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STATE OF CALIFORNIA

NEW MOTOR VEHICLE BOARD

In the Matter of the Petition of SANTA MONICA BMW, INC., Petitioner, vs. BMW OF NORTH AMERICA, INC., BMW OF BEVERLY HILLS, DOES 1 THRU 10. Respondents. ZIPPER BMW OF BEVERLY HILLS, Interested Individual.	**Petition No. P-225-91**

DECISION

The attached Proposed Decision of the Administrative Law Judge is hereby adopted by the New Motor Vehicle Board as its Decision in the above entitled matter.

This Decision shall become effective forthwith.

IT IS SO ORDERED THIS 21 day of March 1995.

MANNING J. POST
President
New Motor Vehicle Board

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In the Matter of the Petition of SANTA MONICA BMW Petitioner, vs. BMW OF NORTH AMERICA, INC., BMW OF BEVERLY HILLS, and DOES 1-10, Respondents. ZIPPER BMW OF BEVERLY HILLS, Interested Individual.	Petitioner No. P-225-91 **PROPOSED DECISION**

PROCEDURAL BACKGROUND

1. On July 24, 1991, Petitioner Santa Monica BMW ("Santa Monica") filed a Petition with the New Motor Vehicle Board ("Board") against Respondents, BMW of North America ("BMW NA") and BMW of Beverly Hills, alleging breach of the implied covenant of good faith and fair dealing, violations of Anti-Trust legislation,

and violations of California Vehicle Code Section 11713.3(d) & (o).[1]

2. On August 5, 1991, Zipper BMW of Beverly Hills ("Zipper") was deemed to be an "Interested Individual" pursuant to Section 3066(a).

3. A first amendment was made to the Petition and filed on August 23, 1991.

4. On October 31, 1991, the Board denied Respondents' motion to dismiss.

5. The hearing was bifurcated with respect to liability and damages on February 10, 1993.

6. Santa Monica is a licensed new motor vehicle dealer enfranchised to sell BMW vehicles. Santa Monica is located at 1820 Santa Monica Boulevard, Santa Monica, California.

7. BMW NA is a distributor of new motor vehicles in California.

8. Zipper was located at 8825 Wilshire Boulevard, Beverly Hills, California. Zipper's assets were sold in a bankruptcy proceeding to BMW NA and BMW of Beverly Hills, a wholly owned subsidiary of BMW NA.

9. BMW of Beverly Hills is a licensed new motor vehicle dealer enfranchised to sell BMW vehicles. The dealership is located at 8825 Wilshire Boulevard, Beverly Hills, California.

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[1] All statutory references are to the California Vehicle Code, unless otherwise indicated.

10. A hearing on this matter was held on May 2-6, 1994, and September 27, 1994, before Douglas H. Drake, Administrative Law Judge for the Board.

11. Petitioner was represented by Robert Ferguson, Esq., 1702 Santa Monica Boulevard, Suite 201, Santa Monica, California.

12. Respondents were represented by Roy Brisbois, Esq. of Lewis, D'Amato, Brisbois & Bisgaard, 221 N. Figueroa Street, Suite 1200, Los Angeles, California.

13. Respondents were also represented by Dennis J. Helfman, Esq., 300 Chestnut Ridge Road, Woodcliff Lake, New Jersey.

BACKGROUND FACTS

14. BMW NA purchased the assets of Zipper for $2 million in goodwill plus appraisal value for the fixed assets at a bankruptcy sale approved by the United States Bankruptcy Court for the Central District of California. On August 15, 1991, BMW of Beverly Hills became an operating dealership in the Western Region.

15. BMW NA operated BMW of Beverly Hills from August of 1991 through April of 1994.

16. Hans Geisler ("Geisler"), former Zipper General Manager, attempted unsuccessfully to purchase BMW of Beverly Hills from BMW NA. Initially, BMW NA was going to finance Geisler's purchase and permit him to buy out the stock over time. Subsequently, Geisler attempted to raise the funds necessary to purchase the franchise outright but the source of the funds could not be substantiated.

17. After the Geisler Investment Group failed to purchase the

dealership, BMW NA decided in late 1992 to put the store up for sale to any qualified buyer.

18. Two serious buyers negotiated to buy the franchise, the Gilbert-Bisset group and Tony Shelly, a BMW dealer in Hawaii.

19. An asset purchase agreement was signed with the Gilbert-Bisset group in January of 1994 and the transaction closed on April 18, 1994.

