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STATE OF CALIFORNIA
NEW MOTOR VEHICLE BOARD

In the Matter of the Protest of)
SPORTMOTIVE CORP., dba) Protest No. PR-287-80
CYCLE SPORTS,)
Protestant)
vs.)
BMW OF NORTH AMERICA, INC.,)
BMW MUNICH, BUTLER & SMITH, INC.)
Respondents)

DECISION

The attached Proposed Decision 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 16th day of April, 1981.

Kathleen O. Turner
KATHLEEN O. TURNER
President
New Motor Vehicle Board

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BMW MUNICH, BUTLER & SMITH, INC.)
Respondents)

PROPOSED DECISION

1. Respondent, Butler & Smith, Inc. (Butler & Smith), located in Norwood, New Jersey, was the exclusive importer and distributor of BMW motorcycles and BMW parts and accessories in the United States through September 30, 1980.

2. Protestant, Sportmotive Corp., dba Cycle Sports (Sportmotive), is a BMW motorcycle dealer located in Santa Clara, California.

3. By letter dated June 30, 1980, Butler & Smith notified Sportmotive that as of October 1, 1980, BMW of North America, Inc., located in Montvale, New Jersey (BMW NA),

would be the exclusive importer and distributor of BMW motorcycles in the United States and that the relationship between Butler & Smith and Sportmotive would be concluded on September 30, 1980.

4. A copy of the Butler & Smith letter dated June 30, 1980, was received by the New Motor Vehicle Board (Board).

5. On October 29, 1980, Sportmotive filed a protest pursuant to the provisions of Vehicle Code Section 3060.^{1/} The protest named Butler & Smith, BMW NA, and BMW Munich as Respondents.

6. Because there is no entity known as BMW Munich, the protest was deemed filed only against Butler & Smith and BMW NA.

7. A hearing was held before Gloriette C. Fong, Administrative Law Judge for the Board, on February 17 and 18, 1981.

8. Sportmotive was represented by Michael J. Flannigan, of the law firm of Pilot & Spar, Los Angeles, California. Butler & Smith was represented by Anthony C. Diepenbrock of the law firm of Johnson, Greve, Clifford & Diepenbrock, Sacramento, California, in association with John C. McGoldrick of the law firm of McCarter & English, Newark, New Jersey. BMW NA was represented by Roy M. Brisbois of the law firm of Lewis, D'Amato, Brisbois & Bisgaard,

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

Los Angeles, California, in association with Robert F. Brodegaard of the law firm of Weil, Gotshal & Manges, New York, New York.

I. Sportmotive versus Butler & Smith

Jurisdictional Issue

9. Butler & Smith contends that the Board is without jurisdiction to hear the protest in that, as to Butler & Smith, the protest was not timely filed.

10. By letter dated June 30, 1980, Butler & Smith notified Sportmotive that "the existing arrangement of BMW with Butler & Smith would conclude as of September 30, 1980." The letter also notified Sportmotive that its relationship with Butler & Smith would be "concluded as of September 30, 1980."

11. The Butler & Smith letter of June 30, 1980, stated that the distribution of BMW motorcycles would be undertaken by BMW NA. Sportmotive reasonably believed that it would be permitted to continue as a BMW motorcycle dealer and that there would merely be a substitution of BMW NA for Butler & Smith. This proposed modification would have been enough to provide Sportmotive with the right to protest since Butler & Smith was attempting to conclude its relationship with Sportmotive, even though the letter did not state that Sportmotive's franchise rights were being terminated.

12. Any right Sportmotive has to protest such a modification of its franchise is governed by Section 3060, which provides that Sportmotive has 30 days from receipt of the

Butler & Smith letter in which to file a protest. Sportmotive did not file a protest in response to the Butler & Smith letter dated June 30, 1980. Therefore, Butler & Smith is not a proper party and is hereby dismissed as a party to these proceedings.

