motorcycles.

the denial of the RIVA product resulted in a modification of the Champion franchise.

B. ASSUMING THAT A MODIFICATION OF THE FRANCHISE DID OCCUR, FACTS RELATING TO WHETHER THE MODIFICATION HAD A SUBSTANTIAL EFFECT ON CHAMPION'S SALES OR SERVICE OBLIGATIONS OR INVESTMENT.

47. The RIVA scooter line, when first introduced in 1982, consisted of only two models, each with a 50 cc engine. In 1983, the line was expanded to include a 180 cc model. In 1984, a 125 cc model was added.

48. Since 1982, the number of Yamaha motorcycle models with engine sizes of 250 ccs or less has been reduced as indicated below.

	<u>Yamaha Motorcycles under 250 cc</u>				
	1981	1982	1983	1984	1985
Street bikes 250 cc or less	6	5	2	2	1
Dual purpose 250 cc or less (Street and dirt capability)	4	8	6	1	-

49. Champion admitted that it had received an adequate supply of the 1982 through 1984 Yamaha motorcycles with engine sizes of 250 cc or less.

50. YMC established through its market study that prospective scooter owners are not interested in small motorcycles, and no substantial evidence was introduced to indicate RIVA owners would "trade-up" into motorcycles.

51. In 1983, Champion sold 67 motorcycles of 250 ccs or less out of overall Yamaha motorcycle sales of 466. In 1984, Champion sold only 37 small motorcycles.

52. In 1983, Yamaha motorcycle dealerships which also sold RIVA scooters purchased an average of only 22 RIVAs compared to an average of 122 RIVAs purchased by RIVA-only dealers. In 1983, the top 13 RIVA dealers in the nation were all RIVA-only dealers. In 1984, the top 11 RIVA dealers in the nation were all RIVA-only dealers. Champion sold only 104 Honda scooters during the 1983-84 calendar years compared to 777 RIVAs sold by Newport during the same period.

53. Champion had no obligation to service RIVA scooters and, in fact, was not permitted to perform RIVA warranty work. Therefore, there was no impact on Champion's service obligations.

54. Because Champion was not deemed to be a RIVA dealer, YMC did not permit Champion to purchase special RIVA tools, parts and equipment. Champion incurred no expense in regard thereto.

55. The total amount of consideration paid by Champion to Award was negotiated and agreed upon by August 24, 1982, prior to the introduction of RIVA.

56. The subsequent investments made by Champion in regard to its relocations and construction of new facilities were done with knowledge of the fact that YMC did not intend to provide RIVA products to Champion. The investments were made solely in regard to Champion's Honda motorcycle and motor scooter franchises, and its Yamaha motorcycle business.

57. Assuming that a modification of the franchise occurred, Champion has not established that such modification had a substantial effect on its sales or service obligations or investment.

C. ASSUMING THAT A MODIFICATION OF THE FRANCHISE OCCURRED, WHICH HAD A SUBSTANTIAL EFFECT ON CHAMPION'S SALES OR SERVICE OBLIGATIONS OR INVESTMENT, FACTS RELATING TO WHETHER YMC HAD GOOD CAUSE FOR MODIFYING CHAMPION'S FRANCHISE.

1) FACTS RELATING TO THE AMOUNT OF BUSINESS TRANSACTED BY CHAMPION AS COMPARED TO THE BUSINESS AVAILABLE TO IT [SECTION 3061(a)].

58. The market area in which Newport and Champion are located is one of the best market areas in the nation for scooters. Up through the date of the hearing, there were no other RIVA dealers other than Newport within its relevant market area.

59. Champion received an award from YMC as being among one of YMC's "Nation's Finest" dealers for the 1984 calendar year. In addition, Champion's ratio of Yamaha to Honda motorcycle sales is significantly higher than the state average. However, YMC has established that it was most unlikely that Champion would perform as effectively in regard to the marketing of RIVA. YMC's experience in marketing RIVAs has confirmed the

predictions of YMC's marketing study. YMC's market penetration in areas where there are RIVA-only dealers is significantly higher than in those areas where YMC markets RIVAs through its motorcycle dealers.

