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STATE OF CALIFORNIA
NEW MOTOR VEHICLE BOARD

In the Matter of the Protest of)
RIVA/VESPA OF SAN DIEGO,) Protest No. PR-814-86
Protestant,)
vs.)
YAMAHA MOTOR CORPORATION, U.S.A.,)
Respondent.)

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 19th day of June, 1987.


FLORENCE S. POST
President
New Motor Vehicle Board,

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STATE OF CALIFORNIA
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In the Matter of the Protest of)
RIVA/VESPA OF SAN DIEGO,)
Protestant,)
vs.)
YAMAHA MOTOR CORPORATION, USA,)
Respondent.)

Protest No. PR-814-86
PROPOSED DECISION

PROCEDURAL BACKGROUND

1. By letter dated March 17, 1986, Respondent, Yamaha Motor Corporation, USA (Yamaha), gave notice to Protestant, Riva/Vespa of San Diego, (RSD), of Yamaha's intention to establish a Yamaha Riva motor scooter franchise at 8063 Balboa Avenue, San Diego, California, which is the established place of business of Kearny Mesa Yamaha (Kearny Mesa), an authorized Yamaha motorcycle dealer.^{1/} RSD is located at 1556 Garnet Avenue, Pacific Beach, California.

^{1/}Kearny Mesa Yamaha does not contend that it is entitled to receive Riva products pursuant to the terms of its existing franchise.

2. At the same time Yamaha gave the notice just described, it also, by letter dated March 17, 1986, gave notice to RSD of Yamaha's intention to establish a Yamaha Riva motor scooter franchise at 4455 El Cajon Boulevard, San Diego, California, which is the established place of business of San Diego Yamaha, an authorized Yamaha motorcycle dealer.^{2/}

3. By separate letters dated March 17, 1986, Yamaha gave notice to the Board of Yamaha's intention to establish Kearny Mesa and San Diego Yamaha as Riva motor scooter dealers. The letters were postmarked March 18, 1986 and were received by the Board on March 20, 1986.

4. By certified letter postmarked March 22, 1986 and received by the Board on March 25, 1986, RSD, pursuant to Vehicle Code section 3062, filed protests against Yamaha's proposed actions.^{3/}

5. Pursuant to Section 585 of the Board's regulations, as contained in Title 13 of the California Administrative Code, both protests were deemed filed as of the date of mailing on March 22, 1986.

6. The Board assigned Protest Number PR-814-86 to the protest concerning Kearny Mesa and Protest Number PR-815-86 to the protest concerning San Diego Yamaha.

^{2/}San Diego Yamaha does not contend that it is entitled to receive Riva products pursuant to the terms of its existing franchise.

^{3/}All references are to the California Vehicle Code unless otherwise indicated.

7. By certified letter dated March 26, 1986, the Board notified RSD that its letter of protest did not comply with the Board's regulations governing the filing of protests as set forth in Title 13, Chapter 1, Subchapter 2, Articles 5 and 6 (commencing with Section 583) of the California Administrative Code.

8. A formal protest in compliance with the above regulations was filed in regard to the Kearny Mesa protest (PR-814-86) on April 5, 1986.

9. A formal protest in compliance with the regulations was filed in regard to the San Diego Yamaha protest (PR-815-86) on April 21, 1986.

10. On March 27, 1986, the Board sent a notice of a pre-hearing conference to be held on April 8, 1986. One of the purposes of the pre-hearing conference is to establish a hearing date. At the requests of counsel, and by their joint stipulations the pre-hearing conference was continued several times. Counsel eventually stipulated to a hearing date of October 20, 1986. Two other jointly stipulated requests for continuances resulted in the hearing commencing on December 8, 1986.

11. The protests were not consolidated for purposes of a decision but it was agreed that a joint hearing could be conducted due to the existence of similar facts relating to the two protests.

12. A hearing was held before Robert S. Kendall, Administrative Law Judge of the Board, commencing on December 8, 1986, and ending on December 13, 1986.

13. The record of the hearing remained open to receive written arguments from the parties. The last such documents were received on April 20, 1987, and the matter thereupon stood submitted.