II. Sportmotive versus BMW NA

(a) Jurisdictional Issues Presented

13. BMW NA contends that the Board is without jurisdiction to hear the protest against BMW NA, in that:

a) There was no franchise relationship between BMW NA and Sportmotive; and

b) There was no timely protest filed by Sportmotive as to BMW NA.

Facts Pertaining to the Relationship Between BMW NA and Sportmotive

14. BMW motorcycles are manufactured in Germany by BMW Motorrad GmbH, (BMW Motorrad). BMW Motorrad is a German company which is a subsidiary of Bayerische Motoren Werke, Aktiengesellschaft (BMW AG), the manufacturer of BMW automobiles. BMW AG is located in Munich, Germany.

15. In 1973, BMW AG decided to form an American corporation to act as a subsidiary in the United States. As a result of this decision, BMW NA was incorporated in 1975 as a Delaware Corporation with principal offices in New Jersey. BMW NA is a wholly owned second tier subsidiary of BMW AG. All of BMW NA's stock is owned by BMW U.S. Holding Corporation,

a Delaware Corporation. All of the stock of BMW U.S. Holding Corporation is owned by BMW AG.

16. Butler & Smith had been the exclusive importer and distributor of BMW motorcycles in the United States for over 25 years. The most recent Importer's Contract between Butler & Smith and BMW AG commenced on October 1, 1968, and expired by its terms on December 31, 1980.

17. Sometime in 1977, after an extended period of discussion, BMW AG and BMW Motorrad made the decision to discontinue their relationship with Butler & Smith. The basis for this decision was dissatisfaction with Butler & Smith's sales performance in the United States.

18. In early 1978, a meeting was held between representatives of BMW AG, BMW Motorrad, and Butler & Smith regarding BMW AG's and BMW Motorrad's decision to terminate Butler & Smith's Importer's Contract.

19. By a letter dated June 28, 1978, BMW AG notified Butler & Smith that BMW AG was exercising its right, pursuant to the Importer's Contract, to terminate its relationship with Butler & Smith.

20. Subsequently, BMW AG filed suit in the Federal Republic of Germany in the Munich State Court, seeking to obtain a judgment that the Importer's Contract between BMW AG and Butler & Smith could be legally terminated in accordance with its provisions as of December 31, 1980. The Munich State Court rendered a decision in favor of BMW AG. Thereafter, the

Munich Regional Appeals Court affirmed the Munich State Court's decision.

21. Butler & Smith commenced an action in the New Jersey Superior Court, claiming the protection of the New Jersey Franchise Act and seeking a judicial declaration that would prevent termination of its Importer's Contract. This action was also decided in favor of BMW AG.

22. A settlement agreement was reached between BMW AG and Butler & Smith and no appeal was taken from the New Jersey court's decision.

23. In connection with the settlement, a termination agreement was entered into between BMW AG and Butler & Smith.

24. As part of the termination agreement, Butler & Smith and BMW NA (the new distributor) entered into a purchase agreement whereby BMW NA was to acquire assets from Butler & Smith. Among the assets purchased were:

- a) BMW motorcycle inventory,
- b) BMW parts and accessories inventory,
- c) Butler & Smith's accounts receivable,
- d) Furniture, machinery, equipment, tools, and other personal property of Butler & Smith,
- e) BMW special tools, signs, and warranty imprinters,
- f) All of Butler & Smith's records, data, computer software, etc.

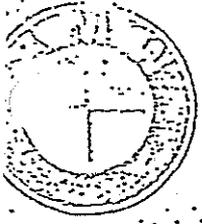
25. BMW NA was designated by BMW AG as the importer and distributor in the United States of BMW motorcycles

effective October 1, 1980. There was and is no written agreement between BMW AG and BMW NA in respect to the importation and distribution of the product. There are, however, operating standards prescribed by BMW AG that BMW NA as a wholly owned subsidiary is required to follow.

26. As part of the purchase agreement with Butler & Smith, BMW NA obtained the right to approve the letter sent by Butler & Smith notifying the BMW motorcycle dealers of the change in distributors.