60. In Orange County and San Francisco County, RIVA scooters are sold exclusively through RIVA-only dealerships. For the year 1984, January through November, the RIVA market share in Orange County was 51.5% of the scooter market and in San Francisco County, the RIVA market share was 48.6%. During the same period, the total RIVA market share in California was approximately 28.2%.

2) FACTS RELATING TO THE INVESTMENT NECESSARILY MADE AND THE OBLIGATIONS INCURRED BY CHAMPION TO PERFORM ITS PART OF THE FRANCHISE [SECTION 3061(b)].

61. The exclusion of RIVA scooters from the Champion franchise had no effect upon Champion's investment or obligation to perform its part of the franchise. Champion's loan commitments and the agreement to purchase the Award business had already been negotiated and settled prior to the introduction of the RIVA product.

62. At the time Champion acquired the business of Award, Champion was aware that the Award facility was the subject of a condemnation proceeding by the city of Costa Mesa and that relocation in the immediate future was essential. Champion, before it became aware of the RIVA product, had contracted to purchase Award and was aware of the necessity to relocate.

63. The subsequent investments made by Champion in regard to its relocations and construction of new facilities were done with the knowledge of the fact that YMC did not intend to provide RIVA products to Champion. The investments were made solely in regard to Champion's Honda motorcycle and motor scooter franchises and its Yamaha motorcycle business.

3) FACTS RELATING TO THE PERMANENCY OF INVESTMENT
[SECTION 306](c)].

64. As set forth above, Champion's investment was for the Yamaha motorcycle franchise, not including RIVA scooters. Therefore, the exclusion of RIVA did not affect the permanency of Champion's investment in its Yamaha motorcycle franchise.

65. YMC, on the other hand, had concerns as to the permanency of Champion's investment due to uncertainties regarding Champion's ability to procure a permanent facility.

66. Champion began its Yamaha operation in the Award facility which was condemned by the city of Costa Mesa. YMC notified Award and Champion that the size and condition of the Award facility were not adequate for RIVA. Although it was known that Champion would eventually have to move its dealership, it was uncertain as to when, where and how this would be accomplished.

67. After approximately five months in the condemned facility, Champion, in February of 1983, moved its Yamaha and

Honda operations to a temporary facility which was even smaller than the Award facility. Champion remained in this temporary facility for one and a half years, eventually relocating to its present facility in September of 1984. This was nearly two years after receiving its Yamaha motorcycle franchise.

4) FACTS RELATING TO WHETHER IT IS INJURIOUS OR BENEFICIAL TO THE PUBLIC WELFARE FOR CHAMPION'S FRANCHISE TO BE MODIFIED OR ITS BUSINESS DISRUPTED [SECTION 3061(d)].

68. YMC's marketing strategy for the RIVA scooter was to present this product to a segment of the public which did not identify itself with the typical motorcycle consumer. As part of this strategy, YMC sought RIVA dealerships which would provide scooter consumers with a comfortable environment and scooter expertise.

69. As a consequence of YMC's marketing strategy, Newport was established as a RIVA-only dealership catering to the specific needs of scooter customers. Newport has been operating as a RIVA-only dealer since September 1982.

70. Newport is now the largest volume RIVA dealer in the nation. Other than some out-dated Vespa scooters, the only scooters that it sells are Yamaha RIVAs.

71. Newport is presently and has been rendering adequate services to the public. Excluding the RIVA product from

Champion's franchise will therefore not be injurious to the public welfare. Since Champion was never offered RIVA and incurred no expenses in regards to RIVA, such exclusion will not result in any disruption of Champion's business.

- 5) FACTS RELATING TO WHETHER CHAMPION HAS ADEQUATE SALES AND SERVICE FACILITIES, EQUIPMENT, PARTS AND QUALIFIED SERVICE PERSONNEL TO REASONABLY PROVIDE FOR THE NEEDS OF THE CONSUMERS FOR YAMAHA VEHICLES, AND HAS BEEN AND IS RENDERING ADEQUATE SERVICES TO THE PUBLIC [SECTION 3061(e)].

72. As discussed supra, at the time Champion became a Yamaha dealer, its facility was inadequate. Champion commenced its motorcycle operations in the Award facility which was condemned by the city of Costa Mesa, and remained in that facility from October 1982 to February 1983. Thereafter, Champion relocated into a temporary facility until approximately September of 1984.

