

NEW MOTOR VEHICLE BOARD
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STATE OF CALIFORNIA
NEW MOTOR VEHICLE BOARD

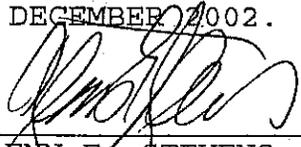
In the Matter of the Protest of)
)
CARS DAWYDIAK, INC.,) Protest No. PR-1817-02
)
) Protestant,)
)
) v.)
)
PIAGGIO USA, INC.,)
)
) Respondent.)
)
_____)

DECISION

The attached "Proposed Ruling on Respondent's Motion to Dismiss the Protest" of the Administrative Law Judge was considered by the Public members of the New Motor Vehicle Board at its Special meeting of December 5, 2002. After such consideration, the Public members of the Board adopted the Ruling on Respondent's Motion to Dismiss the Protest as its Decision in the above-entitled matter.

This Decision shall become effective forthwith.

IT IS SO ORDERED THIS 5th DAY OF DECEMBER 2002.



GLENN E. STEVENS
Vice President
New Motor Vehicle Board

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11 In the Matter of the Protest of)
12 CARS DAWYDIAK, INC.,) Protest No. PR-1817-02
13)
14 Protestant,) PROPOSED RULING ON
15 v.) RESPONDENT'S MOTION TO
16 PIAGGIO USA, INC.,) DISMISS THE PROTEST
17)
18 Respondent.)

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1 makes, including Vespa and Piaggio, which are the subjects of this
2 protest.¹

3 4. On or about June 8, 2002, Piaggio announced to Dawydiak its
4 intention to establish a new Piaggio brand motorcycle franchise at 5921
5 College Avenue in Oakland. Dawydiak was not given statutory notice as
6 provided by Vehicle Code section 3062(a)(1).²

7 ISSUES PRESENTED

8 5. In support of its motion to dismiss, Respondent claims that
9 Dawydiak lacks standing to pursue the protest in that:

- 10 (1) The proposed new dealership will be authorized to sell and
11 service Piaggio brand and not Vespa brand products and is
12 therefore not of the same line-make as Protestant ("line-make
13 issue");
- 14 (2) The proposed new dealership is situated more than 10 miles
15 from Protestant's location and therefore is not in
16 Protestant's relevant market area ("RMA issue"); and
- 17 (3) The protest is untimely and was filed for the purpose of
18 coercing Respondent ("equity issue").

19 6. In response, Protestant argues that the DSSA is ambiguous as
20 to which Piaggio products, or line-makes, Protestant is authorized to
21 represent. Accordingly, Protestant believes that an evidentiary hearing
22 on the merits of the protest is necessary to determine whether
23 Protestant is authorized to represent the Piaggio line-make in addition
24 to Vespa. Protestant maintains that the proposed new dealership in
25 Oakland is factually within Protestant's RMA. Protestant claims that

26 ¹ Because the name "Piaggio" is used by both the Respondent
27 distributor herein and in reference to the Piaggio line-make, the latter
will be referred to as "Piaggio brand."

28 ² All references to statutes herein are to the California Vehicle
Code unless otherwise indicated.

1 because Respondent failed to provide notice as required by section 3062,
2 the protest is timely.

3 RESOLUTION OF THE ISSUES

4 7. At the outset, it should be noted that each of the issues
5 presented pose jurisdictional questions which, if any one is resolved in
6 favor of Respondent, would support granting the motion to dismiss the
7 entire protest. This ruling will proceed to determine all three issues
8 in order to promote efficiency in the event of appeal or subsequent
9 litigation before the Board.

10 THE DSSA UNAMBIGUOUSLY LIMITS PROTESTANT
11 TO THE VESPA LINE-MAKE³.

12 8. The DSSA consists broadly of two parts. The first contains
13 recitals and a set of twenty-two (22) standard contract clauses, and the
14 second is a set of four (4) appendices containing particular terms
15 specific to Protestant. In relevant parts, Recitals A and B refer to
16 the intent of the parties as to the sale of Piaggio products at the
17 dealership location, as specified in Appendix A of the agreement.
18 Recital A significantly proclaims that Piaggio imports and sells "motor
19 vehicles including the world-famous Vespa® scooters, together with
20 related parts, accessories and clothing which are described in Appendix
21 A hereto (hereinafter called the 'Products')." ⁴

22
23
24 ³ Line-make is not defined in the Vehicle Code. The Board
25 considered several factors in determining line-make in *Sports Cycle*
26 *Center, Inc. v. Yamaha Corporation, U.S.A.*, Protest No. PR-467-83.
27 These factors included considering the similarity of the vehicles in
28 three areas: business operations, product features, and product
marketing and advertising. However, the Board's decision may not be
relied on as a precedent decision because the Board has not designated
it as such (Government Code section 11425.60).