27. The letter on the following page from Butler & Smith was received by Sportmotive on July 7, 1980.

/// ///



BUTLER & SMITH, INC.

WALNUT STREET & HUDSON AVENUE NORWOOD, NEW JERSEY 07648

TEL: (201) 767-1223

June 30, 1980

Cycle Sports
2355 El Camino Real
Santa Clara, CA, 95050

Dear Dealer:

For over 25 years, Butler & Smith has been proud to be the exclusive importer and distributor of BMW motorcycles in the United States. Over the past ten of those years, which have seen rapidly expanding markets for BMW products worldwide, BMW Munich has pursued a policy of establishing a network of its own subsidiaries in the major export market for the distribution of BMW cars and motorcycles. Consistent with this policy, the existing arrangement of BMW with Butler & Smith will be concluded as of September 30, 1980. As of October 1, 1980, Butler & Smith therefore will no longer import and distribute BMW motorcycles in the United States. Thereafter, the exclusive importer and distributor of BMW motorcycles in the United States will be BMW of North America, Inc. Accordingly, this will result in our relationship with you also being concluded as of September 30, 1980.

BMW of North America, Inc. is in the process of formulating marketing plans to be implemented on October 1, 1980. Part of these plans includes a review of the existing dealer network.

Through September 30, 1980, we shall, of course, continue to serve you as before. We encourage you, in the interim, to continue to conduct your business in the ordinary course in the best interests of the BMW customer. Please be assured that all warranty claims will be handled in accordance with existing procedures.

We have appreciated the opportunity to do business with our dealers nationwide and to make available to the American public the fine line of BMW motorcycles. Again, let me express my thanks to you for your valued business. We wish you continued success.

Sincerely,

BUTLER & SMITH, INC.

By: 
Peter L. Adams, Vice-President

CERTIFIED MAIL - R.R.R.

NEW JERSEY

28. After receipt of the June 30, 1980, letter from Butler & Smith, Sportmotive received no further communications from Butler & Smith and heard nothing from BMW NA or BMW Motorrad.

29. When BMW NA became the distributor, it divided the existing BMW dealers into three groups:

a) Those dealers that BMW NA wanted to retain as BMW dealers and to whom BMW NA intended to offer a formal franchise agreement.

b) Those dealers that BMW NA was sufficiently interested in to consider for a formal franchise agreement. Dealers in this group were informed by letter that BMW NA would continue to sell BMW products to them as an accommodation until a decision was reached with regard to whether a formal franchise agreement would be offered to them by BMW NA.

c) Those dealers that BMW NA was not interested in and who would not even be considered as candidates for formal franchise agreements. Sportmotive was placed into this third category.

30. Out of approximately 354 BMW motorcycle dealers in the United States, 220 were offered formal franchise agreements, 80 were being considered for such franchises, and 50 were not considered at all. Out of the 47 BMW motorcycle dealers located in California, Sportmotive and three others were in the third category.

31. The decision by BMW NA to place Sportmotive in the third category was based solely upon the number of

wholesale purchases Sportmotive had made from Butler & Smith.

32. Dealers in the third category received no communications from BMW NA advising them of BMW NA's decision. The dealers in the other categories were contacted by BMW NA and notified of their status with BMW NA.

33. The owner of Sportmotive had not interpreted the Butler & Smith letter of June 30, 1980, as informing Sportmotive that it was no longer a BMW motorcycle dealer. Sportmotive was not successful in its efforts to contact BMW NA.

34. BMW NA first contacted Sportmotive only as a direct result of the filing of this protest. This contact occurred in late November or early December, 1980, when the BMW NA District Sales Representative was instructed to evaluate Sportmotive for the possibility of offering it a formal franchise agreement. Subsequent to the evaluation, BMW NA reaffirmed its decision not to offer Sportmotive a formal franchise agreement.

35. Vehicle Code Section 331 provides:

A "franchise" is a written agreement between two or more persons having all of the following conditions:

- (a) A commercial relationship of definite duration or continuing indefinite duration.
- (b) The franchisee is granted the right to offer and sell at retail new motor vehicles manufactured or distributed by the franchisor.

