

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

LS MOTORSPORTS, LLC AND BEST)
BUY VEHICLES, INC.,)
)
Petitioner,)
)
vs.) Case Nos. 07-0655
) 07-2772
WENMARK, INC., d/b/a)
ALL THE WHEEL TOYS,)
)
Respondent.)
_____)

RECOMMENDED ORDER

Pursuant to notice a formal hearing was held on July 19, 2007, in Palm City, Florida, before J. D. Parrish, a designated Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

For Petitioners: No Appearance

For Respondent: Mark Mourning, Pro Se
WenMark, Inc. d/b/a
All the Wheel Toys
1540 Northwest Federal Highway
Stuart, Florida 34994

STATEMENT OF THE ISSUE

The issue in these cases is whether the Petitioner is entitled to establish a dealership for the sale of certain motor vehicles. As to both cases, the Respondent currently sells motorcycles that are manufactured by the same companies

for which the Petitioner seeks approval.

PRELIMINARY STATEMENT

On January 26, 2007, the Department of Highway Safety and Motor Vehicles caused to be published a notice in the Florida Administrative Weekly. The notice announced that LS MotorSports, LLC, intended to establish a dealership for the sale of Zhejiang Lingyun (ZHEL), Chongqing Lifan (CHOL), Chongqing Zongshen (ZONG) and Jiangsu Linhai (LINH) motorcycles at 3525 South U.S. 1, Fort Pierce (Saint Lucie County), Florida on or after December 7, 2006. The dealership name was Best Buy Vehicles, Inc. (Best Buy). Thereafter, the Respondent, WenMark, Inc., d/b/a All the Wheel Toys (Respondent) timely challenged the approval of the dealership proposed by Best Buy. The Respondent maintains it has an exclusive right to sell motorcycles within the geographical area that Best Buy seeks to sell. This case was forwarded to the Division of Administrative Hearings for formal proceedings on February 8, 2007, and was designated DOAH Case No. 07-0655.

Similarly, DOAH Case No. 07-2772, resulted from a second challenge filed by Respondent. The notice in that case was published in the Florida Administrative Weekly on June 15, 2007, and involves the same parties. The motor vehicles in the second case are Qianjiang Motorcycles Group Corporation (QIAN) and Chunfeng Holding Group Co. Ltd. (CFHG). The

Respondent maintains it is exclusively entitled to sell the named motor vehicles in the geographical area sought by Best Buy.

On July 10, 2007, a telephone conference call was conducted in DOAH Case No. 07-2772, and the parties' ore tenus motion for consolidation was granted. As DOAH Case No. 07-0655 was then scheduled for final hearing on July 19, 2007, the parties agreed that the cases would proceed to hearing as scheduled.

At the hearing, Mark Mourning appeared and testified on behalf of the Respondent. No one appeared for LS MotorSports, LLC and Best Buy and no evidence was presented to support the new dealership. A transcript of the proceeding was not filed. The Respondent's Composite Exhibit 1 was admitted into evidence at hearing. The Respondent was also to late-file exhibits that would clarify testimony presented at the hearing. More specifically, the Respondent was to file copies of his agreements with the manufacturers of the motorcycles wherein his company was granted exclusive rights to sell. On August 8, 2007, an unsigned document purportedly from X Power Motor Company was filed with the Division of Administrative Hearings. The record in these cases was then closed. None of the parties filed a proposed recommended order.

FINDINGS OF FACT

1. The Respondent, WenMark, Inc. d/b/a All the Wheel Toys, is an existing dealer of motor vehicles as defined in Section 320.60(11), Florida Statutes (2007).

2. At all times material to the allegations of this case, the Petitioner, LS MotorSports, LLC and Best Buy Vehicles, Inc.,

sought approval for a motor vehicle dealership to be located at 3525 South U.S. 1, Fort Pierce (Saint Lucie County), Florida.

3. The Petitioner's proposed location is within 13 miles of the Respondent's dealership at 1540 Northwest Federal Highway, Stuart (Martin County), Florida. This distance was calculated by MapQuest, an internet site providing directions and distances, but was verified by Mark Mourning. The addresses are on the same road, that is to say "Federal Highway" or U.S. 1. One location is simply north of the other.

