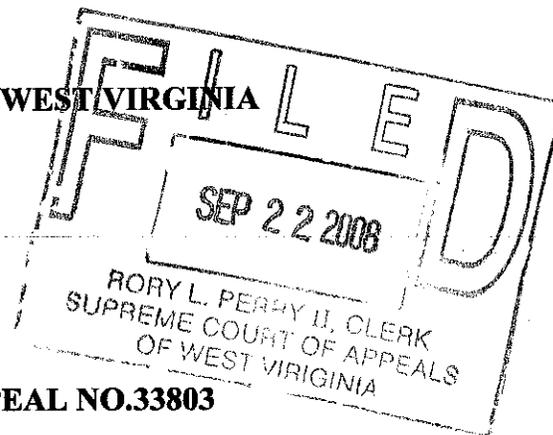


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA



**RAINES IMPORTS, INC., d/b/a
LESTER RAINES HONDA, a West Virginia
Corporation,**

Plaintiff,

APPEAL NO.33803

v.

**CIVIL ACTION NO. 06-C-1422
The Honorable Charles E. King**

**AMERICAN HONDA MOTOR
COMPANY, INC., a California Corporation,**

Defendant.

**BRIEF ON BEHALF OF APPELLANT, RAINES IMPORTS, INC.,
d/b/a LESTER RAINES HONDA**

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September 23, 2008

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**TO THE HONORABLE JUSTICES OF THE
SUPREME COURT OF APPEALS OF WEST VIRGINIA:**

I. KIND OF PROCEEDING AND NATURE OF RULING IN THE LOWER COURT

Pursuant to West Virginia Code § 58-5-1 and Rule 3 of the West Virginia Rules of Appellate Procedure, Plaintiff/Petitioner Raines Imports, Inc. d/b/a Lester Raines Honda (“Lester Raines”) appeals to this Honorable Court from an Order entered by Judge Charles E. King, Jr. of the Circuit Court of Kanawha County on March 26, 2007, granting American Honda Motor Company, Inc.’s (“American Honda”) Motion for Summary Judgment. (A copy of the Order is attached hereto as Exhibit A.) Lester Raines appeals the Circuit Court’s grant of summary judgment and respectfully requests that this Honorable Court grant appropriate relief.

II. STATEMENT OF FACTS AND BACKGROUND

This case is about American Honda’s attempt to establish a new, competing Honda dealership within Lester Raines’ market area of South Charleston, West Virginia. When an automobile manufacturer wishes to establish a new dealership in an area where there is already an existing dealership, West Virginia Code § 17A-6A-12 requires the automobile manufacturer to give written notice that it intends to establish such a dealership to each motor vehicle dealer, of the same line-make, in the “relevant market area.”

Consistent with the statute, American Honda sent a letter to Lester Raines dated May 24, 2006, which clearly indicated that it planned to open a new dealership in the South Charleston area. (A copy of the letter is attached hereto as Exhibit B.) The letter stated, in pertinent part:

As a courtesy, American Honda hereby advises you that another Honda franchise will be located in the “South Charleston” area.

The letter provided further notice that American Honda believed its new South Charleston dealership would be operational by December 2007. As American Honda was no doubt aware, West Virginia Code § 17A-6A-12 required it to notify Lester Raines, in writing, of its intention.¹

Lester Raines sent a return letter to American Honda dated July 19, 2006, indicating that it objected to another dealership being placed within its market area. (A copy of this letter is attached hereto as Exhibit C.) Thereafter, on July 20, 2006, Lester Raines filed a Complaint for Declaratory Judgment in the Circuit Court of Kanawha County, as required by West Virginia Code § 17A-6A-12.

One week after Lester Raines sought declaratory relief from the Circuit Court of Kanawha County, on July 27, 2006, American Honda announced that it had basically changed its mind and that it no longer intended to locate a new dealership in the South Charleston area.² (American Honda's letter is attached hereto as Exhibit D.) The letter stated that American Honda had established "no exact location" or "any specific location" for the proposed new dealership.

¹ West Virginia Code § 17A-6A-12(2) provides, in pertinent part:

Before a manufacturer or distributor enters into a dealer agreement establishing or relocating a new motor vehicle dealer within a relevant market area where the same line make is represented, the manufacturer or distributor shall give written notice to each new motor vehicle dealer of the same line make in the relevant market area of its intention to establish an additional dealer or to relocate an existing dealer within that relevant market area.