- (c) The franchisee constitutes a component of the franchisor's distribution system.
- (d) The operation of the franchisee's business is substantially associated with the franchisor's trademark, trade name, advertising, or other commercial symbol designating the franchisor.
- (e) The operation of a portion of the franchisee's business is substantially reliant on the franchisor for a continued supply of new vehicles, parts, and accessories.

36. Vehicle Code Section 311.1 provides:

A "franchisee" is any person who, pursuant to a franchise, receives new motor vehicles subject to registration under this code from the franchisor and who sells such vehicles at retail.

37. Vehicle Code Section 331.2 provides:

A "franchisor" is any person who manufactures, assembles, or distributes new motor vehicles subject to registration under this code and who grants a franchise.

38. The importation and distribution of BMW motorcycles was undertaken by BMW NA under the instructions of its parent corporation BMW AG. BMW AG and BMW Motorrad had much earlier decided to terminate Butler & Smith. When this had been accomplished, BMW NA by express agreement with Butler & Smith purchased some of Butler & Smith's assets, but assumption by BMW NA of any obligations to the BMW retail dealers in the United States was, by the contract language, negated.

ANALYSIS

39. To accept BMW NA's premise that there was no franchise relationship between it and Sportmotive means that, upon Butler & Smith's termination, all of the approximately 354 BMW motorcycle dealers in the United States and the 47 BMW motorcycle dealers in California were no longer authorized to sell BMW motorcycles as BMW dealers.

40. BMW NA's position would require that, in the event a manufacturer decides to terminate an "independent distributor", the manufacturer's conduct would also result in the arbitrary wholesale termination of all BMW motorcycle dealers' rights to sell BMW products.

41. To accept BMW NA's position would create a situation in which the BMW motorcycle dealers in California have no remedy despite the potential of arbitrary wholesale termination of their right to sell BMW products.

42. Although the Vehicle Code does not expressly provide for such a situation as exists here, the intent of the legislature could not have been to permit a manufacturer to take advantage of the franchise system yet avoid the regulatory power of the Board by the simple expedient of establishing an independent distributor between it and the retailers of its product. To do so would allow the manufacturers to do indirectly what they cannot do directly. The manufacturer could terminate dealers by merely terminating the distributor. The manufacturer could then offer "new" franchises to an arbitrarily selected class of former dealers through a "new"

distributor thereby terminating those "old" dealers to whom no "new" franchise was offered without complying with California law.

(b) Determination of Jurisdictional Issues

43. It is therefore determined that:

A. A duty is owed to dealers by a manufacturer. This duty is owed regardless of the fact that the manufacturer chooses to operate under the franchise system through use of an intermediate distributor. The manufacturer's duty is to ensure that the dealers will not be arbitrarily deprived of their right to market the manufacturer's product in the event of termination of the manufacturer-distributor relationship.

B. In the event of termination of the manufacturer-distributor relationship, the dealers of the manufacturer's product are entitled to the protection of Vehicle Code Sections 3060 et seq with regard to any attempt by the manufacturer (or newly appointed distributor) to infringe upon any of the rights protected by Sections 3060 et seq.

C. Any newly appointed replacement distributor which seeks to do business in this state assumes as a matter of law the obligations of the manufacturer to its dealer network.

D. When BMW NA was appointed the distributor of BMW products, BMW NA assumed the position of distributor in behalf of BMW AG and therefore cannot avoid compliance with the provisions of Vehicle Code Section 3060 et seq with respect to dealers already authorized to sell the manufacturer's product.

Facts Pertaining to Whether the Sportmotive Protest was
Timely Filed in Respect to BMW NA

44. BMW NA did not give the required notice to Sportmotive as to BMW NA's decision not to allow Sportmotive to continue to be a BMW motorcycle dealer.