73. For about two years Champion was located in facilities which, according to YMC's standards, were inadequate.

74. YMC presented no evidence as to any inadequacy of Champion's present sales and service facilities, equipment, parts and service personnel.

6) FACTS RELATING TO WHETHER CHAMPION FAILED TO FULFILL YMC'S WARRANTY OBLIGATIONS [SECTION 3061(f)].

75. YMC presented no evidence to establish that Champion failed to fulfill YMC's warranty obligations regarding Yamaha motorcycles.

7) FACTS RELATING TO CHAMPION'S FAILURE, IF ANY, TO COMPLY WITH THE TERMS OF THE FRANCHISE [SECTION 3061(g)].

76. YMC presented no evidence to establish that Champion failed to comply with the terms of the franchise regarding Yamaha motorcycles.

D. FACTS RELATING TO WHETHER CHAMPION HAS STANDING UNDER SECTION 3062 TO PROTEST THE ESTABLISHMENT BY YMC OF NEWPORT AS A RIVA DEALER. SPECIFICALLY, WHETHER CHAMPION WAS A YMC FRANCHISEE AT THE TIME NEWPORT WAS ESTABLISHED AS A RIVA DEALER.

77. Pursuant to section 3062, a franchisee within the relevant market area is entitled to notice and an opportunity to be heard by the Board prior to the establishment of an additional dealership.

78. Champion received credit approval to become a Yamaha dealer on August 17, 1982 and, on August 24, 1982, Champion opened escrow for the purchase of Award.

79. On September 2, 1982, Champion, pursuant to a buy-sell agreement, took over the management of the Award business.

80. Under the buy-sell agreement, Champion was assigned only the rights in the business operation of Award, until the formal transfer of title. The agreement specified the assignment of rights were confined to the operation of the business. Champion did not acquire any rights in the corporate entity of Award. Award's Yamaha sales and service agreement was regarded as personal between the original parties to the agreement.

81. On September 16, 1982, Saied Partow, owner of Newport, signed a RIVA dealer agreement on behalf of Newport and on September 27, 1982 the dealer agreement was countersigned by YMC.

82. Although the Yamaha franchise was not signed in behalf of Champion until October 5, 1982 and countersigned by YMC on October 12, 1982, the buy-sell between Champion and Award had been approved by YMC, and the closing of escrow was awaiting only the formal execution of documents by the franchisors.

83. To say that Champion had no standing to protest the denial of RIVA or the establishment of Newport would be to recognize form over substance. Further, to allow franchisors to establish additional dealerships during the pendency of an approved buy-sell would create a window of opportunity to avoid compliance with section 3062. The selling dealer may have no interest in filing a protest or prosecuting it, and the buyer under YMC's argument would have no standing. Even if a selling

dealer had filed a protest, the protest may be arguably moot upon completion of the buy-sell.

E. ASSUMING THAT CHAMPION HAS STANDING UNDER SECTION 3062 TO PROTEST YMC'S ESTABLISHMENT OF NEWPORT AS A RIVA DEALER, FACTS RELATING TO WHETHER GOOD CAUSE EXISTS FOR NOT ALLOWING SUCH ESTABLISHMENT.

1) FACTS RELATING TO PERMANENCY OF INVESTMENT [SECTION 3063(a)].

84. The only investment made by Champion was in regard to the acquisition of the Honda motorcycle and motor scooter franchises and the Yamaha motorcycle franchise, not including Riva products. There was no investment made by Champion in regard to RIVA products. (See Paragraphs 54, 55, 56 supra)

2) FACTS RELATING TO THE EFFECT ON THE RETAIL MOTOR VEHICLE BUSINESS AND THE CONSUMING PUBLIC IN THE RELEVANT MARKET AREA [SECTION 3063(b)] AND AS TO WHETHER IT WAS INJURIOUS TO THE PUBLIC WELFARE FOR THE NEWPORT FRANCHISE TO BE ESTABLISHED [SECTION 3063(c)].

85. The following indicates the approximate distances between Newport and other Yamaha dealers in the area.

<u>FROM NEWPORT TO:</u>	Straight- Line Miles	Driving Miles	Driving Time (Min:Sec)
Orange Co. Cycle	7.7	7.9	16:17
Beach Yamaha	4.6	6.2	14:26
Champion Honda Yamaha	.7	.7	1:30

(As of the date of this hearing, none of the above were RIVA dealers)

87. At the time Newport was established as a RIVA dealer, it was not contemplated by YMC that the other Yamaha dealers within Newport's relevant market area would be receiving RIVA scooter products.

