

NEW MOTOR VEHICLE BOARD
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STATE OF CALIFORNIA
NEW MOTOR VEHICLE BOARD

In the Matter of the Protest of)

SAPPORA NARA GROUP, INC.,)
dba L.A. AIRPORT TOYOTA-)

Protestant,)

vs.)

TOYOTA MOTOR DISTRIBUTORS, INC.,)

Respondent.)

Protest No. PR-1246-91

In the Matter of the Petition of)

TOYOTA MOTOR DISTRIBUTORS, INC.,)

Petitioner,)

vs.)

SAPPORA NARA GROUP, INC., dba)
L.A. AIRPORT TOYOTA; KWANG H. KIM;)
YEONG JOO CHO; KEN JELLERSON, and)
DOES 1-20, Inclusive.)

Respondents.)

Petition No. P-232-92

PROPOSED DECISION

PROCEDURAL BACKGROUND

Due to the composite nature of the proceedings in this matter, a discussion of the procedural background has been bifurcated. The first part relates to the initial termination

proceeding and mandamus action, the second part relates to the subsequent termination proceeding and petition.

A. Initial Termination Proceeding

1. By letter dated May 10, 1991, Toyota Motor Distributors, Inc., ("TMD"), 19001 South Western Avenue, Torrance, California, gave notice pursuant to Vehicle Code section 3060^{1/} to Sapporo Nara Group, Inc., dba L.A. Airport Toyota ("Airport"), 646 South LaBrea Avenue, Inglewood, California, of TMD's intention to terminate Airport's Toyota franchise. The notice was received by the New Motor Vehicle Board ("Board") on May 13, 1991.

2. On May 23, 1991, the Board received from Airport a document which purported to be a protest, but did not comply with the regulatory form and content requirements, and was not accompanied by the required filing fee. The Board notified Airport of the deficiencies by letter dated May 29, 1991.

3. On June 6, 1991, the Board received a protest from Airport, dated June 4, 1991, which contained the proper information and was accompanied by the proper filing fee.

4. On June 25, 1991, TMD filed a motion with the Board to reject Airport's protest because the protest was not received by the Board within the statutory time period for such filings.

^{1/} All statutory references are to the Vehicle Code unless otherwise indicated.

5. On July 19, 1991, Sam W. Jennings, Chief Administrative Law Judge/Executive Secretary of the Board, issued an Order Rejecting the Protest for Filing.

6. On July 25, 1991, Airport filed its Motion for Reconsideration of the order rejecting the protest for filing. This motion was denied by order dated July 30, 1991.

7. On August 23, 1991, Airport filed a Petition for Writ of Mandate in the Sacramento County Superior Court. (Sacramento County Superior Court Case number 367813).

8. On August 30, 1991, the parties appeared before the Honorable James T. Ford of the Sacramento County Superior Court. After a hearing on the matter, the court issued an Alternative Writ of Mandate, Order to Show Cause, and a Temporary Stay Order which stayed the effect of the July 19, 1991 Order Rejecting the Protest for Filing.

9. A hearing on the Alternative Writ, Order to Show Cause and Temporary Stay Order was held via telephone conference call before the Honorable Darrel W. Lewis on December 20, 1991. At that time, the court construed an argument by TMD for a change of venue as a motion for such change, granted it, and transferred the case to the Los Angeles County Superior Court.

10. On February 24, 1992, a hearing on the Return to Alternative Writ and Stay Order was held in Los Angeles County Superior Court before the Honorable Robert H. O'Brien. After the hearing, Judge O'Brien's denied the petition for writ of mandamus and directed the discharge and vacation

of the alternative writ, the stay issued thereunder, and the temporary restraining order, all issued by the Sacramento County Superior Court.

B. Second Termination Action and Petition

11. On November 22, 1991, TMD gave notice pursuant to Vehicle Code section 3060, subdivisions (a)(1) and 3060(a)(2) (60- and 15-day notices) to Airport, of TMD's intention to terminate the franchise. The notices were received by the Board on November 25, 1991.

12. On December 7, 1991, Airport filed a protest with respect to both of TMD's notices of termination. The filing was assigned protest number PR-1246-91.