FACTUAL STIPULATIONS

20. The Petitioner and Respondent stipulated that the asset purchase agreement was the one intended to be approved by the Bankruptcy Court, and it is the one that was actually approved.

21. Santa Monica is within BMW of Beverly Hills relevant market area as defined by § 507.

22. The law firm of Lewis, D'Amato, Brisbois & Bisgaard was hired in April of 1993 by BMW NA to do the Zipper asset purchase agreement.

23. BMW of Beverly Hills was sold and the transaction closed on April 18, 1994.

ISSUES PRESENTED

24. Did BMW NA violate the provisions of § 11713.3(d) by preventing or attempting to prevent any other qualified individual from purchasing the assets of Zipper?

25. Did BMW NA violate the provision of § 11713.3(o) by unlawfully competing with Santa Monica BMW?

a. Did BMW NA operate BMW of Beverly Hills temporarily for a reasonable period of time?

b. Did BMW NA operate BMW of Beverly Hills as a bona fide retail operation while it was for sale to any qualified independent person at a fair and reasonable price?

c. Did BMW NA operate in a bona fide relationship in which an independent person has made a significant investment subject to loss in the dealership and can reasonably expect to acquire full ownership of the dealership on reasonable terms and conditions?

26. Did BMW NA intend from the beginning of its involvement with Zipper BMW to own and operate a distributor retail store in Beverly Hills for an indefinite period of time?

27. Did BMW NA preferentially allocate a limited number of vehicles to BMW of Beverly Hills at the expense of Santa Monica BMW?

28. Should Petitioner's renewed request for production of the new car dealer jackets for BMW of Beverly Hills be granted?

29. When the proceedings began before the Board, should an injunction have been granted?

APPLICABLE LAW

30. Vehicle Code § 11713.3 (Deerings 1984 and Supplement 1994) [in pertinent part]:

> It is unlawful and a violation of this code for any manufacturer . . . [or] distributor . . . licensed under this code to do any of the following:
>
> (d) To prevent or require, or attempt to prevent or require, by contract or otherwise, any dealer, or any

officer, partner, or stockholder of any dealership, the sale or transfer of any part of the interest of any of them to any other person or persons . . .

(o) To compete with the dealer in the same line-make operating under an agreement or franchise from a manufacturer or distributor in the relevant market area. A manufacturer or distributor shall not, however, be deemed to be competing when operating a dealership either temporarily for a reasonable period, or in a bona fide retail operation which is for sale to any qualified independent person at a fair and reasonable price, or in a bona fide relationship which an independent person has made a significant investment subject to loss in the dealership and can reasonably expect to acquire full ownership of the dealership on reasonable terms and conditions. . .

31. The Supreme Court of California, in Merrill v. Department of Motor Vehicles (1969) 71 Cal. 2d 907, 80 Cal. Rptr. 89, defined the meaning of 'bona fide' within the entire statutory scheme in which it appeared [Veh. Code § 11701]. In Merrill, the Court concluded that a bona fide motor vehicle dealer seeking to obtain a license from the Department of Motor Vehicles means that dealer must be honest, fair-dealing, and free from deceit. (Id. at page 921.)

FINDINGS OF FACTS

A. FACTS RELATING TO WHETHER THE RESPONDENTS PREVENTED OR REQUIRED ZIPPER TO SELL ITS FRANCHISE

32. BMW NA was requested by Zipper to purchase the franchise and its assets.

33. BMW NA elected to purchase the assets of Zipper from bankruptcy in order to preserve its image in a key and prestigious market.

34. Zipper objected to Santa Monica BMW's attempt to prevent the sale of its assets to BMW NA.

35. The sale of Zipper assets was accomplished in a bankruptcy proceeding in which notice was given to creditors of the intention to sell the assets free and clear of liens.

36. The acquisition of Zipper assets was memorialized in a Chapter 11 Asset Purchase Agreement.

37. On August 1, 1991, the Bankruptcy Court approved the sale of Zipper BMW to BMW of Beverly Hills, a wholly-owned subsidiary of BMW of North America, Inc.

38. The payment of $2,000,000 for the good will of Zipper assets was the result of negotiations and was a fair and reasonable price.

39. BMW NA did not prevent or attempt to prevent Zipper from selling its assets.

40. BMW NA never required or attempted to require Zipper to sell its assets.

41. BMW NA was the only party interested in acquiring the assets of Zipper as set forth in the bankruptcy order. Objections were filed by Universal Computer Services, Inc., and David Meunier and S.A. Andre Trossat. The Bankruptcy court order provides that "parties that received notice and failed to object to the Motion are deemed to have consented."

