

STATE OF CALIFORNIA

NEW CAR DEALERS POLICY & APPEALS BOARD

In the Matter of)
)
STATEWIDE AUTO WHOLESALE, INC.)
dba FREEWAY CHRYSLER PLYMOUTH,) Case No. A-10-70
)
Appellant,) Filed and Served:
)
vs.) 16 November 1970
)
DEPARTMENT OF MOTOR VEHICLES,)
)
Respondent.)
_____)

Time and Place of Hearing: October 21, 1970, 11:00 A.M.
350 McAllister Street
San Francisco, California

For Appellant: Johnson & Borgman
By: J. C. Borgman
Attorney at Law
3126 Buskirk Avenue
Walnut Creek, CA 94596

For Respondent: Honorable Thomas Lynch
Attorney General
By: Victor D. Sonenberg
Deputy Attorney General

FINAL ORDER

In the decision ordered April 6, 1970, by the Director of Motor Vehicles pursuant to Chapter 5, Part 1, Division 3, Title 2 of the Government Code, it was found that appellant:
(1) Wrongfully and unlawfully failed in 3 instances to mail or deliver to respondent the report of sale of used vehicles together with such other documents and fees required to transfer registration of the vehicles within the 20-day

period allowed by law; (2) failed in one instance to affix the operating copy of the report of sale and the paper license plate to a vehicle at the time the vehicle was delivered to the purchaser; (3) employed as a vehicle salesman one not licensed as a vehicle salesman; (4) failed in 3 instances to withdraw advertisements of certain motor vehicles within 48 hours after those motor vehicles were sold or withdrawn from sale; (5) caused advertisements of motor vehicles to be published that were misleading and inaccurate in material particulars, in that the advertisement of a monthly payment to be assumed following payment of a handling fee led members of the public to believe they could receive the benefits of an existing loan, when, in fact, purchase of the vehicles would require the making of a new loan; (6) caused to be published in a newspaper advertisements for the sale of specific motor vehicles without identifying those vehicles by either the vehicle license number or the vehicle identification number.

It was found by respondent that appellant introduced evidence to prove that: (1) Appellant was a volume dealer, having sold approximately 1500 cars during 1968 and even a larger number during 1969; (2) appellant experienced some difficulty in working out its system with newspaper advertising departments for cancelling ads of vehicles when the vehicles had been sold but eventually developed

forms to be sent to the involved newspapers. In a few instances, the advertisements for automobiles sold late Thursday afternoon could not be withdrawn from the Sunday edition of the newspaper by written notification. However, this could be accomplished by making a telephone call to the newspaper on Friday morning; (3) no copy proof was delivered or received by appellant prior to publication with reference to the ads not containing either the vehicle license number or the vehicle identification number; (4) the unlicensed salesman employed by appellant had been licensed at one time but said license was revoked because of the revocation of his driver's license. Two or three weeks prior to the hearing, the vehicle salesman's license was reinstated.

The penalty imposed suspended appellant's license, certificate and special plates for a period of 15 days, with the execution of the suspension ordered stayed for a period of two years upon the condition that the appellant obey all the laws of the United States, the State of California and its political subdivisions, and all the rules and regulations of the Department of Motor Vehicles. It was further ordered that the Director of Motor Vehicles may, during the two year period and after giving appellant notice and opportunity to be heard, vacate the stay order

and impose the suspension or a portion thereof upon evidence satisfactory to the Director that cause for disciplinary action has occurred. If such action is not taken by the Director during the two-year period, the stay is to become permanent and appellant restored to all of its license privileges.

An appeal was filed with this board pursuant to Chapter 5, Division 2 of the Vehicle Code, alleging that: (1) The Decision of the Director of Motor Vehicles is not supported by the findings and the findings are not supported by the weight of the evidence; (2) the penalty provided in the Decision of the Director of Motor Vehicles is not commensurate with the findings.

I. ARE THE FINDINGS OF THE DIRECTOR OF MOTOR VEHICLES SUPPORTED BY THE WEIGHT OF THE EVIDENCE IN THE LIGHT OF THE WHOLE RECORD REVIEWED IN ITS ENTIRETY?