² Lester Raines believes that American Honda had been in negotiations with the Miller Auto Group to open a new Honda dealership in South Charleston sometime in the winter to spring of 2006. Sadly, however, Mr. Miller has since passed away and Lester Raines believes this may account for American Honda's position (for the moment) that it has no agreement with a prospective automobile dealer. As an aside, American Honda's Rule 26(a)(1) disclosures lists no documents related to the negotiation with the Miller Auto Group.

American Honda removed this case to the United States District Court for the Southern District of West Virginia on August 21, 2006 and shortly thereafter, on September 20, 2006, filed its first motion to dismiss. In its motion, American Honda again asserted, this time with an affidavit from Christian Miller, that as of May 24, 2006 no exact location for the new dealership had been established and that as of September 18, 2006 there was still no location for the dealership. American Honda's motion went on to indicate, similar to its July 27, 2006 letter, that "American Honda does not anticipate that the prospective new dealership...will be within your relevant market area."

In its response to American Honda's Motion to Dismiss filed on October 4, 2006, Lester Raines asserted that there was (and is) no question that American Honda could have proceeded with its plans, as described in its May 17, 2006 letter, to open a new Honda dealership in South Charleston (within Lester Raines' relevant market area) had Lester Raines not filed its Complaint for Declaratory Judgment. The fact that American Honda changed its mind about where to put its proposed new dealership does not mean that Lester Raines does not have standing to maintain this action. American Honda gave notice of its intent to place a new dealership in South Charleston and Lester Raines availed itself of the remedy available to it by statute.

Recognizing that West Virginia Code § 17A-6A-12 places the burden of proving good cause for establishing a new car dealership upon the manufacturer, Lester Raines served a first set of discovery requests upon American Honda on November 2, 2006, in order to begin to understand what "good cause" American Honda had for its May 24, 2006 statement that it was going to open another new Honda dealership in South Charleston. These discovery requests were very routine and targeted specifically to the factors for determining if American Honda had good cause, under West Virginia Code § 17A-6A-12, for establishing a new dealership in South

Charleston.³ The discovery requests were also designed to determine what American Honda's intent was at the time it sent its May 24, 2006 letter indicating that it intended to open a new Honda dealership in South Charleston. Rather than answering Lester Raines' routine requests, on November 17, 2006, American Honda filed a Motion for Protective Order. American Honda's Motion for Protective Order remained unresolved before the District Court because it remanded this case to the Circuit Court of Kanawha County on December 12, 2006.

Following remand, on December 13, 2006, Lester Raines again served its discovery requests upon American Honda. Again, rather than answering Lester Raines' routine discovery requests, American Honda filed a Motion for Protective Order and also a Motion to Dismiss. Shortly thereafter, on March 5, 2007, American Honda filed a Supplemental Motion for Summary Judgment and/or Dismissal. American Honda took the position that it did not mean for its letter of May 24, 2006 to be interpreted as statutory notice under West Virginia Code § 17A-6A-12 and that therefore, Lester Raines had no standing to bring its claims. Unlike the position American Honda took before the United States District Court, American Honda argued to the Circuit Court that it had in fact decided on an exact location for its proposed new dealership. Not surprisingly, this new location was allegedly beyond the statutory radius (specified by the former statute) of Lester Raines' dealership.⁴ American Honda essentially took the position that based on the fact that its proposed dealership would be situated 16.3 miles from Lester Raines, a fact which was and is completely unsubstantiated by anyone, other than American Honda's counsel's representations, that it was entitled to summary judgment.

³ Lester Raines served a total of 13 interrogatories and 9 requests for production of documents on American Honda.

⁴ The former statute specified that the air-mile radius to be fifteen miles. The new statute, effective as of March 10, 2007, sets the air-mile radius at twenty miles. American Honda asserts that the proposed new dealership will be located 16.3 miles from Lester Raines' dealership.

On March 12, 2007, Lester Raines filed a response in opposition to American Honda's Supplemental Motion for Summary Judgment and also a Motion to Compel American Honda to answer its discovery requests. Lester Raines asserted that it was entitled to discovery before summary judgment would be proper and that American Honda's actions in this case were in violation of the applicable statute. After oral argument by counsel, the Circuit Court granted American Honda's Supplemental Motion for Summary Judgment on March 26, 2007. It is from this ruling that Lester Raines appeals to this Honorable Court for relief.