45. The June 30, 1980 Butler & Smith letter to Sportmotive, over which BMW NA had approval rights, was such that Sportmotive was reasonable in its belief that it would continue as a BMW dealer with the distribution being made through a BMW entity. BMW NA knowingly allowed Sportmotive to continue to sell BMW products, perform warranty work, use the BMW trademark and hold itself out as a BMW dealer after BMW NA assumed distribution in the United States.

46. Sportmotive is entitled to the protection of Section 3060. BMW NA's decision and conduct, or lack thereof, gave rise to Sportmotive's right to file a protest. The time within which to file such protest would not expire, pursuant to Section 3060 until 30 days after both Sportmotive and the Board received written notice from BMW NA. No such notices were received and therefore, the time within which to file a protest had not expired. The issues raised by Sportmotive's protest were properly before the Board.

47. BMW NA must comply with the notice provisions of Vehicle Code Sections 3060 et seq with regard to any other California BMW motorcycle dealers affected by BMW AG's appointment of BMW NA as its distributor.

Substantive Issues Presented

48. BMW NA contends there is good cause to terminate or refuse to continue Sportmotive's status as a BMW motorcycle

dealer for the following reasons:

1. The amount of business transacted by Sportmotive has been inadequate as compared to the business available to it; [3061(1)]
 2. The investment necessarily made and obligations incurred by Sportmotive to perform its part of the franchise have not been material; [3061(2)]
 3. Sportmotive's investment is not permanent; [3061(3)]
 4. It would not be injurious to the public welfare for the business of Sportmotive to be disrupted; [3061(4)]
 5. Sportmotive does not have adequate motor vehicle sales and service facilities, equipment, vehicle parts, and qualified service personnel to reasonably provide for the needs of the consumers of BMW motorcycles and has not been rendering adequate services to the public; [3061(5)]
 6. Sportmotive has failed to comply with the terms of the franchise. [3061(7)]
49. There is no dispute that Sportmotive has performed all necessary warranty obligations. [3061(6)]

Findings of Fact

Facts Relating to the Amount of Business Transacted by Sportmotive as Compared to the Business Available to It.

[3061(1)]

50. BMW motorcycle sales have declined in the United States during the last few years.

51. BMW motorcycle sales account for less than 4/10 of 1% of the number of motorcycles sold in the United States.

52. Japanese motorcycles are the primary competition for BMW motorcycles. The suggested retail prices for BMW motorcycles range from \$3,995 to \$7,300. These prices are much higher than the prices of Japanese motorcycles.

53. Harley-Davidson motorcycles are closer in price to BMW motorcycles. BMW NA does not consider itself in competition with Harley-Davidson however because BMW NA determined that the consumer profile differed.

54. At the time of its evaluation of Sportmotive, BMW NA was unaware of the number of retail sales by any BMW motorcycle dealer. BMW NA's evaluation was based solely upon the number of wholesale purchases made by the dealers during the past two calendar years.

55. Butler & Smith's wholesale sales average of 25 to 26 vehicles per dealer per year was unacceptable to BMW NA. Yet as the following chart indicates, very few of the 47 California BMW motorcycle dealers made wholesale purchases of 25 motorcycles in 1979 and 1980. The chart on the following pages indicates the wholesale purchases by the California BMW motorcycle dealers for calendar years 1979 and 1980.

