

NEW MOTOR VEHICLE BOARD
1507 - 21st Street, Suite 330
Sacramento, California 95811
Telephone: (916) 445-1888

STATE OF CALIFORNIA
NEW MOTOR VEHICLE BOARD

In the Matter of the Protest of

PMG MOTORSPORTS, INC. ("PMG"),

Protestant,

v.

AMERICAN SUZUKI MOTOR
CORPORATION,

Respondent.

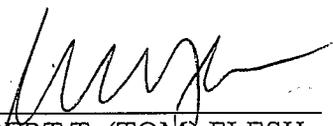
Protest No. PR-2141-08

DECISION

At its regularly scheduled meeting of March 24, 2009, the Public Members of the Board met and considered the administrative record and Administrative Law Judge's "Proposed Order Granting Motion to Dismiss" in the above-entitled matter. After such consideration, the Board adopted the Proposed Order.

This Decision shall become effective forthwith.

IT IS SO ORDERED THIS 24th DAY OF MARCH 2009.



ROBERT T. (TOM) FLESH
President
New Motor Vehicle Board

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2 Sacramento, California 95811
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CERTIFIED MAIL

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8 STATE OF CALIFORNIA
9 NEW MOTOR VEHICLE BOARD

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11 In the Matter of the Protest of
12 PMG MOTORSPORTS, INC. ("PMG"),
13 Protestant,
14 v.
15 AMERICAN SUZUKI MOTOR
CORPORATION,
16 Respondent.

Protest No. PR-2141-08

**PROPOSED ORDER GRANTING
MOTION TO DISMISS**

17
18 To: Fred Tran
In Propria Persona
For the Protestant
19 PMG MOTORSPORTS, INC., dba BIKEWORLD
20 953 W El Camino Real
Sunnyvale, California 94087

21 Maurice Sanchez, Esquire
Kevin M. Colton, Esquire
Brad A. Hakala, Esquire
22 Attorneys for Respondent American Suzuki Motor Corporation
23 BAKER & HOSTETLER LLP
24 600 Anton Boulevard, Suite 900
Costa Mesa, California 92626-7221

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PROCEDURAL BACKGROUND

1. On December 20, 2008, the New Motor Vehicle Board ("Board") received¹ from protestant PMG Motorsports, Inc., dba Bikeworld ("PMG") a protest pursuant to Vehicle Code² section 3060, challenging the termination of its Suzuki motorcycle franchise. The Board filed the protest, effective December 20, 2008, and assigned it Protest No. PR-2141-08.

2. On January 26, 2009, respondent American Suzuki Motor Corporation ("Suzuki") filed a Motion to Dismiss contending that the protest was not timely filed.

3. On February 17, 2009, respondent's Motion to Dismiss was heard telephonically before Administrative Law Judge Diana Woodward Hagle. Baker & Hostetler, LLP, by Maurice Sanchez, Esquire, Kevin M. Colton, Esquire, and Brad A. Hakala, Esquire, represented respondent Suzuki and Fred Tran, in propria persona, represented protestant PMG.

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CONTENTIONS OF THE PARTIES

4. Suzuki contends that PMG failed to file its protest within 30 days after receiving the 60-day notice of termination of its Dealer Agreement from Suzuki. Suzuki relies on section 3060(a)(2), which provides that a franchisee may file a protest with the Board "within 30 days after receiving a 60-day notice". It argues that Suzuki's certified mailing of the notice to PMG was received on November 19, 2008, and that December 20, 2008 (the date of filing of the protest) was 31 days later and that, therefore, the protest was not timely filed.

5. PMG argues that the protest was timely since it was filed within 30 days of receipt of Suzuki's notice of termination to Michael Vanecek (corporate president and 1/3 owner of PMG) at his residence. Michael Vanecek received Suzuki's certified mailing on November 21, 2008, 29 days before the December 20, 2008, filing date and within the 30-day period stated in section 3060(a)(2).

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ISSUE

6. Does Vehicle Code section 3060(a)(2), which requires that a protest be filed within 30

¹ A protest shall be considered received "on the date of certified or registered mailing" (Title 13 of the California Code of Regulations section 585(a)), which date then becomes the date of filing of the protest. Here, protestant sent the certified mailing to the Board on December 20, 2008.

² All statutory references are to the California Vehicle Code unless noted otherwise.

1 days after the franchisee receives a 60-day notice of termination from a franchisor, contemplate that the
2 30-day period be calculated from the latest date that all mailings are received?

3 FINDINGS

4 7. In 2004, the parties entered into a "Suzuki Motorcycle/ATV Dealer Agreement" whereby
5 American Suzuki Motor Corporation granted to PMG Motorsports, Inc., dba Bikeworld, a franchise to
6 sell and service Suzuki motorcycles. Suzuki drafted the contract. Although the contract terms provided
7 that the agreement would expire in three years (and this has since expired), both parties consider the
8 contract to be the operative agreement between them to the present time.

9 8. In the contract, PMG is identified as "a California corporation" located at 953 W. El
10 Camino Real, Sunnyvale, California 94087-1156. The contract further identifies three principals of
11 PMG, each owning 33-1/3% of the company, as follows:

12 Michael David Vanecek, President 501 Malaga Way
Pleasant Hill, CA 94523

13 Fred Xuan Tran, Vice President 2227 Carobwood Lane
14 San Jose, CA 95132

15 Salvador Hernandez, Secretary 2053 Cunningham Way
Martinez, CA 94553

16 (Tom Buttleman Declaration, Exh. A, sec. 5.1)

17 Fred Tran is also the General Manager. (Tom Buttleman Declaration, Exh. A, sec. 6.1)

18 9. All of the foregoing information regarding PMG and its principals is accurate as of the
19 present time.