14. RSD was represented by Cris C. Vaughan, Esq. of the Law Offices of Daniel Patterson. Yamaha was represented by Bruce L. Ishimatsu, Esq. of Kelley, Drye & Warren.

COMPANION DECISION

15. While this proposed decision is limited to Protest No. PR-814-86, reference is made to the companion decision in Protest No. PR-815-86. Yamaha sent the notice of intent concerning establishment of each dealer by separate letters bearing the same date. Both letters were received by RSD on the same date.

16. RSD is in the relevant market areas of both proposed new dealers and each of the proposed new dealers is within the relevant market area of the other proposed new dealer.

17. The protest numbers were assigned by the Board in an administrative function and were not assigned for the purpose of determining which protest would be decided first. Neither side desired to have either protest decided first, therefore the decisions will be issued concurrently but with the merits of the respective protests decided separately.

ISSUES PRESENTED

18. RSD contends that good cause exists for not establishing the proposed franchise at Kearny Mesa for the following reasons:

a. RSD has made the necessary investments to adequately perform its obligations under the franchise agreement, and the additional franchise would jeopardize the permanent investment of RSD [section 3063(a)];

b. The establishment of the additional motor scooter franchise will have an adverse effect on the retail motor scooter business and the consuming public in the relevant market area [section 3063(b)];

c. The establishment of the additional motor scooter franchise would be injurious to the public welfare [section 3063(c)];

d. The Yamaha Riva motor scooter franchisees in the relevant market area are providing adequate competition and convenient consumer care for Yamaha Riva vehicles in the market area, including adequate motor scooter sales and service facilities, equipment, supply of motor scooter parts, and qualified service personnel [section 3063(d)];

e. The establishment of an additional motor scooter franchise in the market area would not increase competition and therefore would not be in the public interest [section 3063(e)]; and

f. Yamaha failed to disclose material facts within its knowledge and control at the time RSD purchased the

business in November of 1985. One of these alleged facts was the intention of Yamaha to proceed with the establishment of Kearny Mesa as an additional Riva motor scooter dealership.

FINDINGS OF FACT

Facts Relating to the Permanency of Investment [section 3063(a)]

19. Vespa at the Beaches, the predecessor of RSD, was owned and operated by Frank Gallagher (Gallagher) from August 1, 1977 until the fall of 1985.

20. Clarence Kamps, Elena Kamps and their son Joel Kamps entered into negotiations with Gallagher to purchase Vespa at the Beaches in midsummer 1985.

21. The Kamps formed a partnership and purchased Vespa at the Beaches for \$240,000. The Kamps began operating the business on November 15, 1985. The name of the business was changed from Vespa at the Beaches to Riva/Vespa of San Diego, (RSD).

22. In November of 1985, the partners formed the corporation Adtrax, Inc., for the purpose of operating the dealership. The directors and officers of the corporation are Joel Kamps, President, Clarence Kamps, Vice-President and Treasurer, and Elena Kamps, Secretary and Chief Executive Officer.

23. On November 25, 1985, the partnership was dissolved and the corporation took over the assets and the liabilities of the business.

24. The stock of Adtrax, Inc. is owned as follows:

<u>Shareholder</u>	<u>No. of Shares</u>
Joel Kamps	20,000
Elena Kamps	19,850
Clarence Kamps	19,850
Lisa Kamps	100
Leslie Kamps	100
Heather Kamps	100

Lisa, Leslie and Heather Kamps are also children of Clarence and Elena Kamps.

25. The \$240,000 purchase price for the Vespa at the Beaches dealership included \$50,000 for parts inventory with \$190,000 for goodwill, equipment, furniture, vehicles, leasehold improvements, and a covenant by Gallagher not to compete in San Diego County for 10 years.

26. The terms of the sale were \$120,000 cash with a \$120,000 note at ten percent interest for ten years.

27. The funds for the down payment of the business came from the personal assets of Clarence and Elena Kamps. Mr. and Mrs. Kamps refinanced their home to raise \$42,000 of the \$120,000 needed for the down payment.