III. ASSIGNMENTS OF ERROR

- A. The Circuit Court Erred in Granting American Honda's Motion for Summary Judgment without Allowing Lester Raines Any Discovery.**
- B. American Honda's Actions Were in Violation of West Virginia Code §17A-6A-12(3).**
- C. The Circuit Court Erred in Finding that the "Relevant Market Area" is Fifteen Air-Miles.**

IV. DISCUSSION OF LAW AND ARGUMENT

The Circuit Court erred in granting American Honda's Supplemental Motion for Summary Judgment for the following three reasons. First, the Circuit Court erred in granting summary judgment without permitting any discovery. Second, the Circuit Court erred in granting summary judgment to American Honda because its actions in this case were in direct violation of West Virginia Code § 17A-6A-12(3). Finally, the Circuit Court erred in finding that Lester Raines' relevant market area is fifteen air-miles.

A. The Circuit Court Erred in Granting American Honda's Motion for Summary Judgment without Allowing Lester Raines Any Discovery.

Summary judgment is appropriate only after the non-moving party has enjoyed "adequate time for discovery." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S.Ct. 2548, 2552 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 n. 5 (1986). As this Court has recognized, summary judgment prior to the completion of discovery is "precipitous." *Williams v. Precision Coil, Inc.*, 194 W. Va. 52, 61, 459 S.E.2d 329, 358 (1995) (quoting *Bd. of Educ. of the County of Ohio v. Van Buren & Firestone, Arch., Inc.*, 165 W. Va. 140, 144, 267 S.E.2d 440, 443 (1980)). In addition, this Court has ruled that it is improper to grant summary judgment while discovery motions are pending. See *Truman v. Farmers & Merchants Bank*, 180 W. Va. 133, 375 S.E.2d 765 (1988). *Truman* is strikingly similar to this case. In *Truman*, the plaintiff sought discovery from the defendant bank. However, rather than responding to the discovery requests served upon it, the defendant filed a motion for protective order and later a motion for summary judgment. Plaintiff, still seeking discovery in the case, filed a motion to compel. The Circuit Court granted summary judgment for the defendant without considering the pending discovery motions, including plaintiff's motion to compel discovery. The Supreme Court of Appeals reversed stating:

[t]he trial court should have considered the merits of the motion for a protective order and the motion to compel discovery before addressing whether summary judgment was proper. The essential claim made on appeal is that by foreclosing any discovery on the part of [the plaintiff] by failing to rule on her motion to compel discovery, she was deprived of developing her case so as to resist [the defendant bank's] summary judgment motion.

Truman, 180 W. Va. at 135, 375 S.E.2d at 767. The court further held that “[w]hen, as here, facts relevant to a motion for summary judgment need to be developed by further discovery, the trial court should not grant the motion.” *Id.* at 136, 375 S.E.2d 768.

Additionally, where a party requires additional information to more fully respond to a motion for summary judgment, the court may, pursuant to Rule 56(f) of the West Virginia Rules of Civil Procedure, “refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.” W. Va. R. Civ. P. 56(f). *See also, Harbaugh v. Coffinbarger*, 209 W. Va. 57, 543 S.E.2d 338 (2000); *Payne’s Hardware & Building Supply, Inc. v. Apple Valley Trading Co.*, 200 W. Va. 685, 490 S.E.2d 772 (1997).

Mr. Lester Raines executed a Rule 56(f) affidavit in connection with Lester Raines’ Response to American Honda’s supplemental motion for summary judgment indicating that he believed discoverable, material facts concerning American Honda’s actions existed but had not been discovered due to American Honda’s refusal to participate in discovery. (Mr. Lester Raines’ Rule 56(f) affidavit is attached hereto as Exhibit E.) Even in the face of this affidavit, absolutely no discovery took place in this case before summary judgment was granted.

As set forth in his Rule 56(f) affidavit, Lester Raines was, at a minimum, entitled to discovery on the issue of whether American Honda engaged in any negotiations with Miller Auto Group, or any other dealers in the South Charleston area, prior to sending its May 24, 2006 letter. At the time the Circuit Court granted summary judgment in this case it found, as a matter of law, that American Honda’s May 24, 2006 letter did not constitute notice as contemplated in § 17A-6A-12. (See Exhibit A, Finding of Fact ¶ 3, Conclusion of Law ¶ 2.) This conclusion of law was

made without the benefit of any discovery and was supported only by self-serving assertions by American Honda.

Some narrow discovery could have revealed that, as Lester Raines suspects, American Honda had reached, or nearly reached, an agreement with Miller Auto Group to open the new Honda dealership in South Charleston. Sadly, however, Mr. Miller passed away. It was at this time that Lester Raines believes American Honda changed its plan, had to seek a new dealer, and lost its initial South Charleston location for the dealership. If discovery reveals that these facts are accurate, this speaks directly to the issue of (i) whether American Honda intended its May 24, 2006 letter to constitute statutory notice (even though it denies these allegations now) and (ii) the ultimate issue of whether Lester Raines had standing to bring its declaratory judgment action.

