

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

GALAXY POWERSPORTS, LLC d/b/a)
JCL INTERNATIONAL, LLC, AND)
J & F SOUTH FLORIDA)
INVESTMENTS, INC. d/b/a)
TREASURE COAST SCOOTERS AND)
THINGS,)
)
Petitioners,)
) Case No. 08-5365
vs.)
)
WENMARK, INC. d/b/a ALL THE)
WHEEL TOYS,)
)
Respondent.)
_____)

RECOMMENDED ORDER

Pursuant to notice a hearing was conducted on March 19, 2009, in Stuart, Florida, before Claude B. Arrington, a designated Administrative Law Judge of the Division of Administrative Hearings (DOAH).

APPEARANCES

For Petitioner Galaxy Powersports LLC d/b/a
JCL International, LLC:

No Appearance

For Petitioner J & F South Florida Investments,
Inc. d/b/a Treasure Coast Scooters and Things:

Guy Young
7320 South US 1
Port St. Lucie, Florida 34952

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

STATEMENT OF THE ISSUE

Whether the Petitioners' proposed dealership should be approved.

PRELIMINARY STATEMENT

Galaxy Powersports, LLC d/b/a JCL International LLC (Galaxy) published three separate "Notices of Publication for a New Point Franchise Motor Vehicle Dealer in a County of More than 300,000 Population" in the Florida Administrative Weekly on October 10, 2008, providing notice of its intent to permit J & F South Florida Investments, Inc. d/b/a Treasure Coast Scooters and Things (Treasure Coast) to sell three separate lines of motorcycles. As will be discussed below, Respondent, WenMark Inc., d/b/a All The Wheel Toys, thereafter timely filed a challenge to one of those lines. The Florida Department of Highway Safety and Motor Vehicles (the Department) forwarded that challenge to DOAH, and this proceeding resulted.

Thereafter, the case was scheduled for hearing and the parties were provided notice of the hearing location and time.

At the hearing, Galaxy did not appear. Galaxy had been provided appropriate notice of the hearing. Treasure Coast was represented by Guy Young. Mr. Young did not testify and he did

not present any exhibits. Respondent presented the testimony of Mark Mourning and offered three Composite Exhibits, each of which was admitted into evidence.

A Transcript of the proceeding was not filed. The parties were granted ten days from the hearing date within which to file proposed recommended orders. Neither party filed a proposed order.

FINDINGS OF FACT

1. On October 10, 2008, in the Florida Administrative Weekly, Volume 34, Number 41, three separate Notices of Publication for a New Point Franchise Motor Vehicle Dealer in a County of More than 300,000 Population were published.

2. The first notice provided, in relevant part, as follows:

Pursuant to Section 320.642, Florida Statutes, notice is given that [Galaxy] intends to allow the establishment of [Treasure Coast] as a dealership for the sale of motorcycles manufactured by Benzhou Vehicle Industry Group Co. Ltd. (SHWI) at 7320 South U.S. 1, Port St. Lucie (St. Lucie County) Florida 34952 on or after September 26, 2008.

3. The second notice provided, in relevant part, as follows:

Pursuant to Section 320.642, Florida Statutes, notice is given that [Galaxy] intends to allow the establishment of [Treasure Coast] as a dealership for the sale of motorcycles manufactured by Zhejiang

Taizhou Wangye Power Co. Ltd. (ZHEJ) at 7320 South U.S. 1, Port St. Lucie (St. Lucie County) Florida 34952 on or after September 26, 2008.

4. The third notice provided, in relevant part, as follows:

Pursuant to Section 320.642, Florida Statutes, notice is given that [Galaxy] intends to allow the establishment of [Treasure Coast] as a dealership for the sale of motorcycles manufactured by Taizhou Zhongneng Motorcycle Co. Ltd. (ZHNG) at 7320 South U.S. 1, Port St. Lucie (St. Lucie County) Florida 34952 on or after September 26, 2008.

5. By letter dated October 16, 2008, Respondent filed the following letter of protest with the Department of Highway Safety and Motor Vehicles:

In regards to the intent of [Galaxy] to establish a Benzhou Vehicle Industry Group LTD (SHWI) with [Treasure Coast] for the sale of motorcycles at 7320 South U.S. 1, Port St. Lucie, Fl [sic] 34952. This letter represents a written complaint to their application for this dealership, because we already represent said dealership.

This letter also represents a complaint on the following conditions:

1. The proposed dealership would be within 20 miles of our dealership, as measured by straight line distance. They are 8.61 miles away per mapquest.
2. The proposed dealership is to be located within the contractual area outlined in our dealer agreement, as we have a 20 mile exclusivity.
3. We have made more than 25% of our retail sales to persons whose registered household addresses are within 20 straight line miles of the proposed dealership during

the past 12 month period.

We have established three out of four of the conditions exist, so we are submitting this complaint protesting the establishment of the above dealership.

6. By letter dated October 22, 2008, the Department referred this matter to DOAH. The letter of referral provided, in relevant part, as follows:

Pursuant to the provisions of section 120.57, Florida Statutes, we are enclosing a Complaint and supporting documents pursuant to 320.642, Florida Statutes, filed by Wendy and Mark Mourning, on behalf of the above Respondent, thus requiring a hearing under the term of this statute.

[Respondent] is protesting the establishment of [Treasure Coast] for the line-make Benzhou Vehicle Industry Group Co. Ltd. (SHWI) at 7320 South US 1, Port St. Lucie, Florida 34952.

7. The protest filed by Respondent was timely.

8. Respondent's dealership is within 8.61 miles of the proposed site. Mr. Mourning verified the driving distance and presented the measured distance as computed by the website Mapquest. Further, the driving time between the two points is less than 30 minutes.

