

STATE OF CALIFORNIA

NEW CAR DEALERS POLICY & APPEALS BOARD

In the Matter of)
FOULGER FORD, INC.,)
Appellant,) Appeal No. A-18-71
vs.) Filed: February 29, 1972
DEPARTMENT OF MOTOR VEHICLES,)
Respondent.)

Time and Place of Hearing: February 9, 1972, 1:30 p.m.
Director's Conference Room
Department of Motor Vehicles
2415 First Avenue
Sacramento, California

For Appellant: Connolly Oyler
Attorney at Law
Gerlach, Harker, Langworthy
& Oyler
15233 Ventura Boulevard, Suite 400
Sherman Oaks, CA 91403

For Respondent: Honorable Evelle J. Younger
Attorney General
By: Frank A. Iwama
Deputy Attorney General

FINAL ORDER

On December 10, 1970, the Department of Motor Vehicles, hereinafter referred to as "respondent", filed an accusation against Foulger Ford, Inc., hereinafter referred to as "appellant", charging that appellant:

"...contrary to Section 11713(a) of the Vehicle Code and Section 433.00, Title 13 of the California Administrative Code, caused advertisements to be published in the San Gabriel Valley TRIBUNE on May 24, 1970, and May 31, 1970, examples of which are attached hereto as Exhibit A, and by this reference made a part hereof, which were misleading and inaccurate in material particulars in that on such dates Respondent (Appellant) advertised a 1969 Mustang for sale, License YDM-718 (YDW-718) at prices about at or below Respondent's (Appellant's) cost in order to entice members of the public to Respondent's (Appellant's) place of business to sell different vehicles when in truth and in fact Respondent (Appellant) had no intention of selling, and refused to sell, the 1969 Mustang referred to herein at the advertised prices."

The matter was heard by an officer of the Office of Administrative Procedure on February 3, 1971, and a proposed decision was issued on March 17, 1971. The hearing officer found as follows:

"On May 24, 1970, respondent (appellant) intentionally caused to be published in a newspaper, the San Gabriel Valley Tribune, an advertisement offering to sell to the public a certain automobile, to wit, a 1969 Mustang, license number YDM-718 for the full price of \$1,778.00. Said advertisement was misleading in a material particular in that respondent (appellant) did not then and there intend to sell said vehicle at the price so advertised, and respondent (appellant) did intend by said advertisement to lead the purchasing public to believe that the advertised price of said vehicle was the total price of said vehicle, when in fact it was not.

"Said vehicle was again thereafter advertised for the said price of \$1,778.00 and was sold for said advertised price on July 6, 1970, following the investigation in this matter."

The Proposed Decision ordered appellant's license, certificate and special plates suspended for a period of ten days, with said suspension being stayed for a period of one year upon condition

that appellant obey all the laws of the United States, State of California, and its political subdivisions, and comply with all the rules and regulations of respondent.

Respondent did not adopt the Proposed Decision. Following notice and written argument, pursuant to Section 11517(c) Government Code, respondent issued a decision adopting the findings and determination of issues in the Proposed Decision but ordered that appellant's license, certificate and special plates be suspended for a period of ten days with seven of said ten days stayed for a period of one year on condition that appellant obey the laws of the United States, State of California, and its political subdivisions, and comply with all the rules and regulations of respondent.

An appeal was timely filed with this board pursuant to Article 3, Chapter 6, Division 2, of the Vehicle Code, urging that the Board find that appellant did not violate Section 11713(a) Vehicle Code nor Section 433.00, Title 13, California Administrative Code, or in the alternative, exercise its penalty determination powers by fixing a penalty consistent with that proposed by the hearing officer.

We reverse the Decision of the Director of Motor Vehicles in its entirety as we do not find any evidence in the administrative record that appellant violated either Section 11713(a) Vehicle Code or Section 433.00, Title 13, California Administrative Code.

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

In Paragraph III of the Director's Decision, it is recited that: (1) appellant did not intend to sell the vehicle in question for the price advertised and (2) appellant intended by said advertisement to lead the purchasing public to believe that the advertised price of the vehicle was the total price, when, in fact, it was not.

Appellant clearly intended to lead the purchasing public to believe that the advertised price of the vehicle was the total price, but we find no evidence in the administrative record to warrant a conclusion that the advertised price was not, in fact, the total price of the vehicle.

There is nothing in the administrative record to establish that the prospective buyer, Mr. William Bezuhly, Jr., or anyone else, was told by a representative of the dealership that the vehicle was for sale at a price greater than the advertised price of \$1,778.00. The hearing officer inquired of Mr. Bezuhly as to whether or not there was any conversation, after Mr. Bezuhly had been informed that the vehicle was advertised only as a weekend special, concerning any other price at which the vehicle would be sold. Mr. Bezuhly replied in the negative (R.T. 28, line 27 to R.T. 29, line 4). Mr. Charles Robert Foulger, general manager and vice president of appellant, testified that he would have accepted Mr. Bezuhly's "...personal check in total." for the

vehicle even though his contact with Mr. Bezuhly was several days following the appearance of the advertisement in the newspaper. This testimony preponderates against a finding that the dealership would sell the vehicle only at a price greater than the amount advertised.