13. On December 26, 1991, TMD filed with the Board a Motion to Dismiss Protest Number PR-1246-91 as untimely.

14. On January 7, 1992, TMD filed a petition with the Board, naming Airport as Respondent. In this petition, TMD alleged that it was owed \$290,104.19 for goods sold and delivered, on open book account, and on account stated. TMD further alleged that Airport was the alter ego of Respondents Kwang H. ("Steven") Kim, Yeong ("John") Cho, and Ken Jellerson, who were the shareholders, officers and directors of L.A. Airport, Inc. The petition was assigned number P-232-92.

15. By order dated February 7, 1992, Respondent's Motion to Dismiss the Protest was denied. By order of the same date, the protest and petition were consolidated.

16. On February 26, 1992, after having received the order from the Los Angeles Superior Court denying the Petition for Writ of Mandamus (see paragraph 10, supra), Respondent filed a Motion in Limine to Dismiss Airport's protest as moot,

17. A hearing was held on the consolidated matters before Chief Administrative Law Judge/Executive Secretary Sam W. Jennings on February 27, 1992, at the Board's offices in Sacramento, California.

18. At this hearing, Judge Jennings granted Respondent's Motion to Dismiss Protest PR-1246-91 as moot, severed said protest from the consolidated proceedings and commenced the hearing on the merits of Petition P-232-92.

19. Respondent Airport appeared in propria persona by Mr. Kwang H. ("Steve") Kim, President, Sapporo Nara Group, Inc. dba L.A. Airport Toyota, 636 S. La Brea Avenue, Inglewood, California.

20. Petitioner TMD was represented by William Paul Kanno, Esq., Karen H. Pennington, Esq., and Crosby, Heafey, Roach & May, 700 South Flower Street, Suite 2400, Los Angeles, California, and Patricia S. Britton, Esq., Toyota Motor Distributors, Inc., 19001 South Western Avenue, Torrance, California.

ISSUES PRESENTED

21. TMD alleged that Airport is indebted to TMD in the amount of \$290,104.19^{2/}, together with interest thereon at the legal rate. It was TMD's contention that this money is owed based upon Airport's failure to pay for goods sold and delivered, based upon an open book account, and as demonstrated in a series of accounts stated in writing.

22. TMD has also alleged that Airport was the alter ego of Respondents Kim, Cho, and Jellerson, and there was a unity of interest and ownership between Respondents such that separateness between said individuals and Airport ceased to exist.

23. TMD alleged that adherence to the fiction of the separate existence of Airport and Respondents Kim, Cho, and Jellerson would lead to an inequitable result in that said Respondents rendered Airport insolvent by the misappropriation of corporate assets for their personal use, and failure to provide adequate capitalization for the corporation.

^{2/} Although TMD alleged in its petition that Respondents were indebted to TMD in the amount of \$290,104.19, there was no evidence presented to support such a figure. All of the evidence adduced at the hearing pertain to a debt in the amount of \$286,104.96.

FINDINGS OF FACT

Facts Relating to Indebtedness

24. The existence and estimated amount of debt was admitted by Mr. Kim at the hearing to be "around 290,000".

25. The existence and estimated amount of debt was admitted in the deposition of Mr. Cho as "200 to 300 hundred thousand (dollars)".

26. The precise amount of debt was established as \$286,102.96 by the uncontroverted testimony of Mr. Norman L. Howes, who was the regional parts manager for the Los Angeles Region at the relevant time, and a final month-end report dated January 31, 1992.

27. The debt existed since March 1, 1991.

Facts Relating to Disregarding the Corporate Entity

27. No Airport formal corporate meetings were held pursuant to written notice.

28. Respondent Cho used Airport corporate assets to discharge personal obligations and expenses. Mr. Cho's house payment, and country club membership were paid out of corporate bank accounts.

29. Respondents Kim, corporate president and Cho, corporate secretary received salaries that were extremely large in view of its short period of operation and Airport's rapid financial decline. Mr. Cho received \$22,000 per month, and Mr. Kim received \$12,000 per month. Airport was in operation from April 1990, however became unable to meet its obligations for parts as early as March of 1991.

30. Airport corporate funds were used to pay obligations of First Auto Sales, an entity owned, at least in part, by Respondent Kim.

31. Respondents Kim and Cho held 46 and 44% of the stock of Airport, respectively.

32. Respondent Jellerson was represented as being a 10% shareholder in Airport, however, Mr. Jellerson never received any stock certificates at any time from the formation of the corporation in April 1990, until Mr. Jellerson's separation from the company on January 7, 1991, at which time Mr. Jellerson's alleged equitable interest in Airport was relinquished.