28. The ten year note in favor of Gallagher is payable at the rate of \$1,585.81 per month.

29. The note is secured by the personal property, inventory, and contracts of RSD as well as the personal guarantees of Joel Kamps, Clarence Kamps and Elena Kamps.

30. Yamaha motor scooter inventory purchased by RSD is floored with ITT Corporation as Yamaha has no flooring program. Prior to the sale of the business Gallagher obtained a flooring line in the amount of \$75,000 with ITT. The Kamps have a flooring line of \$125,000. Yamaha has never complained to RSD that its credit line is insufficient to operate the dealership properly.

31. The security agreement in favor of ITT gives ITT an interest in the inventory, machinery, equipment, fixtures and vehicles of the dealership. Joel, Clarence and Elena Kamps were each required to execute personal guarantees in favor of ITT.

32. Joel, Clarence and Elena Kamps were also required to execute personal guarantees in favor of Yamaha and Yamaha Parts Distributors, Inc.

33. In addition to the cash down payment and cost of improvements, initial operating capital of \$10,000 was also required.

34. RSD is operated at a leased facility. The lease is for five years commencing on November 1, 1985 with an option to renew for an additional five years. The Kamps paid a \$1,500 deposit to the landlord at the time the lease was assigned to them.

35. The lease provides for rental payments of \$1,008 per month through May 1987. Beginning June 1, 1987, the rental payments will be \$1,597 per month and thereafter will be adjusted on an annual basis to reflect any increase in the consumer price index. RSD is also responsible for payment of utilities, taxes and maintenance.

36. Since commencing operation, RSD has made the following improvements to the facility at the cost indicated:

<u>Improvement</u>	<u>Cost</u>
New telephone system	\$ 1,300
New alarm system	1,200
New Riva parts inventory system	1,000
New exterior sign and awnings	900
Clean storage area and discard obsolete vehicles, parts and accessories	600
Remodel customer restroom	300
Remodel customer application and waiting area	300
Paint service, parts and accessory areas	200
Refinish parts counter	150
Steam clean and repair carpets	<u>150</u>
TOTAL IMPROVEMENTS	\$ 6,100

The above figures do not include the 100 plus hours of uncompensated labor supplied by Joel, Clarence and Elena Kamps in accomplishing the improvements.

37. RSD has had an inventory in excess of 100 new motor scooters since commencing operation in November, 1985. In addition to the above inventory, the dealership committed itself to purchase an additional 40 to 50 units at the Yamaha dealer show in September, 1986.

38. The fixed monthly overhead for RSD at the time of the hearing was \$9,055.81.

39. For its first fiscal year, RSD showed a profit of less than \$10,000 from total dealership operations.

40. For the first twelve months the dealership was in operation, November 15, 1985 to November 15, 1986, Joel Kamps' compensation from the business was a total gross salary of \$6,350. During the same time period Elena Kamps received a total gross salary of \$3,545. Clarence Kamps received no monies from the dealership.

Facts Relating to the Effect of
Establishing the Additional Franchise
on the Retail Motor Scooter Business
and the Consuming Public in the
Relevant Market Area
[section 3063(b)]

41. There are a total of seven Yamaha Riva dealerships in San Diego County. Three of these were established after January 1, 1985.

42. In addition to the Yamaha Riva dealers in San Diego County there are four Yamaha motorcycle dealers whose franchises do not include the Riva product line.

43. There are ten Honda motorcycle dealers in San Diego County all of which sell Honda motor scooters.

44. The chart below indicates the straight line and driving distances as well as the driving times between the proposed dealership at Kearny Mesa and other Yamaha dealers within the vicinity.

<u>From Kearny Mesa* to</u>	<u>Straight Line Distance</u>	<u>Driving Distance</u>	<u>Driving Time (Min.)</u>
Riva of San Diego (Protestant)	5.6 Miles	5.7 Miles	9:50 to 15:00
San Diego Yamaha* (Proposed)	5.5 Miles	7.5 Miles	10:00
Lemon Grove Yamaha*	8.3 Miles	14 Miles	20:10
South Bay Yamaha National City	12.5 Miles	14 Miles	18:15
Yamaha of Poway	12.5 Miles	15 Miles	21:00
Rolloff Yamaha* Imperial Beach	16 Miles	18.8 Miles	22:45

*Yamaha franchise does not include Riva products.