88. At the time RIVA was introduced in 1982, Newport was known as Newport Vespa and was recognized as the top selling Vespa dealer in the world.

89. In the year prior to the introduction of RIVA, Newport had sold approximately 400 Vespa scooters. Since 1981, however, Vespa has stopped importing scooters into the United States.

90. As previously discussed, YMC's marketing strategy was to present the RIVA product to a segment of the public which did not identify itself with the typical motorcycle consumer. As a consequence of this strategy, Newport was established as a RIVA-only dealership catering to the specific needs of scooter customers.

91. Newport, since receiving the RIVA franchise, has become the nation's largest RIVA scooter dealer.

92. If Newport is not permitted to remain a RIVA dealer, scooter buyers in the relevant market area will be deprived of a dealership which, as indicated by its volume of RIVA sales, has been successfully meeting the specific needs of scooter customers.

93. There were no significant facts presented to indicate that it would be injurious to the public welfare for the Newport franchise to be established.

- 3) FACTS RELATING TO WHETHER YAMAHA FRANCHISEES IN THAT RELEVANT MARKET AREA ARE PROVIDING ADEQUATE COMPETITION AND CONVENIENT CONSUMER CARE FOR THE OWNERS OF YAMAHA PRODUCTS IN THE MARKET AREA WHICH SHALL INCLUDE THE ADEQUACY OF MOTOR VEHICLE SALES AND SERVICE FACILITIES, EQUIPMENT, SUPPLY OF VEHICLE PARTS, AND QUALIFIED SERVICE PERSONNEL [SECTION 3063(d)].

94. As previously discussed, at the time the RIVA product was introduced, Champion was operating from the Award facility. YMC considered the facility too small to market RIVA products in addition to motorcycles. Subsequently, Champion moved to a temporary facility even smaller than the original Award facility and remained there almost two years.

95. Newport's original facility was considered adequate by YMC for the sale of RIVA scooters.

96. Prior to the time Newport was established, adequate competition and customer care were not available for RIVA customers within the relevant market area.

4) WHETHER THE ESTABLISHMENT OF NEWPORT HAS INCREASED COMPETITION AND THEREFORE WAS IN THE PUBLIC INTEREST. [SECTION 3063(e)].

97. The establishment of Newport has resulted in a 51.5% market share by YMC for scooter sales in Orange County. Newport has become the national sales leader in regard to RIVA scooters. No evidence was presented to show that the increased competition resulting from the establishment of Newport was not in the public interest.

F. ASSUMING THAT CHAMPION HAS STANDING UNDER SECTIONS 3060 or 3062, FACTS RELATING TO WHETHER THE DOCTRINE OF LACHES BARS THE PROTESTS.

98. Assuming Champion's franchise was modified without good cause and assuming that Champion has standing to protest, the doctrine of laches is an equitable defense applicable to the facts of these protests.^{4/}

^{4/}One definition of laches is: Neglect or omission to assert a right which, taken in conjunction with lapse of time and other circumstances, causes prejudice to the adverse party. [Black's Law Dictionary, 5th ed.]

99. In the instant case, Champion had knowledge in September 1982 that a separate RIVA franchise was required by YMC, that YMC was establishing Newport as a RIVA dealer nearby, and that YMC did not intend to include RIVA scooters in Champion's motorcycle franchise. The record clearly indicates that both Cherry, of Award, and Fleming, of Champion, were fully aware of these facts in September 1982 and openly discussed these matters with YMC representatives.

100. This information was acquired and these discussions occurred prior to the establishment of Newport and Champion. Thereafter, as early as November 1982, Fleming was aware that Newport was selling RIVAs. Nevertheless, Champion did not protest the establishment of Newport and entered into its motorcycle franchise with YMC which, according to YMC's specific representations, excluded RIVA scooters.

101. By 1982, Champion had five years experience as a Kawasaki-BMW dealer. The existence and powers of the New Motor Vehicle Board were known to both Award and Champion in 1982. Champion, however, did not file the first protest until November 23, 1983.