Further, at a minimum, Lester Raines should have been entitled to some discovery with respect to the distance between the proposed new dealership location and Lester Raines' dealership and to determine if a new dealer agreement exists and has a probability of completion. The Circuit Court found, as a matter of fact, without discovery, that the new dealership proposed by American Honda was located more than 15 air-miles from Lester Raines. (*See Exhibit A, Finding of Fact ¶ 9.*) This finding was based on nothing more than a map and the self-serving representations by American Honda and its counsel. Lester Raines could not refute the allegation that the proposed new dealership was located outside the statutory radius because it was not given the opportunity to retain its own surveyor. (*See Exhibit E.*) Before summary judgment was considered by the Circuit Court, Lester Raines should have been entitled to discovery on, at least, these material issues.

American Honda should not have been permitted to stonewall discovery and then seek summary judgment. The Circuit Court erred in granting summary judgment to American Honda,

while discovery motions were pending, without allowing Lester Raines any discovery on the material facts in dispute.

B. American Honda's Actions Were in Violation of West Virginia Code § 17A-6A-12(3).

American Honda's actions in the court below were in complete violation of West Virginia Code § 17A-6A-12(3) which provides, in pertinent part:

[o]nce an action has been filed, the manufacturer or distributor shall not establish or relocate the proposed new motor vehicle dealer until the circuit court has rendered a decision on the matter.

It is clear from American Honda's actions that, despite Lester Raines' filing of its declaratory judgment action, American Honda continued to take steps to attempt to establish a new motor vehicle dealership in the South Charleston area.

As of September 20, 2006, while this matter was still pending before the United States District Court for the Southern District of West Virginia, American Honda represented that it had no exact location for its proposed new car dealership. Lester Raines assumed that American Honda had ceased efforts to establish the dealership due to the pendency of this case. However, between September 2006 and March 2007, American Honda apparently took additional steps to establish a new dealership in an exact location (purportedly outside the then required statutory radius).

The statute does not allow any dealership to be established during the pendency of the declaratory judgment action, whether it is within the relevant market area or purportedly just outside of it. Clearly, despite the prohibition in the statute, American Honda continued to take steps to establish a new dealership. Lester Raines attempted to get discovery before the Circuit

Court aimed at figuring out whether any letter of intent, performance agreement or other commitment had been made between American Honda and the proposed dealer or distributor. Again, however, the Circuit Court failed to permit discovery which was directly relevant to whether American Honda was in violation of the statute under which Lester Raines was seeking declaratory relief. Based upon American Honda's own actions and representations, Lester Raines believes American Honda was continuing to take steps to establish a new dealership during the pendency of Lester Raines declaratory judgment action. American Honda was in direct violation of the statute governing this case and the Circuit Court erred in granting summary judgment to American Honda.

C. The Circuit Court Erred in Finding that Lester Raines' "Relevant Market Area" is Fifteen Air-Miles.

On March 10, 2007, before American Honda even argued its Motion for Summary Judgment to the Circuit Court, the West Virginia legislature passed Senate Bill 601. Senate Bill 601 was designed to amend and reenact West Virginia Code Sections § 17A-6A-3, § 17A-6A-10 and § 17A-6A-12, which relate to establishing or relocating motor vehicle dealerships within a "relevant market area." For purposes of this case, it is significant to note that Senate Bill 601 changed the definition of "relevant market area" from a fifteen (15) air-mile radius around an existing dealership to a twenty (20) air-mile radius around an existing dealership. *See* S.B. 601, 78th Leg., 1st Sess. (W. Va. 2007). Senate Bill 601 provides, in pertinent part:

'Relevant Market Area' means the area located within a twenty air-mile radius around an existing same line-make new motor vehicle dealership: *Provided*, that a fifteen mile relevant market are as it existed prior to the effective date of this statute shall apply to any proposed new motor vehicle dealership as to which a manufacturer or distributor and the proposed new motor vehicle dealer have executed on or before the effective date of this statute a written

agreement, including a letter of intent, performance agreement or commitment letter, concerning the establishment of the proposed new motor vehicle dealership.

Id. Senate Bill 601 was effective from its date of passage on March 10, 2007.