It is not necessary to discuss the evidence produced by the respondent to support the finding that appellant employed and delegated the duties of a vehicle salesman to one George Holden who had not been licensed as a vehicle salesman or the finding that appellant caused advertisements of automobiles to be published in newspapers without identifying the vehicles so advertised by either the vehicle license identification number or license number; appellant concedes that these findings are properly supported. Appellant contends that the remaining findings of respondent

are not supported by the weight of the evidence.

We agree with appellant's contention that respondent has not proven a failure on the part of appellant to mail or deliver to the Department of Motor Vehicles documents and fees necessary to transfer registration of the vehicles described as Items 1 and 7 in Exhibit A, attached to the Accusation.

Respondent's Exhibits 11 and 17 establish that vehicles described in Item 1 and Item 7 of Exhibit A of the Accusation were sold on 7/4/68 and 7/17/68, respectively, but there is no evidence in the record that appellant failed to mail or deliver to the Department the documents necessary to transfer registration of the vehicles as found by respondent. Therefore, we reverse respondent as to its findings in this regard.

The evidence that the documents and fees necessary to transfer registration of the vehicle identified in Item 4 of Exhibit A is sufficient to support the finding that said documents and fees were not submitted to the Department of Motor Vehicles within the 20 days allowed by law. Respondent's Exhibit 13 contains the "Dealer Notice" which shows the vehicle was sold on 7/11/68. Also contained within Exhibit 13 is a certified copy of the appropriate Certificate of Ownership and stamped on the reverse side of that document is the date of 9/5/68. This board takes official notice that the

date stamped on the reverse side of the Certificate of Ownership reflects the date that the titling documents were received by the Department of Motor Vehicles for the purpose of transferring registration of the vehicle.

We need not discuss the hearsay question raised by the appellant concerning the affidavit of Richard Griffin, the buyer of the vehicle identified in Item 4 of Exhibit A, because the charge is proven without reference to that affidavit.

The evidence is conflicting concerning the finding that appellant failed to affix at the time of delivery the operating copy of the report of sale and the paper license plate to the vehicle sold to Gaylon G. or Deanne D. Bickford. The Director of Motor Vehicles resolved the conflict adversely to the appellant and we are presented with no evidence or argument which would compel a reversal of this finding.

Appellant contends the evidence does not support the finding that it failed in 4 instances to withdraw advertisements via a writing within 48 hours after the vehicles advertised were sold or withdrawn from sale pursuant to Section 11713(c) Vehicle Code. Appellant argues that respondent's "...evidence consisted entirely of merely showing that the ads had been published 48 hours after the car was sold."

Section 11713(c) Vehicle Code provides that it is unlawful and a violation of the Vehicle Code for a dealer "To fail within 48 hours in writing to withdraw any advertisement of a vehicle that has been sold or withdrawn from sale." Appellant calls our attention to some colloquy during the administrative proceedings concerning the proper interpretation of that section and suggests the statute has caused much confusion. The question was raised as to whether the statute imposes a duty upon the dealer to have the advertisement withdrawn from publication within 48 hours after the vehicle advertised is sold or withdrawn from sale or whether it merely imposes upon the dealer a duty to notify the publisher via a writing within the 48-hour period that the advertisement is to be canceled. Appellant contends that the latter interpretation is correct. We concur with this interpretation of appellant, but it is clear that the respondent, both in the administrative proceedings and before this board, also interpreted the statute in that manner. There is no contention made by respondent that a dealer should be subject to disciplinary action if a publisher fails to respond in time to his cancellation order. Had respondent taken the position that statute requires a dealer to have the ad withdrawn from publication within the 48-hour period, respondent would

merely have sought to prove the date the vehicle was sold or withdrawn from sale and the date the vehicle was last advertised. Respondent, however, went beyond this and proved that the records of the Oakland Tribune did not contain any indication that appellant had submitted a writing to the newspaper directing that the ads in question be canceled.

One could not seriously contend that the Legislature intended that a dealer be held responsible for the acts or omissions of a newspaper publisher over which the dealer has no control. The issue before us is not whether the publisher did or did not respond to appellant's cancellation order, but whether appellant did or did not submit such order timely and in the written form.