⁴ The word "Products" appears capitalized as here in Paragraph 6
of Appendix A as discussed below.

1 9. Paragraph 8 of Appendix A, entitled "List of Products," sets
2 forth in full:

3 Vespa Scooter Models listed in Number 4 above.

4 Accessories, parts, clothing, and merchandise offered in
5 U.S. dealer catalogs and price lists as provided by
6 Piaggio and as may be modified by Piaggio from time to
7 time.

8 10. Paragraph 4, however, does not contain a list of Vespa models.
9 Instead, that paragraph is titled "Hours of Operation" and contains the
10 handwritten entry reading "10 - 7 p.m." A list of Vespa Scooter Models
11 does appear under Paragraph 6 which is entitled "Piaggio Group
12 Trademarks Licensed Hereunder." This paragraph sets forth the following
13 items:

14 PIAGGIO

15 PIAGGIO LOGO

16 VESPA (print and stylish script)

17 RICAMBI ORIGINALI

18 NAMES OF MODELS: Vespa America (ET4 150cc and ET2 50cc)

19 and other Vespa branded motor scooters models which

20 Piaggio may, in its sole discretion, decide at any time

21 [sic] offer for sale in the United States. "Products"

22 does not include any other Piaggio products, such as

23 Gilera, Puch, or Hexagon motor vehicles.

24 11. Although Protestant concedes that the reference in Paragraph 8
25 to Paragraph 4 was erroneous, Protestant believes that because the words
26 "Piaggio" and "Vespa" are listed in Paragraph 6, both are included as
27 the "Products" to which Protestant is franchised. Respondent agrees
28 that the reference to Paragraph 4 was a typographical or other error,

1 but the fact that the list of Vespa Scooter Models alluded to in
2 paragraph 8 is actually found in Paragraph 6 does not alter the meaning
3 of that paragraph. Rather, Respondent claims that Paragraph 6 only
4 lists the trademarks which Protestant is licensed to use under Section 8
5 in the standard agreement. This list happens to include the trademark
6 names of the two Vespa models for which Protestant is franchised.
7 According to Respondent, Paragraph 8 simply meant to incorporate the
8 earlier text specifying the Vespa models to avoid later duplication.

9 12. The general rule in interpreting contracts is to do so in a
10 manner so as to give full expression to the intent of the parties.
11 Where a writing correctly sets forth the agreement of the parties, it
12 must be given the effect it states. Under the Parol Evidence Rule, when
13 a written contract fails because of some ambiguity either on its face or
14 arising from extrinsic circumstances, to clearly show the parties
15 intent, extrinsic evidence may be considered.⁵ A written contract may
16 be said to be ambiguous when its terms are reasonably susceptible to
17 more than one interpretation. Where a mistake or imperfection of a
18 writing is put at issue, the Parol Evidence Rule does not exclude
19 evidence relevant to that issue.

20 13. The DSSA, though it is to a degree in-artful and contains the
21 error discussed above, is not reasonably susceptible to Protestant's
22 interpretation. In the first place, Paragraph 6 purports to list not
23 line-makes, but trademarks. The licensed use of the listed marks is
24 specifically set forth in Section 8 of the standard agreement.⁶ The
25 inclusion of the two Vespa model names there was primarily to authorize

26 ⁵ Under the Parol Evidence Rule, Code of Civil Procedure section
27 1856, the terms of a contract may be supplemented or explained but not
contradicted by extrinsic evidence. Extrinsic evidence is evidence
other than the language of the contract itself.

28 ⁶ Subsection 8.2 at page 12 of the DSSA licenses Dawydiak to
display the trademarks listed in Appendix A under specified conditions.

1 Protestant to use those names as well as the Piaggio manufacturer marks,
2 and not as Protestant would have it to convert a license to use Piaggio
3 trademarks to a franchise to sell Piaggio brand vehicles. Any
4 possibility of that being the intent of the parties is further
5 diminished by the additional language in Paragraph 6 following the Vespa
6 models stating "'Products' (quoted in original) does not include any
7 other Piaggio products, such as Gilera, Puch, or Hexagon models."
8 Paragraph 8 itself defines "Products" as "Vespa Scooter Models"
9 (emphasis added), and does not refer to Piaggio. Only if these
10 troubling words were completely removed could Protestant's reading
11 appear to be a reasonable interpretation.⁸

12 14. Absent ambiguity, the DSSA must be given the effect it sets
13 forth. Protestant is not a Piaggio brand motorcycle franchise, and
14 therefore has no standing to bring this protest.

