

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

PEACE INDUSTRY GROUP, INC.,            )  
AND BAYSIDE AUTO SALES, INC.,        )  
  )  
      Petitioners,                        )  
  )  
vs.                                        )     Case No. 08-4040  
  )  
MOTO IMPORTS DISTRIBUTORS, LLC,     )  
  )  
      Respondent.                        )  
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  )

RECOMMENDED ORDER

Pursuant to notice, a formal hearing was held on January 6, 2009, in Panama City, Florida, before Diane Cleavinger, a duly-designated Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

For Petitioner Peace Industry Group:

No appearance

For Petitioner Bayside Auto Sales:

Larry Bradberry  
1301 Harrison Avenue  
Panama City, Florida 32401

For Respondent Moto Imports Distributors, Inc.:

Wayne Wooten  
12202 Hutchison Boulevard Suite 72  
Panama City Beach, Florida 32407

STATEMENT OF THE ISSUE

Whether the application of Peace Industry Group (Peace) and Bayside Auto Sales, Inc. (Bayside) to establish an additional

franchised dealership for the sale of Astronautical Bashan motorcycles to be located at Bayside Auto Sales, 1301 Harrison Avenue, Panama City, Bay County, Florida, should be granted.

PRELIMINARY STATEMENT

By publication in the August 1, 2008, Florida Administrative Law Weekly, Petitioners Peace and Bayside, provided notice of their intent to establish Bayside as a dealership for the sale of Astonautical Bashan motorcycles at 1301 Harrison Avenue, Panama City, Florida. Pursuant to Section 320.642, Florida Statutes (2008), Respondent, Moto Imports Distributors, Inc. (Moto or Respondent), timely filed a protest of the establishment of the proposed dealership with the Department of Highway Safety and Motor Vehicles (Department).

The Department forwarded the letter of protest to the Division of Administrative Hearings for assignment of an Administrative Law Judge to conduct a formal hearing.

At hearing, Petitioner Bayside presented the testimony of one witness. Bayside did not offer any exhibits into evidence. Petitioner Peace did not appear at the hearing. Respondent Moto presented the testimony of one witness and offered two exhibits into evidence.

After the hearing, neither party filed Proposed Recommended Orders.

FINDINGS OF FACT

1. Petitioner Peace is a licensed distributor of motor vehicles in Florida and is authorized to sell motor vehicles to its dealers in Florida.

2. Petitioner Bayside is a licensed motor vehicle dealer in Florida and is located at 1301 Harrison Avenue, Panama City, Florida.

3. Respondent Moto is a licensed motor vehicle dealer in Florida and an existing Astronautical Bashan dealer located at 12202 Hutchison Blvd Suite 72, Panama City Beach, Florida.

4. Currently, Moto sells the product line of Peace, including the Astronautical Bashan product line. Additionally, Moto has a franchise agreement with Peace. The agreement establishes a franchise territory with a 25-mile radius around Moto's location.

5. Petitioner Peace proposes to establish Bayside as a dealership for the sale of Astronautical Bashan motorcycles. The proposed dealership would be within six miles of Moto's dealership.

6. The two dealerships are located in Bay County and are separated by the Hathaway Bridge. Both draw customers from Bay County, with at least 20 percent of Moto's customers located within 20 miles of Moto's location. There was no consumer data or analysis of sales in the motorcycle industry offered into

evidence. However, Moto's franchise agreement with Peace establishes a market area of at least a 25-mile radius from Moto's location. Bayside clearly is located within Moto's market area.

7. There was no evidence which demonstrated Peace's market share in the motorcycle market. There was no evidence presented analyzing the motorcycle market in the Panama City area. Likewise, there was no evidence presented regarding anticipated growth in the market area. This type of evidence is generally presented by the distributor or manufacturer of the product. As indicated, Peace did not appear at the hearing. Given this lack of evidence, the market share for Peace or Astronautical Bashan motorcycles cannot be established.

8. Moreover, a determination that the establishment of a second dealership in the Panama City territory is warranted must be based on the economic and marketing conditions pertinent to dealers competing in the territory. Given this lack of evidence, Petitioners failed to establish that Peace was underrepresented in the Panama City/Bay county area. Since there is no evidence to support the establishment of a second dealership, Petitioners' application to establish such a dealership should be denied.