45. In developing the original plan for Riva dealers in San Diego County, Yamaha identified certain areas for their establishment. It was Yamaha's original intention that once a dealer was established, no additional Riva dealers would be located within ten miles.

46. Prior to offering the Yamaha Riva franchise to Vespa at the Beaches, Yamaha offered the product to Bob Schaefer, the owner of Kearny Mesa. Yamaha also made the same offer to the prior owner of San Diego Yamaha. Both dealers refused to meet the requirements that Yamaha had established for a dealer to be eligible to receive the product. Yamaha then awarded the Riva franchise to Vespa at the Beaches, the predecessor of RSD.

47. Under Yamaha's original concept for the establishment of dealers in San Diego County, once Vespa at the Beaches was established, Yamaha no longer considered giving Kearny Mesa a Riva franchise.

48. Vespa at the Beaches also carried the Vespa motor scooter line at the time it received the Riva franchise. At the time of the sale of the business to the Kamps, new Vespa motor scooters were unavailable in the United States.

49. When Riva motor scooters were introduced Yamaha established standards that a dealer was required to meet in order to receive the Riva product. These standards were generally determined according to the population of the county where the particular dealer was located. Yamaha created three categories of dealers, A, B and C dealers^{4/}. Each category had minimum requirements in terms of floor space, purchase of initial parts and accessories, and initial orders of motor scooters.

50. Vespa at the Beaches received the Riva franchise in October, 1982. Because of the population of San Diego County, Vespa at the Beaches had to meet the requirements of a category "A" dealer. These requirements included a separate showroom of 1,000 square feet, a dealer identification package at a cost of \$2,500, and a parts and accessories package costing approximately \$1,900.

51. In August, 1985, Yamaha changed its minimum requirements for new Riva dealers. These changes were made to facilitate the enfranchisement of Yamaha motorcycle dealers as Riva motor scooter dealers.

^{4/}Yamaha's criteria for what constituted an A, B or C dealer were as follows: County population of over 500,000 required an "A" dealer, population of 250,000 to 500,000 a "B" dealer and population of less than 250,000, a "C" dealer.

52. Since August, 1985, an existing Yamaha motorcycle dealer is only required to set aside 200 square feet in the motorcycle showroom to display Riva motor scooters and the space is no longer required to be separate from the motorcycle showroom. The initial parts order purchase requirement has been reduced to \$500.

53. Yamaha made the changes due to the complaints from Yamaha motorcycle dealers who did not want to comply with the original requirements in order to become Yamaha Riva dealers.

54. From January, 1985 to mid-November, 1985, Vespa at the Beaches had Riva sales of 168 units, of which 134 were sold as new vehicles at retail.

55. From December 1, 1985 through mid-November, 1986, RSD had sold 147 new motor scooters at retail.

56. Vespa at the Beaches did most of its advertising in newspapers and yellow pages with little emphasis on television, direct mail or radio.

57. Vespa at the Beaches also donated motor scooters to various charitable activities and engaged in sponsorship of community activities. It also displayed motor scooters in various shopping malls throughout the San Diego area.

58. RSD's promotional activities include efforts similar to those of Vespa at the Beaches, as well as extensive use of radio ads.

59. Since acquiring the franchise the Kamps have increased services, increased promotional campaigns, remodeled

the shop, and installed a new sign on the exterior of the building.

60. Yamaha provides a co-operative advertising (co-op) program to Yamaha Riva dealers. This program consists of a 50/50 co-op by which Yamaha reimburses the dealer for 50% of any advertising the dealer does in compliance with the co-op guidelines. At the present time Yamaha's co-op advertising program requires the dealer to pay 50% of the cost. At the time Vespa at the Beaches was the franchisee, the dealer paid only 25% of the advertising costs.