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DEALER	TOWN	M/C'S PURCHASED	TOTAL	TOTAL
DOUGLAS	SAN BERNARDINO	9	18	27
TIN MOTORS	SAN DIEGO	3	30	33
BIKE CTR.	" "	9	34	43
GOLDEN M/C		21	52	73
HA OF SAN LUIS OBISPO		3	9	12
JOSE BMW		13	84	97
W OF MARIN	SAN RAFAEL	2	19	21
SEAVER M/C	SANTA ANA	32	74	106
UKI OF SANTA BARBARA		5	16	21
GLE SPORTS	SANTA CLARA	1	2	3
ST HONDA	SANTA CRUZ	1	9	10
ROSSI M/C'S	SANTA ROSA	1	8	9
FILL'S M/C'S	STOCKTON	0	3	3
RTY'S FOREIGN MOTORS	TORRANCE	18	37	55
M M/C'S	VENTURA	11	15	26
ISE OF YAMAHA	WEST L.A.	0	10	10
IT VALLEY M/C'S	WINNETKA	26	45	71
UNNY'S M/C	BAKERSFIELD	6	30	36
DA OF BURBANK				
		(SEE BILL ROBERTSON)	→	
RMICHAEL HONDA		6	11	17
RIE'S BMW	CHICO	1	9	10
MPION KAW/BMW	COSTA MESA	10	14	24
CIFIC BMW	EUREKA	2	9	11
BIDWELL SHOP		2	15	17
W OF FREMONT		0	13	13
CK'S M/C	FRESNO	8	18	26
BARA UNDERWOOD	LA HABRA	4	10	14
CIFIC COAST	LOMITA	3	12	15
E KOON'S	LONG BEACH	3	6	9
IL ROBERTSON'S	LOS ANGELES	48	66	114

56. BMW NA had decided prior to taking over the distributorship of BMW motorcycles that there were too many BMW motorcycle dealers in California and that the total number of dealers would be reduced from 47 or 48 to approximately 30.

57. BMW NA did not prepare retail sales penetration figures for any market areas of California.

58. BMW NA considers the Greater San Jose/Santa Clara area as the Sportmotive market area. BMW NA had no information as to the population in the area, number of potential motorcycle consumers, or the geographic size of the area.

59. At the time BMW NA made its decision concerning Sportmotive, BMW NA had no information pertaining to Sportmotive's inventory of BMW motorcycles during the last two years.

60. BMW NA was not aware of nor did it ever undertake to determine the number of retail sales by BMW motorcycle dealers during 1979 and 1980.

61. The following are the number of retail sales of new BMW motorcycles made by Sportmotive for the years indicated:

<u>Year</u>	<u>Number of Retail Sales</u>
1977	17
1978	7
1979	9
1980	9

62. None of the BMW motorcycles Sportmotive sold in 1980 were 1980 models. Sportmotive had no 1980 models on display in 1980, and only one 1979 model was on display in 1979. The 1979 model was still not sold at the time of hearing. Of the 9 new

new motorcycles sold in 1980, none were 1980 models and only one was a 1979 model.

63. The majority of the new BMW motorcycles sold by Sportmotive within the last two years have been one or two model years old at the time of sale to the public.

64. Sportmotive did not purchase more 1980 models because the owner had been aware since the end of 1978 of the potential loss by Butler & Smith of its distributorship and because there were a substantial number of unsold 1979 models in the area.

65. Sportmotive's experience in the past indicated that when a distributor loses its distributorship, the distributor or its successor unloads inventory at substantially lower dealer prices. Sportmotive sustained a \$10,000 loss on inventory when this happened previously with another manufacturer.

Facts Pertaining to the Investment
Necessarily Made and Obligations Incurred by
Sportmotive to Perform Its Part of the Franchise
[3061(2)]

66. Sportmotive has been owned and operated by Lutz C. Bergman for 11 years. It has been franchised to sell BMW motorcycles since August, 1972.

67. Sportmotive also sells Norton, Triumph, and Yamaha motorcycles.

68. Sportmotive did not have a BMW franchise at the time it moved into its present leased facility in March, 1969. The lease terms require Sportmotive to spend \$15,000 over the term of the lease to improve the property. The improvements

which have been made were made to accommodate the BMW franchise.

69. BMW NA did not establish any additional facts pertaining to investments or obligations incurred by Sportmotive.

Facts Pertaining to the Permanency of
the Investment of Sportmotive
[3061(3)]

70. Sportmotive is in a leased facility.

71. BMW NA did not establish any additional facts pertaining to the permanency of the investment of Sportmotive.

Facts Pertaining to Whether it Would be
Injurious to the Public Welfare for the
Business of Sportmotive to be Disrupted
[3061(4)]

72. There is another BMW motorcycle dealer located less than 10 miles from Sportmotive.

73. BMW NA did not establish any additional facts as to the effect upon the public in the event Sportmotive ceased being a BMW motorcycle dealer.