Lester Raines filed its declaratory judgment action in this case on July 20, 2006. At that time, American Honda indicated that it intended to open another Honda dealership in the "South Charleston" area and that such dealership could be operational by December 2007. (See Exhibit B.) Clearly, any location in South Charleston would be within Lester Raines' fifteen air-mile radius as provided by the old statute. Thereafter, American Honda asserted that it did not have a specific location in mind for the dealership. In January 2007, American Honda finally announced that it had determined the exact location for the new proposed dealership and that it was 16.3 air-miles from Lester Raines' dealership. Again, Lester Raines asked the Circuit Court for discovery to determine if any letter of intent, performance agreement or other commitment had been made between American Honda and the proposed distributor. Not only was this information relevant to the issue of whether American Honda violated West Virginia Code § 17A-6A-12(3), but it would have also been important to determining whether Lester Raines was, and is, entitled to the benefit of the new twenty air-mile radius in the statute. The Circuit Court found, as a matter of fact, that American Honda's proposed new dealership was more than fifteen air-miles from Lester Raines' existing dealership and, in so finding, implicitly ruled as a matter of law that Lester Raines was not entitled to the benefit of Senate Bill 601. The Circuit Court erred in finding that Lester Raines relevant market area was fifteen air-miles and that American Honda's proposed dealership was outside of Lester Raines relevant market area.

V. RELIEF PRAYED FOR

The Circuit Court erred in granting American Honda's Motion for Summary Judgment without any discovery. The Circuit Court erred in granting American Honda's Motion for Summary Judgment because American Honda's actions in this case were in express violation of West Virginia Code § 17A-6A-12(3). Finally, the Circuit Court erred by applying the wrong law concerning the definition of relevant market area in this case. For the foregoing reasons, Lester Raines appeals from the Circuit Court of Kanawha County's Order Granting American Honda's Motion for Summary Judgment and respectfully requests that this Honorable Court grant all appropriate relief.

Respectfully submitted,

**RAINES IMPORTS, INC. d/b/a
LESTER RAINES HONDA**

By Counsel



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Counsel for Petitioner, Lester Raines Honda

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

RAINES IMPORTS, INC., d/b/a
LESTER RAINES HONDA, a West Virginia
Corporation,

Plaintiff,

v.

AMERICAN HONDA MOTOR
COMPANY, INC., a California
Corporation,

Defendant.

2007 MAR 26 PM 2:20
Civil Action No. 06-C-1422
Judge Charles E. King, Jr.

**ORDER GRANTING DEFENDANT'S MOTION
FOR SUMMARY JUDGMENT**

On the 21st day of March, 2007, came the Plaintiff, by and through Lester Raines, in person and by counsel, David Barnette, and the Defendant, by counsel, Mychal Schulz and John Sullivan, for consideration of Defendant's Amended and Supplemental Motion for Summary Judgment and/or Dismissal.

After carefully reviewing the Defendant's motion, the Plaintiff's response, the parties' memoranda of law, and pertinent legal authority and hearing the arguments of counsel, this Court has concluded the Defendant's motion should be granted.

Findings of Fact

1. Plaintiff, Raines Imports, Inc., operates an automobile dealership located in South Charleston, West Virginia.
2. Defendant, American Honda Motor Company, Inc., is in the business of manufacturing Honda automobiles which are among the makes of vehicles sold and leased by the



Plaintiff.

3. In a letter dated May 24, 2006, Defendant advised Plaintiff, as a courtesy, that the Defendant was planning to locate another Honda franchise in the "South Charleston area". This letter further indicated that no exact location for this new franchise had been determined.

4. In a letter dated July 19, 2006, Plaintiff objected to the Defendant's letter and indicated that Plaintiff had construed the May 24, 2006 letter as a written notice pursuant to West Virginia Code Section 17A-6A-12(2). West Virginia Code Section 17A-6A-12(2) provides:

Before a manufacturer or distributor enters into a dealer agreement establishing or relocating a new motor vehicle dealer within a relevant market area where the same line-make is represented, the manufacturer or distributor shall give written notice to each new motor vehicle dealer of the same line-make in the relevant market area of its intention to establish an additional dealer or to relocate an existing dealer within that relevant market area.

5. On July 20, 2006, Plaintiff filed a complaint for declaratory judgment pursuant to West Virginia Code Section 17A-6A-12(3) in the Circuit Court of Kanawha County. Under this subsection, a new motor vehicle dealer may bring a declaratory judgment action to determine whether good cause exists for the opening of the proposed new motor vehicle dealer within the established dealer's relevant market area. West Virginia Code Section 17A-6A-3(14) defines "relevant market area" as the area located within a fifteen (15) air-mile radius around an existing same line-make new motor vehicle dealership.