B. <u>FACTS RELATING TO WHETHER THE RESPONDENTS OPERATED THE DEALERSHIP TEMPORARILY FOR A REASONABLE PERIOD</u>

42. BMW of Beverly Hills, Inc. began operating the Beverly Hills dealership on or about August 15, 1991.

43. From the time BMW of Beverly Hills, Inc. acquired the assets of Zipper up to at least April 23, 1992, the parties were

engaged in good faith settlement negotiations in an effort to facilitate a mutually acceptable sale of the franchise to Mr. Geisler or his investment group and that for all practical purposes the franchise could not be sold during that period.

44. Between June and November, 1992, Mr. Geisler realized that he would not be able to purchase the franchise over a period of time.

45. Mr. Geisler thereafter made an offer to purchase 100 percent of the franchise in an offer dated November 16, 1992.

46. In late 1992, BMW NA decided against accepting the Geisler November 16, 1992 offer as the source of funds for the offer could not be substantiated.

47. In late 1992, BMW NA decided to place the Beverly Hills franchise up for sale to any qualified buyer.

48. The BMW franchise was offered for sale at a reasonable price of $2,000,000 for goodwill plus assets.

49. The BMW franchise was offered for sale in a public advertisement in the Los Angeles Times dated January 2, 1993.

50. The BMW franchise was further advertised for sale in Automotive News on January 11, 1993.

51. Approximately one half dozen responses were made to the advertisements for sale of the BMW franchise.

52. Two serious contenders arose for the purchase of the BMW franchise, one being led by Tony Shelly, an existing BMW dealer, and the other by Ross Gilbert and Max Bisset.

53. Both the Shelly group and the Bisset/Gilbert group aggressively sought to purchase the franchise and were willing to pay $2,000,000 for its goodwill.

54. By April of 1993, BMW NA and the Bisset/Gilbert group had succeeded in reaching an agreement to purchase the franchise, which included $2,000,000 for goodwill.

55. In April of 1993, BMW NA engaged counsel to prepare an Asset Purchase Agreement to memorialize the sale to Bisset/Gilbert.

56. The BMW franchise and its sale was extremely complex due, in part, to the multiple locations and leases upon which the BMW franchise was located.

57. On January 17, 1994, a devastating earthquake occurred in the Los Angeles area resulting in the Parts and Service facility of BMW of Beverly Hills being destroyed and totally shut down.

58. On January 25, 1994, the Asset Purchase Agreement was signed, selling the franchise to Bisset/Gilbert.

59. The sale of the franchise to Bisset/Gilbert was closed on April 18, 1994, and thereafter neither BMW of North America, Inc., nor any of its subsidiaries had any ownership interest in the franchise.

C. FACTS RELATING TO WHETHER THE BEVERLY HILLS DEALERSHIP WAS A BONA FIDE OPERATION DURING BMW NA'S OPERATION THEREOF

60. Throughout Petitioner's case-in-chief, Jay Patel, a Certified Public Accountant, testified to the meaning of 'bona fide' as given to him by Robert Ferguson. Accordingly, a bona fide retail operation was defined as a prudent business person's standard which is what a willing investor would do, what kind of

returns one would anticipate from such investment, and what kind of business decisions a prudent person would make about an automobile dealership in the Los Angeles area.

61. Petitioner, in its closing brief, defined a 'bona fide' retail operation as follows:

"When a distributor operates a retail dealership it must not take any advantage because of its position against any dealer within the relevant marketing area." (Petitioner's Closing Brief, p. 5) However, petitioner has cited no authority for either definition of 'bona fide.' Therefore, this Administrative Law Judge shall not rely on either definition.

62. 'Bona fide' shall be defined as "in or with good faith; honestly, openly, and sincerely; without deceit or fraud." Merrill v. Department of Motor Vehicles (1969) 71 Cal. 2d 920, 80 Cal. Rptr. 97; BLACK'S LAW DICTIONARY 177 (6th ed. 1990)

63. BMW of Beverly Hills, Inc. retailed vehicles to the consuming public.

64. Vehicles wholesaled to BMW of Beverly Hills, Inc., by BMW NA were at the same price as any other dealer.

65. BMW of Beverly Hills, Inc. paid the same price for parts purchased from BMW NA as all other dealers.

66. BMW of Beverly Hills Inc. received no preference in respect to warranty matters.

67. BMW of Beverly Hills, Inc. was both subject to and underwent warranty audits.

68. BMW of Beverly Hills, Inc. did not promote itself, nor allow its employees to promote the fact that it was owned by the distributor or manufacturer.