102. Champion took no formal action for over a year. During this time YMC and Newport proceeded to conduct business openly with Champion's knowledge. During this same time period, Newport moved to its present facility at 1880 Newport Boulevard, Costa Mesa, in order to expand and to promote more

efficiently the RIVA product. Newport spent approximately \$351,000 for the purchase of the land and building at this location and additionally expended approximately \$60,000 on improving the facility.

103. YMC did not give notice to Champion under sections 3060 or 3062, because it believed in good faith that these sections were not applicable in that YMC had determined that RIVAs were a separate line-make from Yamaha motorcycles.

104. Champion contended that its protests were timely filed in that YMC did not give notice pursuant to sections 3060 and 3062. This contention is without merit in that:

- 1) Champion had actual knowledge of YMC's intentions;
- 2) Champion unreasonably delayed filing its protests with the Board;
- 3) Both YMC and Newport materially changed position during this time period;
- 4) Both YMC and Newport, in good faith, believed that the RIVA product was a separate line-make from Yamaha motorcycles and;
- 5) There was no wilful intent on the part of YMC to avoid compliance with sections 3060 and 3062.

DETERMINATION OF ISSUES

A. Protestant has proven that its franchise was modified.

B. Although a modification of the franchise did occur, Protestant has failed to prove that the inability to obtain RIVA products had a substantial effect on its sales or service obligations or investment.

C. Assuming such a modification substantially affected Champion's sales, service obligations or investment, Respondent has proven that it had good cause for the modification in that:

- (1) Respondent proved that the amount of RIVA business likely to be transacted by Protestant as compared to the RIVA business available to it would not have been adequate [section 3061(a)];
- (2) Respondent proved that Protestant did not make any investment or incur any obligations in regard to the performance of its franchise other than that for the marketing and servicing of Honda motorcycles and motor scooters, and Yamaha motorcycles not including RIVA products [section 3061(b)];

- (3) Respondent proved that Protestant had no permanent investment in regard to RIVA products [section 3061(c)];
- (4) Respondent proved that it would not be injurious to the public welfare to exclude RIVA products from the products available to Protestant and that it would not result in any disruption of Protestant's business [section 3061(d)];
- (5) Respondent proved that at the time of the introduction of RIVA products, Protestant's sales and service facilities were inadequate and remained so for approximately two years. Respondent did not prove that Protestant did not have adequate equipment, parts or qualified service personnel [section 3061(e)];
- (6) Respondent did not prove that Protestant failed to fulfill Respondent's warranty obligations [section 3061(f)];
- (7) Respondent did not prove that Protestant failed to comply with the terms of the franchise [section 3061(g)].

D. Protestant had standing under section 3062 to protest Respondent's establishment of Newport as a RIVA dealer.

E. Although Protestant had standing under section 3062 to protest Respondent's establishment of Newport as a RIVA dealer, Protestant has failed to prove that there was good cause not to establish Newport as an additional dealership in that:

- (1) Protestant proved that its investment in its Yamaha motorcycle franchise is permanent, but failed to prove this investment will be adversely affected by the establishment of Newport as a RIVA dealer [section 3063(a)];
- (2) Protestant failed to prove that the establishment will have an adverse effect on the retail motor vehicle business and the consuming public in the relevant market area [section 3063(b)];
- (3) Protestant failed to prove that the establishment will be injurious to the public welfare [section 3063(c)];
- (4) Protestant failed to prove that there is adequate competition and convenient consumer care for the owners of Yamaha RIVA scooters in the relevant market area, including adequate motor vehicle sales and service facilities, equipment, supply of vehicle parts, and qualified personnel [section 3063(d)];

(5) Protestant failed to prove that the establishment would not increase competition and that therefore the establishment would not be in the public interest [section 3063(e)].

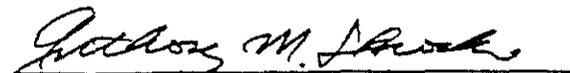
F. Respondent has established that Protestant failed to file its protests with due diligence and without unreasonable delay and before a substantial change in position by both Respondent and Newport.

It is therefore determined that:

The protests are overruled.

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, and recommend its adoption as the decision of the New Motor Vehicle Board.

DATED: August 22, 1985


ANTHONY M. SKROCKI
Administrative Law Judge
New Motor Vehicle Board