

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

ADLY MOTO, LLC, AND SCOOTER)
SUPERSTORE OF AMERICA, INC.,)
)
Petitioners,)
)
vs.) Case No. 08-4386
)
SOLANO CYCLE, INC.,)
)
Respondent.)
_____)

RECOMMENDED ORDER

A formal hearing was conducted in this case on June 17, 2009, in Gainesville, Florida, before Barbara J. Staros, Administrative Law Judge with the Division of Administrative Hearings.

APPEARANCES

For Petitioners: Neil Davis
Adly Moto, LLC
Hammerhead
1725 Hurd Drive, Suite 108
Irving, Texas 75038

Mark Calzaretta
Scooter Superstore of America
2311 Thomas Street
Hollywood, Florida 33020

For Respondent: Martin Solano, President
Solano Cycle, Inc.
1024 South Main Street, Suite A
Gainesville, Florida 32601

STATEMENT OF THE ISSUE

The issue is whether Petitioners' application to establish a new dealership for the sale of motorcycles manufactured by Herchee Industrial Co., Ltd. (HERH), at 203 Northeast Avenue, Gainesville, Florida 32609, should be granted.

PRELIMINARY STATEMENT

In the Florida Administrative Weekly, Volume 34, Number 31, August 1, 2008, the Department of Highway Safety and Motor Vehicles (DHSMV) published a Notice of Publication for a New Point Franchise Motor Vehicle Dealer in a County of Less than 300,000 Population. Said notice advised that Petitioner Adly Moto, LLC, intended to establish Scooter Superstore of America, Inc., as a new dealership for the sale of motorcycles manufactured by Herchee Industrial Co., Ltd. (HERH), at 203 Northeast 39 Avenue, Gainesville, Alachua County, Florida 32609.

On or about August 28, 2008, Respondent Solano Cycle, Inc., filed a Petition or Complaint Protesting Establishment of Dealership (Petition) with DHSMV about the proposed new motorcycle dealership. DHSMV referred the Petition to the Division of Administrative Hearings on September 4, 2008. The case was assigned to Administrative Law Judge Ella Jane P. Davis and was subsequently reassigned to the undersigned.

On September 30, 2008, a Notice of Hearing was issued scheduling a final hearing on March 24 through 26, 2009.

Petitioners requested a continuance of the hearing which was granted. An Order Re-Scheduling Hearing was issued rescheduling the hearing for June 17 through 19, 2009.

On June 11, 2009, an Order granting Motion to Withdraw as Counsel was issued to Respondent's counsel. Neither party filed any response in compliance with the Order of Pre-hearing Instructions. Neither the Petitioners nor the Respondent were represented by counsel at the hearing. No expert testimony was presented.

The hearing commenced as scheduled and concluded in one day. Petitioners presented the testimony of Neil Davis and Mark Calzaretta. Petitioners offered Exhibits 1 through 4, which were admitted into evidence. Respondent presented the testimony of Martin Solano. Respondent offered Exhibits 1 through 9, which were admitted into evidence.

The hearing was not transcribed. Petitioner Adly Moto submitted a Proposed Recommended Order. Petitioner Scooter Superstore submitted a Proposed Recommended Order and an After Hearing Statement. Respondent did not file a post-hearing submission.

FINDINGS OF FACT

1. While the dealership agreement between Petitioner Adly Moto (Adly) and Respondent is not in evidence, the weight of the

evidence established that Respondent is an existing franchised dealer for Petitioner Adly.

2. According to DHSMV's published notice, Petitioner Adly intended to establish a new motorcycle dealership, Scooter Superstore, at 203 Northeast 39th Avenue, Gainesville, Florida, on or after July 16, 2008. There is no real dispute that this location is only 3 to 4 miles from Respondent's place of business. Therefore, Respondent has standing to protest Petitioner's application pursuant to Section 320.642(3)(a)2., Florida Statutes (2008).