9. Respondent has dealer agreements to sell various lines of motorcycles, including the following: motorcycles manufactured by Benzhou Vehicle Industry Group Co. Ltd. (SHWI); motorcycles manufactured by Zhejiang Taizhou Wangye Power Co.

Ltd. (ZHEJ); and motorcycles manufactured by Taizhou Zhongneng Motorcycle Co. Ltd. (ZHNG).

10. Although Respondent still has a valid dealer agreement as to motorcycles manufactured by Benzhou Vehicle Industry Group Co. Ltd. (SHWI), Respondent has discontinued the sale of those motorcycles. Mr. Mourning testified that Respondent has no objection to permitting Treasure Coast to sell motorcycles manufactured by Benzhou Vehicle Industry Group Co. Ltd. (SHWI).

11. As to motorcycles manufactured by Zhejiang Taizhou Wangye Power Co. Ltd. (ZHEJ), and motorcycles manufactured by Taizhou Zhongneng Motorcycle Co. Ltd. (ZHNG), Respondent has served the area for not less than two years and has successfully promoted those two lines of motorcycles within its territory or community. Respondent established that its sales of those motorcycles are within 12.5 miles of the proposed dealership.

12. Respondent adequately represents Zhejiang Taizhou Wangye Power Co. Ltd. (ZHEJ) and Taizhou Zhongneng Motorcycle Co. Ltd. (ZHNG) in Respondent's community or territory.

CONCLUSIONS OF LAW

13. The Division of Administrative Hearings has jurisdiction over the parties to and the subject matter of these proceedings. §§ 120.569, and 120.57(1), Fla. Stat (2008).

14. Section 320.605, Florida Statutes (2008), provides:

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.

15. Section 320.642, Florida Statutes (2008), 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 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.

* * *

(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:

* * *

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

1. Any existing motor vehicle dealer or dealers of the same line-make have a licensed franchise location within a radius of 12.5 miles of the location of the proposed additional or relocated motor vehicle Dealer. . . . (Emphasis added.)

16. The Respondent established as a matter of law that it has standing to protest the proposed dealership.

17. Respondent waived at the formal hearing its protest as to motorcycles manufactured by Benzhou Vehicle Industry Group Co. Ltd. (SHWI). Consequently, the Department should permit Treasure Coast to sell motorcycles manufactured by Benzhou Vehicle Industry Group Co. Ltd. (SHWI).

18. Treasure Coast and Respondent clearly believed that all three proposed dealerships were at issue at the formal hearing and evidence was taken as to all three lines. Unfortunately for Respondent, the only protest referred to DOAH was the protest pertaining to motorcycles manufactured by Benzhou Vehicle Industry Group Co. Ltd. (SHWI). Whether Respondent timely challenged the proposal pertaining to the sale of motorcycles manufactured by Zhejiang Taizhou Wangye Power Co. Ltd. (ZHEJ) and motorcycles manufactured by Taizhou Zhongneng

Motorcycle Co. Ltd. (ZHNG) at the proposed site was not established.

19. The Petitioners presented no evidence to support a conclusion that the Respondent has not provided adequate representation of Zhejiang Taizhou Wangye Power Co. Ltd. (ZHEJ) and Taizhou Zhongneng Motorcycle Co. Ltd. (ZHNG) in the community or territory surrounding the proposed site. To the contrary, the evidence established that Respondent has provided adequate representation for those two lines in the community or territory surrounding the proposed site.

20. No recommendation is made as to the sale of motorcycles manufactured by Zhejiang Taizhou Wangye Power Co. Ltd. (ZHEJ) or Taizhou Zhongneng Motorcycle Co. Ltd. (ZHNG) because the undersigned lacks jurisdiction to make a recommendation. Had the undersigned had such authority, the recommendation would be to deny the application to permit Treasure Coast to sell motorcycles manufactured by Zhejiang Taizhou Wangye Power Co. Ltd. (ZHEJ) or Taizhou Zhongneng Motorcycle Co. Ltd. (ZHNG) at the proposed site.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Florida Department of Highway Safety and Motor Vehicles enter a Final Order authorizing Treasure Coast to sell motorcycles manufactured by Benzhou

Vehicle Industry Group Co. Ltd. (SHWI) at Petitioners' proposed dealership.

DONE AND ENTERED this 16th day of April, 2009, in Tallahassee, Leon County, Florida.



CLAUDE B. ARRINGTON
Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060
(850) 488-9675
Fax Filing (850) 921-6847
www.doah.state.fl.us

Filed with the Clerk of the
Division of Administrative Hearings
this 16th day of April, 2009.

COPIES FURNISHED:

Leo Su
Galaxy Powersports, LLC, d/b/a
JCL International, LLC
2667 Northhaven Road
Dallas, Texas 75229

Mark Mourning and Wendy Mourning
WenMark Inc., d/b/a All The Wheel Toys
1540 Northwest Federal Highway
Stuart, Florida 34994

Michael James Alderman, Esquire
Department of Highway Safety and
Motor Vehicles
Neil Kirkman Building, Room A-432
2900 Apalachee Parkway
Tallahassee, Florida 32344

Guy Young
J & F South Florida Investments, Inc.
d/b/a Treasure Coast Scooters and Things
7320 South US 1
Port St. Lucie, Florida 34952

Electra Theodorides-Bustle, Executive Director
Department of Highway Safety and
Motor Vehicles
Neil Kirkman Building
2900 Apalachee Parkway
Tallahassee, Florida 32344

Robin Lotane, General Counsel
Department of Highway Safety and
Motor Vehicles
Neil Kirkman Building
2900 Apalachee Parkway
Tallahassee, Florida 32344

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.