Facts Pertaining to Whether Sportmotive
has Adequate Motor Vehicle Sales and
Service Facilities, Equipment, Vehicle
Parts, and Qualified Service Personnel
to Reasonably Provide for the Needs of
the Consumers of BMW Motorcycles and
Whether Sportmotive has been Rendering
Adequate Services to the Public
[3061(5)]

74. BMW NA has no established standards for the size of a facility from which to sell and service BMW motorcycles.

75. BMW NA's decision that Sportmotive should not be a BMW dealer was not based upon any deficiency in regard to Sportmotive's facilities.

76. BMW NA had no information as to the extent of the inventory of parts and accessories carried by Sportmotive.

77. Concern over Sportmotive's parts supply was not a factor in BMW NA's decision in regard to Sportmotive.

78. There were no problems with regard to the quality of service provided by Sportmotive.

79. BMW NA acknowledged Sportmotive's willingness to participate in the training of service personnel.

Facts Pertaining to Whether
Sportmotive Failed to Fulfill the Warranty
Obligations to be Performed
[3061(6)]

80. There is no dispute that Sportmotive is adequately fulfilling warranty obligations.

Facts Pertaining to Whether
Sportmotive Failed to Comply with the
Terms of the Franchise
[3061(7)]

81. The primary concern BMW NA had regarding the extent of Sportmotive's compliance with the terms of the BMW motorcycle franchise was Sportmotive's failure to purchase what BMW NA considered to be an adequate and representative

model line from the distributor during the last two years.

82. Sportmotive had no outdoor BMW sign. Sportmotive's large outside sign had been struck by trucks two or three times and destroyed. Sportmotive is unsure if local laws would presently allow an outdoor sign but is willing to put one up if permitted to do so. There is presently a large BMW sign in the dealership office window. BMW NA is not aware of any other deficiency in the area of brand identification other than the lack of an outdoor sign.

Factors Used by BMW NA in Evaluating
a Dealership to Determine the Dealership's
Qualifications to be a BMW Dealer

83. BMW NA had initially decided that Sportmotive was not qualified to be a BMW dealer solely on the number of wholesale purchases by Sportmotive during the last two years. As a result of this decision Sportmotive was one of the California dealers with which BMW NA chose not to communicate.

84. It was not until after the protest in this matter was filed that BMW NA made contact with Sportmotive and evaluated Sportmotive's qualifications.

85. The following are the factors purportedly used by BMW NA in evaluating Sportmotive's qualifications.

- A. Whether the market area is strong enough to support a BMW dealership?

BMW NA did not know the size of the geographic area involved nor did it know the size of the population being served. It had no data concerning the number of potential motorcycle consumers in the market area.

B. Whether the facilities are adequate?

BMW NA has no objective standards by which to measure the adequacy of a facility. Its only concern with Sportmotive's facility was with regard to Sportmotive's showroom. (See paragraph G below)

C. Whether the dealer is sufficiently interested in being a BMW dealer?

BMW NA had no doubts about Mr. Bergman's sincere interest in being a BMW dealer.

D. Whether the dealer was going to sell BMWs exclusively or be a multi-line dealer?

Sportmotive is a multi-line dealer, but BMW NA had no concern or problem with this fact in the case of Sportmotive.

E. Whether the dealer was willing to stock a representative line of BMW products?

In 1979, Sportmotive only ordered two 1979 models. In 1980, Sportmotive ordered only one 1980 model. BMW NA had no information in regard to what Sportmotive's total BMW inventory was during the above two-year period.

The last dealer visit by a Butler & Smith representative was in May, 1979. At that time, Sportmotive had ten new BMW motorcycles on display. In May of 1978, Sportmotive had fourteen new

BMW motorcycles in stock and was considered by Butler & Smith to be overstocked.