3. Respondent's license number is not in evidence.

4. According to DHSMV's published notice, Adly intended to establish Scooter Superstore as a dealer for the sale of HERH motorcycles. Currently, Respondent sells Adly motorcycles. The only evidence of record that HERH manufactures Adly products is an announcement dated April 2008 which states that "Her Chee Industrial/ADLY Moto LLC (USA) is proudly introducing Hammerhead Off-Road as our scooter distribution partner in the US." It is therefore presumed that HERH manufactures Adly products.

5. According to the evidence presented, Respondent has sold primarily scooters of 50 cubic centimeters or less. Respondent insists that he has ordered vehicles over 50 cubic centimeters from the distributor, but that the distributor has refused to ship these vehicles to him. There is evidence that

at least three such vehicles were ordered by Solano Cycle, Inc., but the evidence is inconclusive as to whether or not these vehicles were to be offered for sale at the Gainesville location which is the subject of this controversy, or at another Solano Cycle location in another city. However, the evidence is insufficient to establish conclusively as to whether or not Adly vehicles larger than 50 cubic centimeters have been sold by Respondent.¹

6. The market in Gainesville, Florida, comprises primarily college students and professors. According to Martin Solano, president of Respondent, the market in Gainesville is primarily scooters of 50 cubic centimeters or less.

7. Other than anecdotal observations, no competent substantial evidence was presented as to the Gainesville market. There is no evidence establishing an objective, reasonable standard against which to compare the actual market penetration achieved by the existing dealer.

8. Respondent moved to a larger location because the earlier location was very small and, therefore, could not hold a lot of stock.

9. There is no evidence as to Respondent's profits, capitalization, or financial resources to compete with the proposed new dealership.

10. No market penetration data, whether inter-brand or intra-brand, is in evidence.

11. Since an objective reasonable standard was not established, the actual penetration achieved against the expected standard cannot be established.

CONCLUSIONS OF LAW

12. The Division of Administrative Hearings has jurisdiction over the parties and subject matter of this proceeding pursuant to Sections 320.699, 120.569, and 120.57(1), Florida Statutes (2008).

13. The definition of motor vehicle does not include motorcycles powered by a motor with a displacement of 50 cubic centimeters or less. § 320.27(1)(b), Fla. Stat. (2008).

14. Section 320.642, Florida Statutes (2008), sets forth the procedure for establishing proposed motor vehicle dealerships or permitting the relocations of such dealerships as follows 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 to the department. Such notice shall state:

(a) The specific location at which the additional or relocated motor vehicle dealership will be established.

(b) The date on or after which the licensee intends to be engaged in business with the additional or relocated motor vehicle dealer at the proposed location.

(c) The identity of all motor vehicle dealers who are franchised to sell the same line-make vehicle with licensed locations in the county or any contiguous county to the county where the additional or relocated motor vehicle dealer is proposed to be located.

(d) The names and addresses of the dealer-operator and principal investors in the proposed additional or relocated motor vehicle dealership.

Immediately upon receipt of such notice the department shall cause a notice to be published in the Florida Administrative Weekly. The published notice shall state that a petition or complaint by any dealer with standing to protest pursuant to subsection (3) must be filed not more than 30 days from the date of publication of the notice in the Florida Administrative Weekly. The published notice shall describe and identify the proposed dealership sought to be licensed, and the department shall cause a copy of the notice to be mailed to those dealers identified in the licensee's notice under paragraph (c).

(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 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.

(3) An existing franchised motor vehicle dealer or dealers shall have standing to protest a proposed additional or relocated motor vehicle dealer where the existing motor vehicle dealer or dealers have a franchise agreement for the same line-make vehicle to be sold or serviced by the proposed additional or relocated motor vehicle dealer and are physically located so as to meet or satisfy any of the following requirements or conditions:

(a) If the proposed additional or relocated motor vehicle dealer is to be located in a county with a population of

less than 300,000 according to the most recent data of the United States Census Bureau or the data of the Bureau of Economic and Business Research of the University of Florida:

* * *

2. The existing motor vehicle dealer or dealers of the same line-make have a licensed franchise location within a radius of 20 miles of the location of the proposed additional or relocated motor vehicle dealer;
(emphasis added)

15. Respondent met its burden of proving that it had standing to protest Petitioners' applications.

16. Petitioners have the burden to establish that Respondent is not providing adequate representation of the line-make in the community or territory. See § 320.642(2)(a)2., Fla. Stat. (2008).

