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STATE OF CALIFORNIA  
NEW MOTOR VEHICLE BOARD

In the Matter of the Protest of )  
JOE BABER, ) Protest No. PR-171-78  
Protestant, )  
vs. )  
YAMAHA MOTOR CORPORATION, U.S.A., )  
Respondent. )

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PROPOSED DECISION

Procedural Background

1. Respondent, Yamaha Motor Corporation, U.S.A. ("Yamaha"), gave notice on January 24, 1978, pursuant to section 3060 of the Vehicle Code<sup>1/</sup> of its intention to terminate the franchise of protestant, Joe Baber ("Baber"), located at 218 Soscol, Napa, California.

2. On February 13, 1978, Baber filed a protest with the New Motor Vehicle Board ("Board").

3. A hearing was held pursuant to section 3066 before Anthony M. Skrocki, Hearing Officer for the New Motor Vehicle Board, on May 15, 16, 17, and 18, 1978, in Sacramento. Yamaha was represented by Julian Eli Capata of the law firm of Mori &

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1. All references are to the Vehicle Code unless otherwise indicated.

Ota, a Professional Corporation. Baber was represented by A. Albert Spar of the law firm of Sidney I. Pilot, a Professional Corporation.

Issues Presented

4. Yamaha contends that good cause exists to terminate Baber's franchise for the following reasons:

(a) The amount of business transacted by Baber as compared to the business available to him has been inadequate (§3061(1));

(b) There have been no investments necessarily made or obligations incurred by Baber to perform his part of the franchise (§3061(2));

(c) There has been no appreciable permanent investment made by Baber (§3061(3));

(d) The termination of Baber's franchise would be beneficial to the public welfare as it is Yamaha's intention to replace the franchise and the disruption of the business of Baber would not be injurious to the public welfare (§3061(4));  
and

(e) The extent of Baber's failure to comply with the terms of the franchise (§3061(7)).

In addition to the above issues, section 3061 requires consideration of the following:

(f) Whether Baber has adequate motor vehicle sales and service facilities, equipment, vehicle parts, and qualified personnel to reasonably provide for the needs of the consumers for the motor vehicles handled by Baber and whether he has

been and is rendering adequate services to the public (§3061(5));

(g) Whether Baber has failed to fulfill the warranty obligations of Yamaha to be performed by Baber (§3061(6)).

Findings of Fact

Findings Relating to Amount of Business Transacted by Baber as Compared to the Business Available (§3061(1)).

1. Yamaha uses as a factor in evaluating a franchisee's performance the market share achieved by Yamaha as against its competition in the county in which the franchise is located, as compared to the market share achieved by Yamaha in surrounding counties and the state.

2. Baber is located in Napa County and is the only Yamaha franchisee in Napa County.

3. The following charts depict the market share comparison between Yamaha and its major competitors in Baber's county (Napa), surrounding counties and the state.

MARKET SHARE HISTORY

December 1974

	HONDA		KAWASAKI		SUZUKI		YAMAHA			
	Market Share	Index to State	Market Share	Index to State	Market Share	Index to State	Market Share	Amount Above State	Amount Below State	Index to State
Lake	48.39	98	24.19	239	2.42	32	21.77	2.02		110
Solano	50.28	101	5.23	52	5.35	71	25.82	6.07		131
Sonoma	41.43	84	12.99	128	7.16	95	25.24	5.49		128
Napa	52.61	106	1.66	16	4.74	63	25.59	5.84		130
California	49.55	100	10.13	100	7.53	100	19.75			100

Source: R. L. Polk & Co.

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MARKET SHARE HISTORY

SEPTEMBER\* 1975

	HONDA		KAWASAKI		SUZUKI		YAMAHA			
	Market Share	Index to State	Market Share	Index to State	Market Share	Index to State	Market Share	Amount Above State	Amount Below State	Index to State
Lake	48.33	95	28.33	190	1.67	22	20.00	5.83		141
Solano	46.41	91	14.37	95	4.47	84	23.71	9.54		167
Sonoma	40.83	80	17.14	114	9.24	120	19.67	5.50		139
Napa	64.71	127	4.04	27	4.04	52	13.97		.20	99
California	51.11	100	15.08	100	7.72	100	14.17			100

\* December not available (September represents 87 % of total year)

Source: R. L. Polk & Co.