33. No substantial evidence was offered demonstrating Mr. Jellerson, who was corporate vice president and general manager of Airport, misappropriated Airport funds for personal use, or in any other way diverted corporate funds for other than corporate uses. Evidence was presented and testimony was given that demonstrated Mr. Jellerson was concerned with the rapid depletion of Airport's working capital and attempted to resolve problems associated therewith.

34. Airport is a close corporation as defined by Corporations Code section 158.

RELEVANT LAW

Under the "alter ego" doctrine, the court, or in this case the Board, disregards the corporate entity and holds each shareholder against whom alter ego liability is established

jointly and severably liable for the full amount of the corporation's obligation (Minnesota Mining & Manufacturing Co. v. Superior Court (1988) 206 Cal.App.3d 1025, 1028-1029 (253 Cal.Rptr. 908). There are two general requirements for disregarding the corporate entity. First, there must be "such unity of interest and ownership that the separate personalities of the corporation and the individual no longer exist." (Automotriz Del Golfo De California v. Resnick (1957) 47 Cal.2d 792,796 (306 P.2d 1).) Second, it must be demonstrated that "if the acts are treated as those of the corporation alone, an inequitable result will follow." (Ibid.) The alter ego doctrine lies in equity and, "though courts have justified its application through consideration of many factors (cf. Associated Meat Vendors Inc. v. Oakland Meat Co. (1962) 210 Cal.App.2d 825, 838-840 (26 Cal.Rptr. 806)), their basic motivation is to assure a just and equitable result." NEC Electronics Inc. v. Hurt (1989) 208 Cal.App.3d 772, 777 (256 Cal.Rptr. 441) quoting Alexander v. Abbey of the Chimes (1980) 104 Cal.App.3d 39, 48 (163 Cal.Rptr. 377).

Most notably, in holding the individual defendants personally liable for their corporation's debt to the plaintiff, arising from the purchase by the corporation of a used car in connection with the corporate business, the court in McKee v. Peterson (1963) 214 Cal.App.2d 515 (29 Cal.Rptr. 742), pointed out that there was a significant diversion of corporate funds to other than corporate uses

which would justify disregard of the corporate entity. The court noted that one of the individual defendants withdrew money from the corporate bank account to discharge his personal obligations, and that he and other individual defendants also received salaries that were extremely large in view of the short period of operation of the corporation and considering its net income and its rapid decline into insolvency.

Corporations Code section 300, subdivision (e) states, in relevant part, that:

(t)he failure of a close corporation to observe corporate formalities relating to meetings of directors or shareholders in connection with the management of its affairs . . . shall not be considered a factor tending to establish that the shareholders have personal liability for corporate obligations.

DETERMINATION OF ISSUES

1. Airport is indebted to TMD in the amount of \$286,102.96 plus interest at the legal rate of 10% per annum from March 1, 1991, to the present.

2. The commingling of corporate and personal assets by shareholders Kim and Cho, misappropriation of corporate funds for personal use, and the large salaries and draw of said shareholders, in view of the weak financial condition of Airport, substantially contributed to Airport's inability to meet its obligations. Adherence to the fiction of separate existence of the corporation under these circumstances would be inequitable and promote injustice.

3. No evidence or testimony was presented to demonstrate that Respondent Jellerson misappropriated corporate funds or in any other manner disregarded the entity of the corporation by making Airport a conduit for his own private business.

4. Applying the alter ego doctrine, the Board disregards Airport's corporate form and holds shareholders Kim and Cho jointly and severably liable for the full amount of Airport's obligation to TMD.

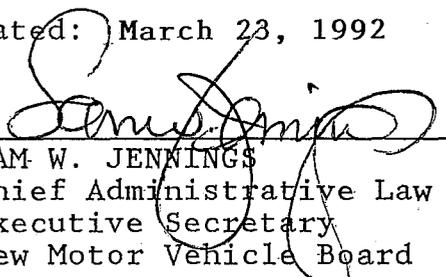
PROPOSED DECISION

The following proposed decision is respectfully submitted:

Sappora Nara Group, Inc., dba L. A. Airport Toyota, and shareholders Kwang H. Kim and Yeong Joo Cho are jointly and severably indebted to and shall pay Toyota Motor Distributors, Inc. for the sum of \$286,102.96 plus interest at the legal rate of 10% per annum from March 1, 1991, to the date payment is made.

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

Dated: March 23, 1992



SAM W. JENNINGS
Chief Administrative Law Judge/
Executive Secretary
New Motor Vehicle Board