17. The above-referenced statute sets forth 11 factors which may be considered in determining whether there is adequate representation for the line-make.

18. Factor 1 addresses the impact a new dealership will have on consumers, the public interest, existing dealers and the licensee. Other than anecdotal testimony and conjecture, there is no competent evidence establishing the impact on these entities.

19. Factor 2 relates to the size and permanency of the dealer's investments and obligations it has incurred to comply

with its dealer agreement. The dealer agreement is not in evidence, nor are the totality of the dealer's investments and obligations. Thus, it is impossible to reach a conclusion of law as to factor 2.

20. Factor 3 relates to the reasonably expected market penetration of the line-make for the community or territory. No market penetration data is in evidence.

21. Factor 4 relates to the actions of the licensee to deny existing opportunities for growth, expansion, or relocation. Respondent presented some evidence that he requested vehicles from the distributor that were not shipped to Respondent. However, the evidence is inconclusive as to whether those vehicles were for the Gainesville location.

22. Factor 5 addresses attempts of the licensee to coerce the existing dealer into consenting to the additional franchise. There is no evidence that Petitioner Adly attempted to coerce Respondent into consenting to the proposed dealership.

23. Factor 6 concerns the distance, travel time, traffic patterns, and accessibility between the existing dealer and the proposed dealer. Other than acknowledgment that the proposed dealership is approximately 3 to 4 miles from the existing dealership, no evidence was presented to reach a conclusion of law regarding this factor.

24. Factor 7 addresses the benefits to the consumer from the proposed dealership, which can not be obtained by other geographic or demographic changes in the community or territory. Other than anecdotal speculation, there is no evidence to establish whether benefits to consumers is likely to occur.

25. Factor 8 concerns whether the protesting dealer is in substantial compliance with the dealer agreement. Clearly, the distributor is unhappy with Respondent. Respondent is frustrated with the dealer. However, as the dealer agreement is not in evidence, it cannot be determined whether Respondent is in substantial compliance with said agreement.

26. Factor 9 addresses the adequacy of inter-brand and intra-brand competition with respect to the subject line-make in the community or territory and adequately convenient customer care. No competent evidence was presented as to inter-brand or intra-brand competition to support a conclusion regarding this factor.

27. Factor 10 concerns the justification of the proposed dealership based on the economic and marketing conditions pertinent to dealers competing in the community. There is no evidence establishing an objective, reasonable standard in which to compare the actual market penetration of the existing dealer.

28. Factor 11 considers the volume of registrations and service business transacted by the existing dealer of the same

line-make in the community of the proposed dealership. There is no competent evidence regarding the volume of registrations and service business transacted in the community.

29. Petitioners argue that Respondent has failed to present any argument or evidence as to why Petitioners' request for an additional line-make franchise should be denied. However, Section 320.642(2)(a)2., Florida Statutes, clearly places the burden on Petitioners to prove that the existing franchised dealer is not providing adequate representation.

30. Having weighed the statutory criteria enumerated in Section 320.642(2), Florida Statutes, Petitioners have not met this burden.

RECOMMENDATION

Based on the forgoing Findings of Fact and Conclusions of Law, it is

ORDERED:

That the Department of Highway Safety and Motor Vehicles enter a final order denying Petitioners' application.

DONE AND ENTERED this 20th day of August, 2009, in
Tallahassee, Leon County, Florida.

Barbara J. Staros

BARBARA J. STAROS
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 20th day of August, 2009.

ENDNOTE

1/ A "sales report" from Petitioner Adly is in evidence which reflects one Adly 150 cubic centimeter invoiced to Solano Cycle. Respondent's exhibit 1 reflects Adly sales from 2007-June 2009. While most are identified with the designation "50", others are not clearly identified as to their size.

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.