6. In a letter dated July 27, 2006, Defendant, without knowledge of the pending lawsuit, responded to Plaintiff's July 19, 2006 letter. In its response, the Defendant stated the May 24, 2006 letter was not a notice pursuant to West Virginia Code Section 17A-6A-12(2);

restated that the location for the new dealership had not been determined; advised Plaintiff that the Defendant did not anticipate the new dealership would be within the Plaintiff's relevant market area and advised Plaintiff that if the Defendant decided to locate the new dealership within the Plaintiff's relevant market area, the Defendant would send Plaintiff notice pursuant to West Virginia Code Section 17A-6A-12(2).

7. On August 21, 2006, Defendant removed this action to United States District Court for the Southern District of West Virginia.

8. On December 12, 2006, the Honorable David A. Faber remanded this action to the Circuit Court of Kanawha County, West Virginia.

9. Defendant has recently decided on the location for the new dealership. The site for the new dealership is located more than 15 air-miles from the location of the Plaintiff's existing dealership.

Conclusions of Law

1. Standing is defined as party's right to make a legal claim to seek judicial enforcement of a duty or right. *Findley v. State Farm Mutual Automobile Insurance Company*, 213 W.Va. 80, 576 S.E.2d 807 (2003).

2. Defendant's letter of May 24, 2006, to Plaintiff did not constitute notice pursuant to West Virginia Code Section 17A-6A-12(2).

3. Because Defendant's letter of May 24, 2006 to Plaintiff did not constitute notice pursuant to West Virginia Code Section 17A-6A-12(2), Plaintiff does not have standing to bring its claim against Defendant.

4. The standard for granting motions for summary judgment has been stated by the

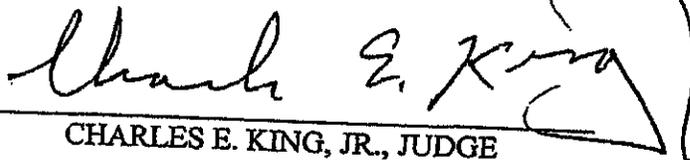
West Virginia Supreme Court of Appeals as “[a] motion for Summary Judgment should be granted only when it is clear that there is no genuine issue of fact to be tried and inquiry concerning the facts is not desirable to clarify the application of law.” *Williams v. Precision Coal, Inc.*, 194 W.Va. 52, 59, 459 S.E.2d 329, 336 (1995), quoting Syllabus Point 1, *Andrik v. Town of Buckhannon*, 187 W.Va. 706, 421 S.E.2d 247 (1992), quoting Syllabus Point 3, *Aetna Casualty & Surety Co. v. Federal Insurance Co. of New York*, 148 W.Va. 160, 133 S.E.2d 770 (1963). In following this standard, this Court finds that there is no genuine issue of fact to be tried in this matter.

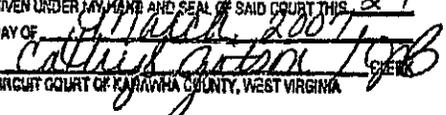
WHEREFORE, this Court does hereby **ORDER** that the Defendant’s Amended and Supplemental Motion for Summary Judgment and/or Dismissal is **GRANTED**.

The Court does **FURTHER ORDER** that a certified copy of this Order be sent to all parties or counsel of record.

The Court notes the objection and exception of the party aggrieved by this Order.

Entered this 26TH day of March, 2007.


CHARLES E. KING, JR., JUDGE

STATE OF WEST VIRGINIA
COUNTY OF KANAWHA, SS
I, CATHY S. GATSON, CLERK OF CIRCUIT COURT OF SAID COUNTY
AND IN SAID STATE, DO HEREBY CERTIFY THAT THE FOREGOING
IS A TRUE COPY FROM THE RECORDS OF SAID COURT.
GIVEN UNDER MY HAND AND SEAL OF SAID COURT THIS 27TH
DAY OF MARCH, 2007.

CATHY S. GATSON, CLERK
CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA



May 24, 2006

Mr. Lester Raines
LESTER RAINES HONDA
5102 MacCorkle Ave., SW
S. Charleston, WV 25309

Dear Mr. Raines:

As a courtesy, American Honda hereby advises you that another Honda franchise will be located in the "South Charleston" area.

Currently, no exact location or specific timeline has been established, but it is anticipated that the new dealership could be operational by December 2007.

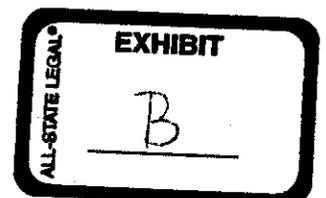
If you have any questions, please feel free to contact me at (937) 440.5034.