MARKET SHARE HISTORY

DECEMBER 1976

	HONDA		KAWASAKI		SUZUKI		YAMAHA			
	Market Share	Index to State	Market Share	Index to State	Market Share	Index to State	Market Share	Amount Above State	Amount Below State	Index to State
Lake	64.42	130	5.77	43	1.92	29	24.04	4.42		123
Solano	51.90	104	10.71	81	2.62	39	24.78	5.16		126
Sonoma	46.50	94	.54	04	5.69	85	29.53	9.91		151
Napa	60.75	122	4.98	37	4.67	70	17.76		1.86	91
California	49.68	100	13.29	100	6.67	100	19.62			100

Source: R. L. Polk & Co.

MARKET SHARE HISTORY

DECEMBER 1977

	HONDA		KAWASAKI		SUZUKI		YAMAHA			
	Market Share	Index to State	Market Share	Index to State	Market Share	Index to State	Market Share	Amount Above State	Amount Below State	Index to State
Lake	66.67	137	3.40	28	1.36	15	21.09		.59	97
Solano	50.72	104	12.14	100	4.05	45	24.46	2.78		113
Sonoma	43.20	89	13.68	113	6.80	76	25.04	3.36		115
Napa	55.75	114	8.18	67	11.76	131	15.86		5.82	73
California	48.80	100	12.15	100	8.97	100	21.68			100

Source: R.L. Polk & Co.

4. A comparison of these statistics indicates that Yamaha's California market share has remained essentially stable at about twenty percent (except for 1975). Yamaha's market share in Napa County has declined from 25.59% in 1974 (which is 5.84% greater than the state market share or a 30% better performance than California as a whole) to 15.86% in 1977 (which is 5.82% below the state market share of a 27% weaker performance than California as a whole).

5. Honda, which is also sold by Baber, suffered no such similar decreasing discrepancy between Napa County and California market shares.

6. Yamaha's market share of a particular county results also from sales by other Yamaha dealers not located in that county. Yamaha, therefore, also uses as a basis for evaluating a dealer's performance, the number of wholesale sales (purchases by the dealer from Yamaha) by each dealer as compared with other dealers and the total wholesale sales within the District Manager's territory.

7. Baber's purchases from Yamaha have dropped from 72 in 1974 to 59 in 1977. The following chart is illustrative of the purchases of Baber as compared to purchases by other Yamaha dealers in surrounding counties and in the District Manager's territory as a whole:

YAMAHA WHOLESALE SALES

<u>Year</u>	DM Territory		Fairfield Cycle Ctr		Yamaha of Vallejo		Yamaha of Petaluma		Baldwin Boat Shop		Baber		Ang Rossi	
	<u>Units/Index</u>		<u>Units/Index</u>		<u>Units/Index</u>		<u>Units/Index</u>		<u>Units/Index</u>		<u>Units/Index</u>		<u>Units/Index</u>	
1974	7,293	100	202	100			127	100	46	100	72	100	59	100
1975	6,514	89	87	43			108	85	31	67	72	100	26	44
1976	9,351	128	175	87	85	100	121	95	32	70	51	71	48	81
1977	14,279	196	243	120	216	254	206	162	79	172	59	82	55	93

8. Yamaha also utilizes retail sales statistics to evaluate a dealer's performance. The following chart on page 5a is indicative of Baber's retail sales performance.

9. At least part of Baber's weak performance can be attributed to a breakdown in communications between Baber and Yamaha's District Manager.

10. Prior to 1973 Baber had no difficulties in communication with Yamaha or in obtaining motorcycles which were on allocation due to insufficient supply to meet demand. In 1973 Bill Cavalier was appointed District Manager and subsequent to that time, there has been a breakdown in communication between Yamaha and Baber.

11. When there is a shortage of a particular model, it is left to the District Manager's discretion, without guidelines from Yamaha, to determine how the motorcycles should be allocated.