Testimony from appellant's witnesses supports the finding that appellant failed to follow the mandate of Section 11713(c) Vehicle Code. The advertisements of the vehicles described as Items 2, 3, 4 and 8 in Exhibit A were published in one or more newspapers during the first half of July 1968. Appellant's sales manager testified under cross-examination that advertisements placed by appellant were "probably" being canceled only by telephone calls in July 1968 (Vol. 2, R.T. 14, lines 5-7). While there was testimony produced by appellant that it commenced using a system wherein postcards were used to cancel ads,

appellant's sales manager testified that this procedure commenced approximately 10 months prior to the administrative hearing, which made the inauguration of the use of postcards well after the publication of the ads in question (Vol. 2, R.T. 14, lines 8-9).

Furthermore, another witness called by appellant, a classified advertising salesman for the Contra Costa Times during 1968 and 1969, testified under cross-examination that he started receiving written cancellations of advertisements from appellant shortly after receiving a copy of a letter from the Department of Motor Vehicles addressed to dealers; this letter was received sometime in August of 1968 (Vol. 2, R.T. 34, lines 14-26).

The evidence clearly supports the finding that appellant failed to cancel advertisements placed by appellant for those vehicles described as Items 2, 3, 4 and 8 of Exhibit A in writing within the time specified in Section 11713(c) Vehicle Code.

Respondent found that appellant committed acts in violation of Section 11713(a) Vehicle Code in July 1968 by publishing in two newspapers advertisements of automobiles that were misleading and inaccurate in material particulars, namely that the buyer could "assume" a monthly payment, following payment of a "handling fee" which falsely led members of the public to believe they could receive the

benefits of existing loans on the vehicles. For example, a portion of an advertisement offering a 1960 Thunderbird for sale included the language, "Pay \$28 and assume \$38 per month." Appellant attacks this finding by contending that: (1) Respondent did not meet its burden of proof in that it did not show that appellant's advertising was misleading in material particulars and (2) respondent did not present evidence that there are benefits in an existing loan, or at least that prospective customers were informed or thought there were benefits to be received from an existing loan.

Section 11713(a) Vehicle Code does not in any way define "material particulars" and, at the time the advertisements in question were published, respondent had not defined the term through its regulatory powers. However, in a contract for sale of an automobile, it is obvious that the method of financing the purchase price is a "material particular". It is common knowledge that automobiles are frequently purchased on a deferred payment plan and that the buyer frequently looks to the seller for assistance in arranging for the deferred financing when the vehicle is purchased from an automobile dealer. The amount of the down payment and the amount and number of monthly payments is as important to the buyer who cannot pay cash for a vehicle as the make, condition and price of the vehicle.

There is no burden upon respondent to prove any benefits inure to a buyer who assumes an existing loan. The question is whether reference in an advertisement to the payment of a handling fee and assuming a monthly payment would lead the reader of the advertisement to believe that he would be benefited by such an arrangement. This question is well answered by the following excerpt from Respondent's Reply Brief:

"Clearly, the words 'assume a monthly payment', when used in connection with an offer to sell a used car, reasonably conveys the idea that there has already been some previous monthly payment made toward the balance of the purchase price. ...this is clearly a 'benefit' of an existing loan. And appellant's ads further enhanced the idea of 'benefit' from an existing loan by specifying a small amount for a 'handling fee'. Here the obvious implication is that the down-payment had already been satisfied in connection with the existing loan, and all that was required was a minimal fee for administrative cost. Thus, whether or not in any given case there actually is a 'benefit' involved in an existing loan, the ads in question certainly conveyed the idea that a benefit was available in the form of some payment already made by a prior owner."

Respondent proved publication of the advertisements containing the objectionable language and the fact that none of the vehicles so advertised had existing loans which could be assumed. These were the elements regarding this aspect of its case necessary for respondent to prove. Although respondent elected to go further and proved that some readers of the advertisements were misled as to the

terms of financing of the automobile, doing so was unnecessary in view of the language in Webster vs. Board of Dental Examiners, 17 Cal.2nd 534, 541, that:

"...the evils of deceptive advertising cannot be reached effectively if legislation to that end is interpreted to require proof of actual reliance upon a false statement knowingly made, as in a common law action in deceit."