69. BMW of Beverly Hills, Inc. received the same bonus programs as any other dealers.

70. The General Manager of BMW of Beverly Hills, Inc. instructed the employees that if any employees promoted the Beverly Hills franchise as a factory owned store, they were subject to immediate termination.

71. BMW NA placed severe restrictions on the General Managers of the BMW of Beverly Hills franchise to ensure that it 1) did not hire employees from other dealers, 2) did not advertise prices nor 3) promote itself as a factory store or facility.

72. BMW NA never gave any preferential allocation of vehicles to BMW of Beverly Hills.

73. No confidential information was imparted to BMW of Beverly Hills by BMW of North America about any of the other dealer competitors.

74. The BMW of Beverly Hills, Inc. franchise was run by the General Manager as if it was his own dealership, including making a profit.

75. Interest was always paid by BMW of Beverly Hills, Inc., on the flooring of the vehicles it purchased from BMW NA.

76. Interest at 6 to 6 1/2 percent was paid on all monies borrowed on the line of credit extended by BMW NA to BMW of Beverly Hills.

77. The General Manager of the BMW of Beverly Hills dealership had responsibility for operations which included hiring and firing of personnel and determination of the advertising expenses to be incurred.

78. The determination of what price retail cars would be sold for by BMW of Beverly Hills, Inc., was usually left to the Sales Managers of the dealership.

79. BMW NA never dictated what a retail car should be sold for.

80. Other than the three restrictions placed on the general manager, Geisler, as General Manager of the franchise, was never treated any differently at BMW of Beverly Hills, Inc., by the distributor than he was when he was the General Manager and part-owner of Zipper.

81. Every effort was made by the distributor to treat BMW of Beverly Hills, Inc., exactly the same as an independent franchise dealer.

82. BMW NA never consciously or intentionally misallocated vehicles in favor of BMW of Beverly Hills, Inc., and to the detriment of Santa Monica BMW.

83. The decision by Bisset/Gilbert to pay $2,000,000 for the goodwill of the Beverly Hills franchise was made in April of 1993.

84. BMW NA developed a sales planning guide system of allocation in February of 1994 and the system would first affect allocation of cars to dealers in April of 1994.

85. BMW NA did not develop a sale planning guide allocation system in February of 1994 for the purposes of creating an increase in the value of the goodwill of BMW of Beverly Hills, Inc., since the sales price of the goodwill had been agreed upon ten months earlier, in April of 1993.

DETERMINATION OF ISSUES

86. BMW NA did not violate the provisions of § 11713.3(d) by preventing or attempting to prevent any other qualified individual from purchasing the assets of Zipper.

87. BMW NA was retailing BMWs within a Relevant Market Area against one of its franchisees. However, the Legislature found that this will not be competition if any one of the three safe harbors contained in § 11713.3(o) are met. BMW NA operated BMW of Beverly Hills temporarily for a reasonable period of time. Furthermore, BMW of Beverly Hills was a bona fide retail operation which was for sale to any qualified individual at a fair and reasonable price.

88. BMW NA failed to prove that Beverly Hills BMW, Inc., operated in a bona fide relationship in which an independent person had made a significant investment subject to loss in the dealership and could reasonably expect to acquire full ownership of the dealership on reasonable terms and conditions.

89. BMW NA did not intend to own and operate a distributor retail store in Beverly Hills for an indefinite period of time.

90. The asking price of $2,000,000 for goodwill plus assets was a fair and reasonable price.

91. At all times relevant BMW of Beverly Hills, Inc., dealership was a bona fide retail operation.

92. Whether an injunction should have been granted Santa Monica BMW is moot at this juncture due in part to the efforts of Mr. Ferguson and Santa Monica BMW in persuading BMW NA to sell BMW of Beverly Hills to an independent individual or group and the fact that BMW of Beverly Hills, Inc., was sold to an independent entity.

PROPOSED DECISION

THEREFORE, the proposed decision is respectfully submitted:

1. Petitioner shall take nothing.

2. Petitioner's renewed request for production of BMW of Beverly Hills new car dealer jackets is denied.

I hereby submit the foregoing which constitutes my proposed decision in the above-entitled matter, as a result of a hearing held before me on the above date and recommend adoption of this proposed decision as the decision of the New Motor Vehicle Board.

Dated: March 14, 1995

DOUGLAS H. DRAKE
Administrative Law Judge
New Motor Vehicle Board