20 10. The Dealer Agreement states that "[a]ny notice of termination under this Agreement shall
21 be mailed or delivered to the other party as provided herein." (Tom Buttleman Declaration, Exh. A, sec.
22 16.6) It further provides that "[a]ny notice...pursuant to this Agreement must be in writing and...sent by
23 any traceable means (e.g.,...certified mail, etc.) to the address of the parties shown on this
24 Agreement...All notices to Dealer must be sent to the General Manager or any majority Owner at the
25 Location. When so delivered, such service of notice shall satisfy all requirements for notice under this
26 Agreement." (Emphasis added.) (Tom Buttleman Declaration, Exh. A, sec. 20.1)

27 11. In November 2008, Suzuki sent four certified mailings advising PMG of franchise
28 termination to the following:

1	PMG Motorsports, Inc., and 3 Owners	953 W. El Camino Real Sunnyvale, CA 94087-1156
2	Fred Xvan [sic] Tran	2227 Carobwood Lane San Jose, CA 95132
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4	Michael D. Vanecek	501 Malaga Way Pleasant Hill, CA 94523
5		
6	Salvador Hernandez	2053 Cunningham Way Martinez, CA 94553

7 (Tom Buttleman Declaration, Exh. C)

8 12. The certified mailings were received on the following dates:

9	PMG Motorsports, Inc., and 3 Owners	November 19, 2008
10	Fred Xvan [sic] Tran	November 19, 2008
11	Michael D. Vanecek	November 21, 2008
12	Salvador Hernandez	November 19, 2008 ³

13 (Tom Buttleman Declaration, Exhs. D-G; Declaration of Fred Tran)

14 13. On December 20, 2008, Fred Tran mailed via certified mail a protest to the New Motor
15 Vehicle Board on behalf of PMG. The protest was filed by the Board effective December 20, 2008.

16 14. December 20, 2008, is 31 days beyond November 19, 2008, the date of receipt of the
17 notice of termination by PMG (the corporation) at its principal place of business in Sunnyvale, by Fred
18 Xvan [sic] Tran (the General Manager, Vice President, and 1/3 owner) at his residence in San Jose, and
19 by Salvador Hernandez (Secretary and 1/3 owner) at his residence in Martinez. However, December 20,
20 2008, is within 30 days of November 21, 2008, the date of receipt of the notice of termination by Michael
21 D. Vanecek (President and 1/3 owner) at his residence in Pleasant Hill.

22 ANALYSIS

23 15. Since PMG Motorsports, Inc., is a corporation, notice given solely to the corporation
24 would have been legally sufficient. A corporation is a "person", a separate legal entity from its owners.

25 ~~(Corp. Code sec. 18; Code Civ. Proc. sec. 17(a)) Here, PMG (the corporation) was the party which~~

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28 ³ The parties agreed during oral argument that Salvador Hernandez received the certified mailing on November 19, 2008. Protestant's argument herein is based solely on the November 21, 2008, receipt of the mailing by Michael D. Vanecek.

1 contracted with Suzuki to become a franchisee. When PMG received Suzuki's notice of dealer
2 termination, the 30-day window for filing a protest with the Board opened.

3 16. The Dealer Agreement additionally required Suzuki to give notice "to the General
4 Manager or any majority Owner at the Location".⁴ (Tom Buttlerman Declaration, Exh. A, sec. 20.1) The
5 phrase "at the Location" means PMG's principal place of business and modifies General Manager (as
6 well as majority Owner. Suzuki was thus obligated to mail a termination notice to PMG Motorsports and
7 to its General Manager at 953 W. El Camino Real, Sunnyvale, CA 94087-1156; Suzuki satisfied this
8 obligation in a single letter addressed to the corporation and its officers.

9 17. Even assuming arguendo that the Dealer Agreement required Suzuki to give notice to the
10 General Manager at his residence, that would not change the result here, since General Manager Fred
11 Tran received the notice at his residence on November 19, 2008, the same day the mailing was received
12 by PMG.

13 18. The 30-day time period to file a protest began on November 19, 2008, the date of notice to
14 the corporation and to the General Manager. That one of the corporate officers received the mailing on a
15 later date does not extend the filing period.

16 19. Sonoma Subaru, Inc. v. New Motor Vehicle Board, 189 Cal.App.3d 13 (1987) is on point.
17 In that case, the dealer failed to file a timely protest and the Court of Appeal denied the dealer's petition
18 to order the Board hear its case. The case arose in 1985, before Vehicle Code section 3060 was amended
19 to make more conspicuous the statement advising the dealer of the time deadline to file a protest. "Where
20 no protest of the termination is filed within the allotted time, the Legislature's obvious intent is to let the
21 franchisor treat the termination as final and effective... Sanctioning late filings would undercut that
22 finality and create uncertainty in the minds of franchisors as to whether they may treat their relationship
23 with unsatisfactory franchisees as concluded. We conclude the Legislature did not intend that the... filing
24 deadline be extended." (*Id.* at 22) Now, with a franchisor receiving a more conspicuous advisement of
25 the time deadline to file a protest, the Sonoma Subaru holding is even more compelling precedent.

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28 ⁴ Since ownership of PMG was in equal 1/3 shares, there is no "majority Owner". The letter of termination to PMG's principal
place of business was, however, addressed to all three owners as well as the corporation.