4. The Respondent is licensed by the Department of Highway Safety and Motor Vehicles and is authorized to sell motorcycles manufactured by various manufacturers. Some confusion in these cases results because the motorcycles are manufactured outside of this country, imported, and may or may not be sold with the same name brands. Essentially, the Respondent maintained it was granted an exclusive right to sell motorcycles described in this record as ZONG, CFHG, and LINH. It is the Respondent's assertion that Petitioners have been unlawfully selling motorcycles that have been distributed in violation of its exclusive right to sell.

5. Additionally, since the existing dealership is adequately meeting the needs of the geographical area to be

served by the Petitioners, the Respondent maintains it should continue to be the sole approved dealership for the area.

6. According to the Respondent's most recent sales data, 78 percent of its sales are within 20 miles of the proposed dealership.

7. If allowed to sell motorcycles at the proposed location, the Petitioners will in all likelihood take sales away from the existing dealer.

8. The Petitioners have presented no evidence to support the new point location.

9. The motorcycles at issue in this case may bear the names of customized sellers. That is to say, unlike automobiles, the manufacturers and distributors of these types of vehicles are inclined to "name" the cycle based upon the seller's preference. The Respondent maintains that it has exclusive right to sell the motor vehicles based upon the manufacturers and distributors regardless of the vehicle's ultimate sales "name." The Petitioners presented no evidence to refute this assertion.

10. The new point dealership would be located in St. Lucie County, Florida, a county of less than 300,000 population, according to the latest population estimates of the University of Florida, Bureau of Economic and Business Research.

CONCLUSIONS OF LAW

11. The Division of Administrative Hearings has

jurisdiction over the parties to, and the subject matter of, these proceedings. §§ 120.57(1), and 320.699, Fla. Stat. (2007).

12. For purposes of this case, "motor vehicle" includes any new motorcycle. And, "motor vehicle dealer" means any entity that is licensed to sell motorcycles. See §§ 320.60(10) and (11), Fla. Stat. (2007).

13. Section 320.642(2), Florida Statutes (2007), provides, in pertinent part:

(2)(a) An application for a motor vehicle dealer license in any community or territory shall be denied when:

* * *

2. The licensee fails to show that the existing franchised dealer or dealers who register new motor vehicle retail sales or retail leases of the same line-make in the community or territory of the proposed dealership are not providing adequate representation of such line-make motor vehicles in such community or territory. The burden of proof in establishing inadequate representation shall be on the licensee.

14. The conditions for standing to protest an additional motor vehicle dealership are provided in Section 320.642(3)(a) for counties with populations of less than 300,000 such as St. Lucie County. These standing requirements will be enforced according to parameters plainly set forth by the legislature. See Braman Cadillac, Inc. v. Department of Highway Safety and

Motor Vehicles, 584 So.2d 1047 (Fla. 1st DCA 1991). In this matter, the Respondent has demonstrated it has standing to contest the new point dealership.

15. The Petitioners have not shown by any evidence that the existing dealership is providing inadequate representation in the community or territory of the proposed dealership.

16. Inasmuch as the existing dealership has shown a substantial percentage of its sales would fall within 20 miles of the proposed dealership, it has adequately demonstrated it would be financially harmed if another dealer were approved.

17. Section 320.605, Florida Statutes (2007), provides as follows:

It is the intent of the Legislature to protect the public health, safety, and welfare of the citizens of the state by regulating the licensing of motor vehicle dealers and manufacturers, maintaining competition, providing consumer protection and fair trade and providing minorities with opportunities for full participation as motor vehicle dealers.

18. Based upon the foregoing, the Petitioners have failed to establish they are entitled to a new point motorcycle dealership as requested.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Department of Highway Safety and Motor Vehicles enter a Final Order denying the new

point dealership sought by the Petitioners.

DONE AND ENTERED this 5th day of September, 2007, in
Tallahassee, Leon County, Florida.



Hearings

J. D. Parrish
Administrative Law Judge
Division of Administrative

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Hearings

Filed with the Clerk of the
Division of Administrative

this 5th day of September, 2007.

COPIES FURNISHED:

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 15 days from the date of this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will issue the Final Order in this case.