Sincerely,

A handwritten signature in black ink, appearing to read 'C.D. Miller'.

Christian D. Miller
Assistant Zone Manager – Market Representation

cc: G.P. Russo, Zone Sales Manager



Automobile Sales Division • Central Zone Office

LR0001

Lester Raines

RAINES REPORTS, INC.

HONDA MAZDA MITSUBISHI

5111 MacCORKLE AVENUE S.W. • SO. CHARLESTON, W.VA. 25309
PHONE: (304) 768-1251 FAX: (304) 768-2428

July 19, 2006

CERTIFIED MAIL - RETURN RECEIPT REQUESTED
AND VIA TELECOPIER (937) 440-5055

Christan D. Miller
Assistant Zone Manager - Market Representation
Honda Automobile Sales Division
Central Zone Office
American Honda Motor Company, Inc.
101 South Stanfield Road
Troy, Ohio 45373

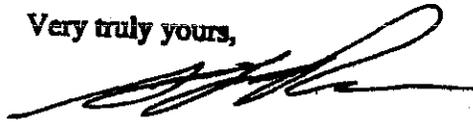
Re: Your Letter of May 24, 2006

Dear Mr. Miller:

Please be advised that Lester Raines Honda objects pursuant to W. Va. Code § 17A-6A-12(2) of your location of a Honda franchise within the "South Charleston" area. W. Va. Code § 17A-6A-3(14) defines a relevant market area as the area located within a 15-air mile radius around an existing same line new motor vehicle dealership.

W. Va. Code § 17A-6A-12(3) provides that a declaratory judgment action can be brought against American Honda Motor Company at which time you would be compelled to show that good cause exists for the establishment of a location of a "South Charleston" Honda dealership. Please be advised that I fully intend to file such declaratory judgment action absent a representation by you that you will not establish another Honda franchise in the "South Charleston" area.

Very truly yours,



Lester Raines

LR/DAB/jet





July 27, 2006

CERTIFIED MAIL RETURN RECEIPT REQUESTED
AND VIA TELECOPIER (304) 768-2428

Lester Raines
President
Raines Imports, Inc. d/b/a Lester Raines Honda
5111 MacCorkle Avenue SW
So. Charleston, W.Va. 25309

Re: Your Letter Dated July 19, 2006

Dear Mr. Raines:

I am writing in connection with your letter dated July 19, 2006, which references our letter to you dated May 24, 2006, in which American Honda advised you, as a courtesy, that another Honda franchise will be located in the "South Charleston area" at some point in the future but that, currently, no exact location or specific timeline has been established.

In your July 19, 2006 letter, you state that "Lester Raines objects pursuant to W.Va. Code § 17A-6A-12(2) of your location of a Honda franchise within the 'South Charleston' area." American Honda does not understand this purported "objection." Subsection (2) of § 17A-6A-12 does not provide for an "objection" by a dealer, but rather a notice by a franchisor. The only provision of § 17A-6A-12 that provides for any type of dealer objection is subsection (3), which permits a dealer to file a declaratory judgment action protesting a notice given by a franchisor under subsection (2).

ALL-STATE LEGAL
EXHIBIT
D

Automobile Sales Division • Central Zone Office

LR0003

American Honda has not given you notice pursuant to subsection (2), which provides that, "Before a manufacturer or distributor enters into a dealer agreement establishing . . . a new motor vehicle dealer within a relevant market area where the same line-make is represented, the manufacturer or distributor shall give written notice to each new motor vehicle dealer of the same line-make in the relevant market area of its intention to establish an additional dealer . . . within that relevant market area." As your letter acknowledges, a "relevant market area" is defined by the statute as "the area located within a fifteen air-mile radius around an existing same line-make new motor vehicle dealership." W.Va. Code § 17A-6A-3(14). As stated in our letter dated May 24, 2006, American Honda has not decided on any specific location for a new dealership in the South Charleston area. Accordingly, at this time it is impossible to determine whether any dealership established in the future might be within your relevant market area and thus whether your dealership would have any right to protest under § 17A-6A-12(3).

At this time, American Honda does not anticipate that the prospective new dealership in the South Charleston area will be within your relevant market area. If, however, American Honda decides to establish a new dealership within your relevant market area, you will receive notice pursuant to § 17A-6A-12(2).

Sincerely,



Christian D. Miller
Assistant Zone Manager-Market Representation

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

**RAINES IMPORTS, INC., d/b/a
LESTER RAINES HONDA, a West Virginia
Corporation,**

Plaintiff,

v.