We find that the evidence produced by respondent was sufficient to support Finding VIII of the Decision of the Director of Motor Vehicles.

II. IS THE PENALTY IMPOSED BY THE DIRECTOR OF MOTOR VEHICLES COMMENSURATE WITH HIS FINDINGS?

Appellant argues that the penalty imposed is much too harsh even though this board holds that the findings of respondent are supported by the evidence. Appellant contends that some of the violations are of a technical or of a de minimus nature and that one was based upon an ambiguous statute. Appellant further argues that the violations concerning the advertising of vehicles in such a way that one would be led to believe that the vehicle could be purchased under an existing loan "...appears to be the only type of violation involved that the revocation penalties could possibly apply."

The evidence concerning the employment of the unlicensed salesman indicated that appellant held little or no respect for the requirements of the law; the unlawful employment was continued by appellant even after the July 28, 1969, Accusation and until only two or three weeks before the administrative

hearing on November 20, 1969. This board was not favorably impressed with appellant's contention that it was unaware that the salesman was unlicensed. Appellant was charged with the duty of determining that he was licensed when it employed him. The reason for the revocation of the salesman's license was entirely immaterial and in no manner excused appellant from continuing the unlawful employment, particularly during the period after being charged with the violation by the Department's Accusation.

Although we do not dismiss the remaining violations as being insignificant, we are of the opinion that the false and misleading advertising violations are of serious consequence.

The evidence clearly shows that appellant put into operation and maintained a scheme designed to mislead the public, and caused advertisements of a false and misleading nature to be published in newspapers. The ads referred the reader to a named person and gave a telephone number different from the telephone number listed in appellant's other advertisements. The advertisements did not disclose appellant's name. The phone number was that of an answering service. Appellant's agent returned the calls and, in several instances, informed the prospective buyers responding to the ads that the vehicles had been repossessed (Volume 1, R.T. 20, 24, 26, 33 and 49). This was a deliberate falsehood; the

vehicles had not been repossessed. This was established not only by respondent's direct evidence but also by the testimony of appellant's finance manager (Vol. 2, R.T. 38, lines 19-24).

We are unimpressed with appellant's arguments that respondent should have informed appellant that its advertisements were objectionable. There are situations wherein reasonable men may differ as to whether or not certain advertisements are of a false or misleading nature. When such opportunity for confusion exists, perhaps a warning or other clarifying device should be provided by the enforcing agency prior to proceeding with disciplinary action. However, on the facts in this case, no reasonable man could harbor any doubt as to whether the ads would or would not convey to the public a false message. A warning in this case was not indicated.

We do not find the penalty imposed by respondent too severe. It gives appellant the opportunity to continue in the business of selling automobiles, providing appellant abides by the laws governing the conduct of such business. Appellant purports to have a sincere desire to follow the law and regulations of the Department of Motor Vehicles with reference to advertising vehicles. The two-year probationary period imposed in this case will give appellant

adequate opportunity to demonstrate its ability and desire to do so.

With respect to Items 1 and 7 of Exhibit A, attached to the Accusation, and by reference made a part of Finding III of the Decision of the Director of Motor Vehicles, the Decision is reversed. In all other respects, the Decision is affirmed.

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WARREN BIGGS, President

ROBERT B. KUTZ

GILBERT D. ASHCOM

PASCAL B. DILDAY

MELECIO H. JACABAN

MRS. AUDREY B. JONES, Vice President

ROBERT B. NESEN

adequate opportunity to demonstrate its ability and desire to do so.

With respect to Items 1 and 7 of Exhibit A, attached to the Accusation, and by reference made a part of Finding III of the Decision of the Director of Motor Vehicles, the Decision is reversed. In all other respects, the Decision is affirmed.

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WARREN BIGGS, President

ROBERT B. KUTZ

Gilbert D. Ashcom

GILBERT D. ASHCOM

PASCAL B. DILDAY

MELECIO H. JACABAN

MRS. AUDREY B. JONES, Vice President

ROBERT B. NESEN

adequate opportunity to demonstrate its ability and desire to do so.