15 **THE PROPOSED PIAGGIO BRAND FRANCHISE**
16 **IS WITHIN PROTESTANT'S RMA**

17 15. Both parties offered evidence by way of declaration testimony
18 concerning measurements of Protestant's RMA with respect to the location
19 of the proposed franchisee by the use of Global Positioning System
20 ("GPS") technology.⁹ Protestant's witness, Mr. Dawydiak, using a

21 ⁷ Protestant's argument at hearing that the absence of Piaggio
22 among Gilera, Puch and Hexagon means that Piaggio brand motorcycles are
23 included with Vespa is not convincing because the phrase as worded
24 clearly means that "Products" does not include any other Piaggio
25 products than Vespa, and the reference to three of the several other
26 brands that Piaggio manufactures is made exemplary and not exclusive by
27 use of the words, "such as."

28 ⁸ Protestant argued that the purported ambiguity requires at least
limited discovery and evidentiary hearing. However, that would be
appropriate only if uncertainty actually existed. Extrinsic evidence
may be taken to show what the parties to a contract meant by what they
said, not to show that they meant something other than what they said.
(See *Yarus v. Yarus* (1960) 178 Cal.App.2d 190.)

⁹ Global Positioning System technology involves the use of
satellite based telecommunications to determine the position of points
at the surface of the earth.

1 navigational GPS instrument accurate to 10 meters determined the
2 distance between his and the proposed dealership was 9.99 miles.
3 Respondent's witness was a licensed surveyor using a more sophisticated
4 GPS instrument, capable of survey-grade measurements accurate to 2
5 centimeters. This witness obtained a distance of 10 miles and 88 feet.

6 16. Because neither witness showed that the GPS readings were
7 taken properly, the ALJ rejected the evidence as lacking proper
8 foundation for credibility.¹⁰ The parties were given an additional
9 opportunity to produce credible evidence, and the eventual result of
10 Respondent's measurements provided a distance of 52,641.2 feet from a
11 point on the site of Protestant's dealership, to a point on the apparent
12 rear boundary of the proposed dealership. This establishes that the
13 proposed dealership is at least 158.8 feet within the 10 mile RMA
14 radius.

15 **EQUITY IS NOT AVAILABLE TO RESPONDENT**

16 17. Respondent alleges that it orally informed Dawydiak of its
17 intent to establish a Piaggio brand franchise in Oakland during a
18 conversation that transpired on June 8, 2002. Because the protest was
19 not filed until August 20, 2002, a little more than two months later and
20 shortly after the Oakland dealership began operations, Respondent,
21 without citing legal authority, believes the protest was untimely and
22 for reasons of equity, should be dismissed.

23 18. No legal basis exists for Respondent's assertion that the
24 protest is untimely. The only statutory limitation applicable to a
25 protest of establishment is found in section 3062(a)(1). However, that
26 20 day period never began to run because Respondent did not provide.

27
28 ¹⁰ Neither party demonstrated that the GPS readings were taken on
the sites of the respective dealerships.

1 written notice to the Board and Protestant as required by subsection (3)
2 of that statute.

3 19. Respondent failed to show facts sufficient to justify
4 equitable relief. It was Respondent's own representative, Mr.
5 Cunningham, who, when he advised Protestant of the proposed new
6 dealership also stated that it ". . . would be more than 10 miles from
7 Protestant's location . . ." (Declaration of Michael Cunningham in
8 Support of Piaggio USA, Inc.'s Request for Dismissal of Cars Dawydiak,
9 Inc.'s Protest, page 3, line 21.) Respondent made no allegation that it
10 proceeded with the new dealership in reliance on any independent
11 assurance of Protestant. If respondent had desired to avoid the
12 potential for a protest sooner, it might better have filed written
13 notice at least as early as the June 8, 2002, conversation.¹¹

14 20. Respondent's allegation, through Mr. Cunningham, that
15 Dawydiak's motive in filing the protest was "among other reasons" to
16 resolve other problems the parties were having falls far short of
17 showing such harm to Respondent as to overshadow Dawydiak's "other
18 reasons" as well his statutory right to place the disputed establishment
19 before the Board for a determination of good cause.

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27 ¹¹ A manufacturer or distributor is free to rely on its own
28 judgment as to the Board's protest jurisdiction, but the only definitive
method of 'clearing the market' is providing statutory notice.

1 RULING ON THE MOTION TO DISMISS

2 In consideration of the documents filed and the arguments and
3 testimony given in this matter, the motion is granted on the basis that
4 the proposed additional franchisee is of a different line-make than that
5 of the protesting franchisee. The ruling is made notwithstanding that,
6 as determined herein, the proposed franchisee is located within
7 Protestant's RMA and the protest was timely filed.

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9
10 I hereby submit the foregoing which
11 constitutes my proposed ruling in the
12 above-entitled matter, as a result of
13 a hearing before me on the above date
14 and recommend the adoption of this
15 proposed ruling as the ruling of the
16 New Motor Vehicle Board.

17 DATED: November 21, 2002

18 By Kenneth B. Wilson
19 KENNETH WILSON
20 Administrative Law Judge
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25
26

27 Steven Gourley, Director, DMV
28 Terri Thurlow, Chief,
Licensing Branch, DMV