**CIVIL ACTION NO. 06-C-1422
The Honorable Charles E. King**

**AMERICAN HONDA MOTOR
COMPANY, INC., a California Corporation,**

Defendant.

AFFIDAVIT OF LESTER RAINES

STATE OF WEST VIRGINIA

COUNTY OF KANAWHA, to wit:

I, Lester Raines, being first duly sworn, deposes and states as follows:

1. I am the owner and President of Raines Imports, Inc., d/b/a Lester Raines Honda, located in South Charleston, Kanawha County, West Virginia. I am submitting this Affidavit in opposition to American Honda Motor Company, Inc.'s ("American Honda") Amended and Supplemental Motion for Summary Judgment and/or Dismissal and in accordance with Rule 56(f) of the West Virginia Rules of Civil Procedure. I have personal knowledge of the facts set forth herein.

2. American Honda first advised me, by letter dated May 24, 2006, that it planned to open a new Honda dealership in South Charleston. Thereafter, on July 27, 2006, American Honda advised that it did not have an exact location chosen in South Charleston. Through the course of this litigation, I have learned that American Honda

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now wants to locate a new Honda dealer in an exact location approximately sixteen (16) miles from my current dealership.

3. Through this litigation my lawyers have tried to get discovery from American Honda concerning its plans to open a new Honda dealership with my market area. American Honda has refused to answer any discovery or produce witnesses for depositions. I believe that discoverable, material facts exist concerning American Honda's actions in this case but such information has not been discovered due to American Honda's refusal to participate in discovery.

4. I believe these discoverable, material facts can be realistically discovered within the remaining six (6) month period established by this Court, and agreed to by American Honda, for discovery.

5. The discoverable facts I am seeking from American Honda will, if obtained, be sufficient to create issues both genuine and material to this case. Specifically, while the former statute governing this case set the relevant market area surrounding my dealership at a fifteen (15) air-mile radius, the new statute now creates a twenty (20) air-mile radius. The exact location of American Honda's proposed new dealership is relevant, genuine and material to the issues in this case.

6. The facts I am seek to discover in this case include, but are not limited to:

- The exact location of the proposed new dealership (as established by a surveyor of my choice) for the reasons explained above;
- Whether or not a new dealer has been identified and whether a new dealer agreement has been reached;

- Facts relied upon by American Honda which American Honda asserts demonstrates good cause for establishing a new Honda dealership in the South Charleston market area;
- The investigation and research that was done to conclude that the relevant South Charleston market could support a new Honda dealership;
- The allocation of vehicles American Honda anticipates providing to the proposed new dealership;
- Whether American Honda engaged in negotiations with any existing dealerships in the region, including Miller Auto Group; and
- What research, investigation, facts or documents American Honda relied upon for its May 24, 2006 assertion that it would have a new dealership open in South Charleston by December of 2007.

7. Neither I, nor my counsel, have failed to conduct discovery in this matter.

It is American Honda that has refused to engage in discovery in this case thus preventing me from adequately being able to refute the allegations contained in the affidavit of William Green and in the pending Amended and Supplemental Motion for Summary Judgment and/or Dismissal filed by American Honda.

8. Additionally, I had no idea where American Honda was considering placing its new dealership until I received a copy of the pending Motion for Summary Judgment. Thus, I was unable to conduct my own investigation and/or survey concerning the proposed location for the new dealership.

9. Without some discovery in this matter, I am unable to adequately refute the allegations contained in the affidavit of William Green and in the pending Amended and Supplemental Motion for Summary Judgment and/or Dismissal filed by American Honda.

Further this Affiant saith not.

Dated this 12th day of March, 2007.



Lester Raines

Taken, subscribed and sworn to before the undersigned this 12th day of March, 2007. My commission expires May 28, 2012.





Notary Public

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

**RAINES IMPORTS, INC., d/b/a
LESTER RAINES HONDA, a West Virginia
Corporation,**

Plaintiff,

APPEAL NO. _____

v.

**CIVIL ACTION NO. 06-C-1422
The Honorable Charles E. King**

**AMERICAN HONDA MOTOR
COMPANY, INC., a California Corporation,**

Defendant.

CERTIFICATE OF SERVICE

I, David Allen Barnette, counsel for the Plaintiff, do hereby certify that a true copy of the foregoing *Brief on Behalf of Appellant, Raines Imports, Inc. d/b/a Lester Raines Honda* was served this 22 day of September, 2008, by first-class mail, postage prepaid, addressed as follows:

Mychal Sommer Schulz, Esquire (WVSB# 6092)
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Counsel for Respondent



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