F. Whether the dealer had a sufficient line of credit?

Sportmotive has had a line of credit established with the Bank of America in the amount of \$100,000 for over four years. Sportmotive also has an additional line of credit with the Borg-Warner Acceptance Corporation in the amount of \$150,000. BMW NA was not concerned that Sportmotive's line of credit was inadequate.

G. Whether the dealer was willing to provide an exclusive display area for BMW motorcycles?

In BMW NA's opinion, Sportmotive's showroom was too small to display the BMW line of motorcycles along with the other lines carried by Sportmotive. This concern was alleviated when Sportmotive agreed to devote the entire showroom space to the display of BMW motorcycles.

H. Whether the dealer was willing to provide a separate and distinct BMW parts and accessories display?

BMW NA believed Sportmotive would continue to do so.

I. Whether the dealer was willing to provide a separate and distinct area for BMW service?

BMW NA believed Sportmotive would continue to do so.

J. Whether the dealer was willing to participate in BMW training programs?

BMW NA believed Sportmotive would continue to do so.

K. Whether the dealer had adequate product identification?

BMW NA is not aware of any other deficiency in the area of brand identification other than the lack of an outdoor sign.

L. The past performance of the dealer while Butler & Smith was the distributor.

BMW NA's initial decision in regard to the status of Sportmotive was made solely upon the number of wholesale purchases by Sportmotive from Butler & Smith during 1979 and 1980.

86. After the filing of this protest and a second evaluation by BMW NA, using the above factors, BMW NA again determined that Sportmotive was not qualified to be a BMW dealer. It would appear, however, that the only standard not substantially met, and therefore the sole basis for refusing to do business with Sportmotive, was the number of wholesale purchases made by Sportmotive from the distributor.

Determination of Issues

87. BMW NA has failed to establish that there is good cause to terminate or refuse to continue the status of Sportmotive as a BMW motorcycle dealer in that:

(a) BMW NA did not establish that the amount of business transacted by Sportmotive was inadequate as compared to the business available to Sportmotive.

[3061(1)]

(b) BMW NA did not establish that Sportmotive does not have a material investment and BMW NA did not establish that Sportmotive has not incurred material obligations in the performance of its part of the franchise. [3061(2)]

(c) BMW NA did not establish that Sportmotive's investment is not permanent. [3061(3)]

(d) BMW NA did not establish that it would be beneficial and not injurious to the public welfare for the business of Sportmotive to be disrupted. [3061(4)]

(e) BMW NA did not establish that Sportmotive does not have adequate motorcycle sales and service facilities, equipment, parts, and qualified service personnel to reasonably provide for the needs of consumers of BMW motorcycles and has not been and is not rendering adequate services to the public. [3061(5)]

(f) BMW NA did not establish that Sportmotive's failure to comply with the terms of the franchise was material. [3061(7)]

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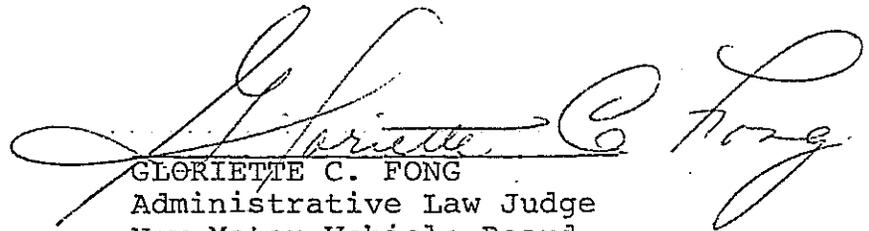
88. There was no dispute that Sportmotive has fulfilled all necessary warranty obligations.

The proposed decision is respectfully submitted:

The protest is sustained. BMW NA has not established good cause to terminate or refuse to continue Sportmotive's status as a BMW motorcycle dealer.

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: March 18, 1981


GLORIETTE C. FONG
Administrative Law Judge
New Motor Vehicle Board