61. The fiscal year for the Yamaha co-op program in 1986 was October 1, 1985 through September 30, 1986. From about November 15, 1985 through September 30, 1986, RSD spent \$27,039.06 on qualified co-op advertising. RSD's unreimbursed out-of-pocket expenses for co-op advertising for this time period were \$13,519.53.

62. In addition to the out-of-pocket expenses for co-op advertising, RSD also purchased advertising in the Yellow Pages, newspapers and on radio. These expenses were not eligible for the co-op program. The total out-of-pocket expenses for advertising for the dealership for its first fiscal year were in excess of \$20,000.

63. The chart below lists the market penetration by Yamaha Riva in calendar year 1985 for the geographical areas listed.

<u>Geographical Area</u>	<u>% Penetration in Calendar Year 1985</u>
Nation	9.91
California	17.03
Orange County	35.37
San Francisco County	27.30
Sacramento County	21.83
Santa Clara County	21.41
San Mateo County	21.41
San Diego County	13.86
Alameda County	13.73
Los Angeles County	13.67
Contra Costa County	11.72

64. There were a total of 300 new Yamaha Riva vehicles sold in San Diego County in 1985. Of this total, 137 units, or 46%, were registered in zip codes any portion of which lie within a five-mile radius of the Kearny Mesa location. The remaining 163 vehicles were registered in zip codes throughout the remainder of San Diego County.

65. The chart below lists the motor scooter market penetration in San Diego County for calendar year 1985.

	<u>Honda</u>	<u>Yamaha</u>
San Diego County	85.40%	13.86%
Zip Codes Outside 5 Miles of Kearny Mesa Location	89.00%	11.00%
Zip Codes Within 5 Miles of Kearny Mesa Location	78.00%	22.00%

66. The market penetration for Yamaha Riva in those zip codes within five-miles of Kearny Mesa was 22%. In the portion of San Diego County lying south of Kerny Mesa and outside of the five-mile radius, the Yamaha Riva penetration was 12% and in those zip codes to the north of the five-mile radius surrounding Kearny Mesa the market penetration was 9%.

67. From December 1, 1985 through October 31, 1986, 70% of all sales by RSD were registered into zip codes within five-miles of the Kearny Mesa location.

68. The market penetration in San Diego County of Yamaha Riva, when compared to Honda motor scooters for calendar year 1985, was a prime factor in Yamaha's decision to recommend establishment of additional dealers.

69. RSD is located approximately one mile from the Pacific Ocean and immediately north of Balboa Bay and San Diego Harbor. Military installations and the San Diego airport are in the area to the south of the dealership.

70. Approximately 80% of Riva sales from a Riva-only dealer will be registered in areas within five miles of the dealer's location. Because of RSD's location, however it is expected that many more of its sales would be to people outside of the five mile radius.

71. The location of Kearny Mesa is in the middle of the prime sales territory of RSD.^{6/} The penetration for Riva in all

^{6/}RSD and Kearny Mesa are 5.5 to 5.6 miles apart, the midpoint being approximately at 2.8 miles.

of San Diego County in 1985 was 13.86%, while in those zip codes within five miles of Kearny Mesa the Riva penetration was 22%.

72. The heaviest concentration of registrations of Rivas sold by RSD are directly east of the dealership toward the Kearny Mesa area.

Facts Relating to Whether
It Would Be Injurious to the
Public Welfare for an Additional
Franchise to Be Established
[section 3063(c)]

73. The record is devoid of any evidence that the public welfare will be injured as a result of the establishment of Kearny Mesa.

Facts Relating to Whether the Franchisees of
the Same Line-Make in the Relevant Market Area
Are Providing Adequate Competition and Convenient
Consumer Care for Yamaha Riva Vehicles in
the Market Area, Including the Adequacy
of Motor Scooter Sales and Service
Facilities, Equipment, Supply of Vehicle Parts,
and Qualified Service Personnel
[section 3063(d)]

74. From December 31, 1985 through October 31, 1986, 85% of the Riva motor scooters serviced by RSD were owned by people who resided in zip codes within five miles of Kearny Mesa.