#### CONCLUSIONS OF LAW

9. The Division of Administrative Hearings has jurisdiction over the parties to and the subject matter of this proceeding. §§ 120.57 and 120.569, Fla. Stat. (2008).

10. The scope of the inquiry in the case is set forth in Section 320.642, Florida Statutes (2008), which provides in pertinent part:

(1) Any licensee who proposes to establish an additional motor vehicle dealership or permit the relocation of an existing dealer to a location within a community or territory where the same line-make vehicle is presently represented by a franchised motor vehicle dealer or dealers shall give written notice of its intention by certified mail to the department.

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

1. A timely protest is filed by a presently existing franchised motor vehicle dealer with standing to protest as defined in subsection (3); and

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.

(b) In determining whether the existing franchised motor vehicle dealer or dealers are providing adequate representation in the community or territory for the line-make, the department may consider evidence which may include, but is not limited to:

1. The impact of the establishment of the proposed or relocated dealer on the consumers, public interest, existing dealers, and the licensee; provided, however, that financial impact may only be considered with respect to the protesting dealer or dealers.

2. The size and permanency of investment reasonably made and reasonable obligations incurred by the existing dealer or dealers to perform their obligations under the dealer agreement.

3. The reasonably expected market penetration of the line-make motor vehicle for the community or territory involved, after consideration of all factors which may affect said penetration, including, but not limited to, demographic factors such as age, income, education, size class preference, product popularity, retail lease transactions, or other factors affecting sales to consumers of the community or territory.

4. Any actions by the licensees in denying its existing dealer or dealers of the same line-make the opportunity for reasonable growth, market expansion, or relocation, including the availability of line-make vehicles in keeping with the reasonable expectations of the licensee in providing an adequate number of dealers in the community or territory.

5. Any attempts by the licensee to coerce the existing dealer or dealers into consenting to additional or relocated franchises of the same line-make in the community or territory.

6. Distance, travel time, traffic patterns, and accessibility between the existing dealer or dealers of the same line-make and the location of the proposed additional or relocated dealer.

7. Whether benefits to consumers will likely occur from the establishment or relocation of the dealership which the protesting dealer or dealers prove cannot be obtained by other geographic or demographic changes or expected changes in the community or territory.

8. Whether the protesting dealer or dealers are in substantial compliance with their dealer agreement.

9. Whether there is adequate interbrand and intrabrand competition with respect to said line-make in the community or territory and adequately convenient consumer care for the motor vehicles of the line-make,

including the adequacy of sales and service facilities.

10. Whether the establishment or relocation of the proposed dealership appears to be warranted and justified based on economic and marketing conditions pertinent to dealers competing in the community or territory, including anticipated future changes.

11. The volume of registrations and service business transacted by the existing dealer or dealers of the same line-make in the relevant community or territory of the proposed dealership.

11. The burden of proof in this proceeding is on Petitioners. § 320.642(2)(a)2., Fla. Stat. In order to prevail, Petitioners must establish by a preponderance of the evidence that the existing franchised dealer is not providing adequate representation of the same line-make motor vehicles in the designated community or territory.

12. Having weighed the statutory criteria enumerated in Section 320.642(2), Florida Statutes, in light of the facts found herein, Petitioners have not met their burden of proving by a preponderance of the evidence that the existing Peace dealer is providing inadequate representation to the Panama City/Bay County territory. There was no evidence that demonstrated the benefits of establishing the proposed dealership would outweigh any negative impact on the existing dealer. Therefore, the establishment of Peace's dealership at Bayside's location should be denied.

RECOMMENDATION

Based upon 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 establishment of Peace's dealership at Bayside, 1301 Harrison Avenue, Panama City, Florida.

DONE AND ENTERED this 13th day of February, 2009, in Tallahassee, Leon County, Florida.

*Diane Cleavinger*

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DIANE CLEAVINGER  
Administrative Law Judge  
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Filed with the Clerk of the  
Division of Administrative Hearings  
this 13th day of February, 2009.

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.