With respect to Items 1 and 7 of Exhibit A, attached to the Accusation, and by reference made a part of Finding III of the Decision of the Director of Motor Vehicles, the Decision is reversed. In all other respects, the Decision is affirmed.

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WARREN BIGGS, President



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With respect to Items 1 and 7 of Exhibit A, attached to the Accusation, and by reference made a part of Finding III of the Decision of the Director of Motor Vehicles, the Decision is reversed. In all other respects, the Decision is affirmed.

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WARREN BIGGS, President

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GILBERT D. ASHCOM

PASCAL B. DILDAY

MELECIO H. JACABAN

MRS. AUDREY B. JONES, Vice President

ROBERT B. NESEN

A large, stylized handwritten signature in black ink, appearing to read 'Robert B. Neesen', is written over the typed name 'ROBERT B. NESEN'.

adequate opportunity to demonstrate its ability and desire to do so.

With respect to Items 1 and 7 of Exhibit A, attached to the Accusation, and by reference made a part of Finding III of the Decision of the Director of Motor Vehicles, the Decision is reversed. In all other respects, the Decision is affirmed.

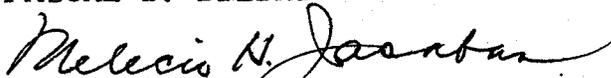
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ROBERT B. NESEN

adequate opportunity to demonstrate its ability and desire to do so.

With respect to Items 1 and 7 of Exhibit A, attached to the Accusation, and by reference made a part of Finding III of the Decision of the Director of Motor Vehicles, the Decision is reversed. In all other respects, the Decision is affirmed.

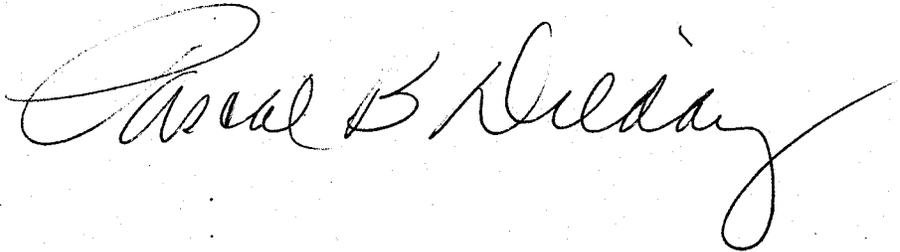
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WARREN BIGGS, President

ROBERT B. KUTZ

GILBERT D. ASHCOM

PASCAL B. DILDAY

A large, stylized handwritten signature in cursive script, appearing to read "Pascal B. Dilday", is written over the typed name of Pascal B. Dilday.

MELECIO H. JACABAN

MRS. AUDREY B. JONES, Vice President

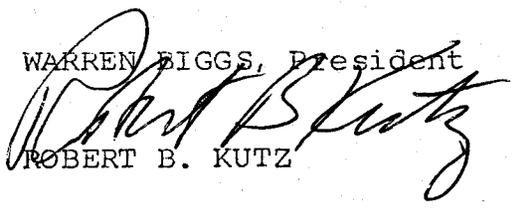
ROBERT B. NESEN

adequate opportunity to demonstrate its ability and desire to do so.

With respect to Items 1 and 7 of Exhibit A, attached to the Accusation, and by reference made a part of Finding III of the Decision of the Director of Motor Vehicles, the Decision is reversed. In all other respects, the Decision is affirmed.

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WARREN BIGGS, President


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GILBERT D. ASHCOM

PASCAL B. DILDAY

MELECIO H. JACABAN

MRS. AUDREY B. JONES, Vice President

ROBERT B. NESEN

adequate opportunity to demonstrate its ability and desire to do so.

With respect to Items 1 and 7 of Exhibit A, attached to the Accusation, and by reference made a part of Finding III of the Decision of the Director of Motor Vehicles, the Decision is reversed. In all other respects, the Decision is affirmed.

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WARREN BIGGS, President

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GILBERT D. ASHCOM

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Audrey B Jones
MRS. AUDREY B. JONES, Vice President

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