75. From March, 1985 through October, 1985, the predecessor dealership (Vespa at the Beaches) performed service on 245 Riva motor scooters. From March 1986 through October 1986, RSD performed service on 352 Riva motor scooters.

76. Because of the geography of its immediate area, RSD has no alternative but to draw customers from the northeast,

east and southeast. The east and southeast are in the direction of Kearny Mesa.

77. RSD is open to the public from 9:00 a.m. to 6:00 p.m. during the week and 10:00 a.m. to 4:00 p.m. on the weekends. These hours change from summer to winter. The dealership is open on Sundays during the summer and during the holiday seasons in winter.

78. RSD has a main showroom building of 2130 square feet and a back lot area consisting of 3250 square feet on which is a 24' x 24' galvanized shed.

79. The size of RSD's showroom exceeds the 1,000 square foot minimum established by Yamaha for a Riva-only dealer. The dealership also uses a 14 foot wide sidewalk in front of the store to display vehicles.

80. RSD is located on Garnet Avenue in a commercial area. Garnet Avenue runs in front of the store and is a heavily traveled two-way street with one lane in each direction. Parking is permitted on each side of the street in the vicinity of the dealership.

81. In addition to on-street parking, there is also a large parking lot adjacent to the street next to the building occupied by the dealership. Room also exists to park vehicles at the rear of the store and on the dealership lot.

82. RSD has never received customer complaints as to the adequacy of parking.

83. RSD has never received complaints from Yamaha that there are improvements needed in the facility or that the facility is inadequate in any way.

84. To keep adequate stock of parts and accessories on hand, and to track inventory, an inventory card system has been established. The dealership purchases parts and accessories from Yamaha as well as from outside suppliers and has a wide selection available to its customers.

85. RSD purchased \$12,302.31 in parts and accessories from Yamaha Parts Distributors, Inc. from December 1, 1985 through October, 1986. During the same time period, \$4,064.71 worth of parts and accessories were purchased from outside suppliers.

86. RSD has never received any complaints from Yamaha regarding the service or parts departments of the dealership.

87. Joel Kamps is the General Manager of RSD and is also involved in the sale of vehicles. He is generally at the dealership seven days a week.

88. Elena Kamps is the office manager and salesperson for the dealership. She also works on a full-time basis, generally seven days a week.

89. In addition to Joel Kamps and Elena Kamps, there are three other full-time employees at the dealership. These are the head mechanic, assistant mechanic, and a parts manager/salesperson. A salary increase was given to the head mechanic in order to retain him.

90. In addition to the full-time employees, the dealership also hires part-time employees, particularly during the summer when there is a greater demand for sales and service. Based on the experience gained in 1986, at least one extra part-

time mechanic as well as additional salespersons will be hired during the summer months.

91. The head mechanic, assistant mechanic, and parts manager have all attended a Yamaha training seminar on starting systems and electrical problems in the Riva 180. In addition, the assistant mechanic and the parts manager were for one year under the instruction of a Yamaha-trained mechanic previously employed by the dealership.

92. The two mechanics employed full-time by RSD trade weekends, thereby having at least one qualified mechanic at the dealership from Monday through Saturday. Also, the parts manager/salesperson often works six days a week.

93. Yamaha has never complained to RSD that it does not have adequately trained service personnel or service facilities or tools.

94. Since the Kamps acquired the dealership, service volume has increased by 43%, with an increase of \$8,000 in gross revenue from the service department.

95. At present the service facility of RSD is operating at approximately 75% capacity and has room to expand as the need for additional service space increases.

96. Yamaha has never complained to the Kamps that the dealership did not have sufficient equipment to service Riva products.

97. Below are listed the Riva dealerships in San Diego County and the number of new Riva vehicles displayed by each dealership.