12. Due to the "clash" between Cavaliere and Baber, Baber did not receive as many of the allocated models as he could have, had there been no communications problems. Baber's sales suffered as a result. If Baber had received the allocated models he desired in 1976 and 1977, his sales would probably have equalled the state average for Yamaha.

13. In May of 1977, Baber wrote to the Yamaha National Sales Manager in Buena Park (which also included a letter signed by Baber in March 1976, but not previously mailed) setting forth his version of the problems he was having. Yamaha made no response to Baber's attempt to resolve these problems other than to contact Baber in December 1977 (some seven months later) and request Baber sign a voluntary termination agreement.

BABER'S REGISTERED SALES

<u>YEAR</u>	<u>Total No. of Yamaha's Sold by Baber</u>	<u>No. &amp; Percent of Total Baber Sales Regis. in Napa County</u>	<u>No. &amp; Percent of Total Baber Sales Regis. Outside Napa County</u>	<u>Percent of Yamaha Regis. in Napa Co. Due to Baber Sales</u>	<u>Percent of Yamaha Regis. in Napa County Due to Other Dealers (Pump-In)</u>
1975	58	34 (59% of Baber sales)	24 (41% of Baber sales)	81%	19%
1976	59	46 (78% of Baber sales)	13 (22% of Baber sales)	65%	35%
1977	48	32 (67% of Baber sales)	16 (33% of Baber sales)	36%	64%

(RT 155, 156, Resp. Exh. C-K, C-L.)

Findings Pertaining to Investments  
Necessarily Made or Obligations Incurred  
by Baber to Perform His Part of the  
Franchise (\$3061(2)).

14. Baber has been a Yamaha dealer for over fifteen years and has been at his present location for approximately twelve years.

15. Baber is also a Honda franchisee and has been for approximately twelve years. The Honda Franchise was acquired by Baber with the knowledge and permission of Yamaha. Both makes are sold from the same location.

16. Baber's dealership includes two buildings, which are situated on approximately one acre of fenced land which he owns. The front building has 3,600 square feet and includes the show room. The rear building, constructed four to six years ago, is approximately 5,000 square feet and is used for service and storage.

17. Baber's investment in his business totals a little over \$400,000 and is broken down as follows:

Buildings & Land	\$175,000
Equipment	50,000
Motorcycles	80,000
Yamaha Parts	30,000
Honda Parts	40,000
Accessories for Yamahas and Hondas	30,000

(All figures are approximate.)

18. Baber's monthly payroll (not including himself) is \$5,000.

19. Much of Baber's equipment is limited to use on Yamaha products.

20. Baber's dealership is open seven days a week and he commits forty to fifty hours a week to its operation.

21. Baber's wife, Bonnie, is also employed at the dealership.

Findings Relating to Permanency of the Investment (§3061(3)).

22. Baber's investment is permanent.

(See Findings of Fact Nos. 16 and 17.)

Findings Relating to the Effect on the Public Welfare and Disruption of Baber's Business (§3061(4)).

23. If Baber's franchise is terminated and not replaced, Yamaha owners or prospective Yamaha buyers in Napa would be required to travel to Vallejo (a distance of approximately fourteen miles) to reach the nearest authorized Yamaha dealer. Service would not be available through a franchised dealer in Napa County.

If terminated by Yamaha, Baber probably would not be able to maintain his dealership solely by the sale of Hondas.

24. Although Yamaha has expressed its intention to replace Baber, it would be difficult to do so in the City of Napa as locations are difficult to find due to zoning restrictions and a redevelopment program. This has resulted in high rent and high priced real estate which would make it even more difficult for a new dealer to survive, especially if it were a single line dealer.

Findings Relating to Whether Baber Failed  
to Comply With the Terms of the Franchise  
(\$3061(7)).

25. Yamaha's complaints about Baber's failure to comply with the terms of the franchise essentially involve those provisions of the Dealer Franchise Agreement which require Baber "to promote aggressively the sale of" Yamaha products and "to keep in stock a full line display of Yamaha products". The "basic problem" was Baber's alleged failure to keep in stock a full line of Yamaha motorcycles.

26. Not all Yamaha dealers carry a full line of Yamaha motorcycles.

27. Baber's inventory of Yamaha motorcycles fluctuated.

28. The inventory taken by the District Manager would occur only at the time of his infrequent and random personal visits to the dealership. The dealer is not required to submit a monthly inventory report to Yamaha. Yamaha has no records by which it can be determined whether a dealer has placed orders for motorcycles which were not filled.

29. Baber does not keep records of his inventory.

30. Yamaha does not accept back orders. To obtain a particular model of motorcycle, it is necessary that the model be available at the time of order. If the order is not placed "at the right time", the order will not be filled nor will a record be made that such order was placed.

31. Baber at times did not carry a full line of Yamaha motorcycles. This, at least in part, is attributable to both the fact that certain models were unavailable or on allocation,

and the breakdown in communications between Baber and the Yamaha District Manager.

32. Baber devotes an equal portion of his showroom floor space to Yamaha and Honda and has always kept the displays separated.

Findings Relating to the Adequacy of Sales and Service Facilities, Equipment, Parts, and Personnel to Provide for the Needs of the Public and Whether Baber Has Been and Is Rendering Adequate Services to the Public (§3061(5)).

33. Yamaha has been and is satisfied with the sales and service facilities, equipment, parts inventory, and personnel of Baber. The facilities were described by Yamaha as very nice and the Yamaha District Manager was "very impressed". The Yamaha District Manager described the service department as "very good" and Yamaha had no complaints about the service department.

34. The dealership is open seven days a week and has five, full-time employees.

Findings Relating to Whether Baber Has Failed to Fulfill the Warranty Obligations of Yamaha to be Performed by Baber (§3061(6)).

35. Yamaha introduced no evidence to indicate Baber was deficient in performing Yamaha warranty work.

#### Determination of Issues

1. Yamaha has failed to establish that good cause exists for terminating Baber's franchise for the following reasons:

(a) The failure of Baber to transact as much Yamaha business as is available is due in part to friction between Baber and the Yamaha District Manager. This friction has resulted in fewer Yamahas being ordered by Baber and fewer of the more saleable allocated Yamaha models being received by Baber;

(b) Baber has made investments and incurred obligations to perform his part of the franchise;

(c) Baber's investment is permanent;

(d) The termination of Baber's franchise would not be beneficial to the public welfare and the disruption of Baber's business would be injurious to the public, Baber and Yamaha. Termination of Baber's franchise would leave Napa County without an authorized Yamaha sales or service facility. Loss of the Yamaha franchise could cause Baber to be unable to maintain his facility in operation. Establishing a new Yamaha franchise in Napa County to replace Baber might be possible but it is subject to speculation as to when, where, and if such a facility could be profitable especially if the new franchisee is to be a single line dealer;

(e) Baber has substantially complied with the terms of the franchise. Baber's failure to carry a full line display of Yamaha motorcycles, which may have contributed to the failure of Baber to obtain as much business for Yamaha as was available (see Determination of Issues 1(a)), was caused in part by Yamaha's inability to provide sufficient numbers of the more readily saleable models. Yamaha's failure to establish a more

efficient ordering/allocation system contributed to the reduction of Baber's inventory. This situation set the stage for the friction that ultimately developed between Yamaha's franchisee and Yamaha's District Manager resulting in the potential loss of a long established dealer with excellent facilities and a good reputation;

(f) Baber's sales and service facilities, equipment, and parts inventory and personnel are adequate to provide for the needs of the public. Baber has been and is rendering adequate services to the public;

(g) Yamaha has not shown that Baber failed to fulfill warranty obligations.

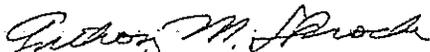
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The following proposed decision is respectfully submitted.

The protest is sustained. Yamaha has not established good cause to terminate Baber's franchise.

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

Dated: August 14, 1978.

  
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ANTHONY M. SKROCKI  
Hearing Officer  
New Motor Vehicle Board