<u>Dealership</u>	<u>Number of New Rivas Displayed</u>
Riva of San Diego (RSD)	43
Motorcycle Mart	25
Encinitas Riva Scooters	23
Yamaha of Poway	22
South Bay Yamaha	10
El Cajon Yamaha	8
North County Yamaha	4

Facts Relating to Whether the
Establishment of an Additional
Franchise Would Increase Competition
and Therefore Be in the Public Interest
[section 3063(e)]

98. There have been three Yamaha Riva dealers added in San Diego County since 1985.

99. From calendar year 1985, when compared to the estimated total unit sales for calendar year 1986, the State of California experienced a 99% increase in Riva sales, while Orange County experienced a 54% increase, and San Diego County experienced a 124% increase.

100. The majority of a motor scooter dealers customers come from within five miles of the dealership location.

101. The straight-line distance between RSD and Kearny Mesa is 5.5 miles, with Kearny Mesa almost due east of RSD. The driving distance between RSD and Kearny Mesa is 5.6 miles and it requires from 9 minutes and fifty seconds to 15 minutes depending upon the day of the week and time of day.

102. RSD regularly advertises on a popular San Diego radio station and in the local newspapers. These newspapers include the San Diego Union, San Diego Reader and Evening Tribune all of which are distributed in the area of Kearny Mesa. RSD also advertises in the City Slicker magazine which is distributed county-wide.

103. The total out-of-pocket advertising expenses spent by RSD in its first fiscal year was \$20,000.

104. Kearny Mesa is an aggressive merchandiser that advertises heavily throughout San Diego County.

105. Kearny Mesa spends between \$20,000 and \$25,000 a year on advertising but has the additional advantage of Yamaha's 75/25 co-op program for motorcycles compared to the 50/50 co-op program for motor scooters.

Facts Relating to Whether Yamaha Failed to Disclose Material Facts Within Its Knowledge and Control at the Time the Kamps Purchased the Business of Vespa at the Beaches in November, 1985.

106. The Kamps began negotiating for the purchase of the dealership in mid-summer 1985. At that time the Riva District Manager for the State of California was Ronald Knapp (Knapp). Knapp had been the person who offered the Riva franchise to Kearny Mesa when Riva was first introduced in October, 1982, but Kearny Mesa declined.

107. Prior to purchasing the dealership, Joel Kamps inquired of Knapp whether Yamaha was considering or had any plans for establishing Kearny Mesa as a Riva dealer. Although it is true that Yamaha had considered giving the Riva franchise to

Kearny Mesa, Knapp told the Kamps that Kearny Mesa would not receive the Riva franchise as long as he was the district manager.

108. Knapp left the employment of Yamaha on January 6, 1986 after having worked for Yamaha for 22 years. Yamaha subsequently decided to establish Kearny Mesa as a Riva dealer. This decision was not made until after February 1, 1986.

DETERMINATION OF ISSUES

Protestant has established that there is good cause for not permitting the establishment of a Yamaha Riva dealership at Kearny Mesa for the following reasons:

a. The additional franchise will jeopardize the permanent investment of the Protestant [section 3063(a)];

b. Establishment of the additional motor scooter franchise will have an adverse effect on the retail motor vehicle business and the consuming public in the relevant market area [section 3063(b)];

c. Franchisees of the same line-makeup in the relevant market area are providing adequate competition and convenient consumer care for Yamaha Riva motor scooters in the market area, including adequate sales and service facilities, equipment, supply of motor scooter parts and qualified service personnel [section 3063(d)];

d. Establishment of an additional motor scooter franchise in the market area would not increase competition so as to be in the public interest [section 3063(e)].

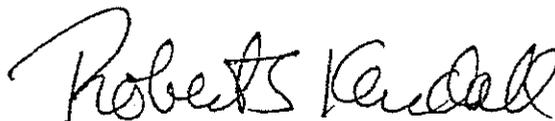
RSD did not prove that Yamaha failed to disclose material facts known to it which would have affected the decision of the Kamps to purchase the dealership.

THEREFORE, the following proposed decision is respectfully submitted:

The protest is sustained. Yamaha Motor Corporation, USA shall not establish Kearny Mesa Yamaha as a Riva franchisee.

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

Dated: June 1, 1987



ROBERT S. KENDALL
Administrative Law Judge
New Motor Vehicle Board