We turn now to that portion of Paragraph III that finds that the advertisement was misleading in that appellant did not intend to sell the vehicle at the advertised amount. Respondent apparently proceeded on the theory that when a new car dealer licensee advertises a vehicle for sale for a given price, on a given date, that he is guilty of misleading advertising if his intent is to sell the car for that price only on the date the advertisement appears in the newspaper, unless the advertisement expressly states that the vehicle will be available for purchase at that price only on the date the advertisement is published. To express the proposition in another way, the respondent apparently believes that when a licensee advertises a given car for a given price on a given day, there is necessarily an implied representation by the licensee that the car will be made available for sale at that price for a "reasonable time", in this case several days, after the advertisement is published, unless such implied representation is expressly negated by language contained within the advertisement specifying a time limit. Counsel for respondent have cited no authority to support such a theory and we have found none. In our view, the invitation contained in an advertisement terminates at the close of the business day on which the advertisement appears, in the absence

of language in the advertisement declaring its duration. While it may be a desirable business practice to follow the theory urged by the respondent, neither the Legislature nor the respondent, through regulations adopted concerning false advertising, have seen fit to impose license discipline upon a dealer who does not adopt this theory in his advertising practices. It may also be a sound business practice to keep a vehicle for sale at the advertised price until it has either been sold or until it has been made the subject of another advertisement but, again, imposing such a requirement must be left to the Legislature or imposed by the Director of Motor Vehicles through his rule-making power.

We are unable to glean from the administrative record any evidence which would support a finding as to what appellant would or would not have done May 24, 1970. There was no contact between Mr. Bezuhly and anyone at the dealership on that date. Mr. Bezuhly "...attempted to call on that first day, that Sunday" (R.T. 4, line 21). He attempted to call the dealership on Sunday but there was no answer (R.T. 17, lines 11-13). The first time he talked to anyone at the dealership was the following Monday (R.T. 17, lines 15-16). Mr. Bezuhly did make contact with the dealership on three consecutive days following the date the advertisement was published and his offers to purchase the vehicle were rejected. In our view, on none of those three days was appellant under any obligation to sell the vehicle at the previously advertised price, or at any price, and appellant's

refusal to sell could not attach a false or misleading quality to the advertisement published by appellant on May 24, 1970.

It is an elementary rule of contract law that an advertisement is not an offer but a mere invitation to others to make offers. (Lonergan v. Scolneck, 129 C.A.2d 179.) "A mere advertisement or request for bids for the sale of particular property or the erection or construction of particular work is merely an invitation for offers, and is not an offer to accept any particular bid. It results in a contract only on the acceptance of a bid." (17 C.J.S. Contracts 48.)

The record before us does not show that Mr. Bezuhly, or anyone else, made an offer to appellant on the date the public was invited to so do. It merely shows that his offer to purchase the vehicle on subsequent dates was rejected. In our view, this well-settled rule of contracts should not be ignored in the absence of a statute or, at least, a regulation thereon. We find no language in either Section 11713 Vehicle Code or Sections 17500 et seq. Business and Professions Code authorizing such a deviation and, as stated, we find no regulation of the Director of Motor Vehicles on this matter.

Indeed, language in Section 11713 Vehicle Code supports the proposition that all that is required of the dealer is to have the vehicle available for sale at the advertised price on the date of publication and that it may be withdrawn from sale at that price thereafter. Subsection (b) in pertinent part provides that it is unlawful and a violation of the Vehicle Code for a dealer:

"To advertise...for sale...in any manner, any vehicle not actually for sale at the premises of such dealer...at the time of the advertisement..." (emphasis added).

Subsection (c) in pertinent part 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." (Emphasis added.)

The latter subsection is inapplicable here because appellant did not continue to publish the advertisement on May 25, May 26 or May 27. However, in the light of the language of subsection (c), it appears that even had it done so, it would have had the right to withdraw the vehicle from sale so long as it gave the publisher written advice to withdraw the advertisement within 48 hours of the time the vehicle was withdrawn from sale.

Utilization of the familiar retailing device of advertising "leaders" is an acceptable business practice, and that is all that the record establishes as having occurred in this case.

The Decision of the Director of Motor Vehicles is reversed in its entirety.

This final order shall become effective when served upon the parties.

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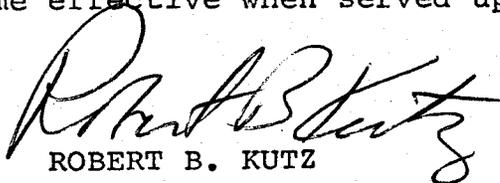
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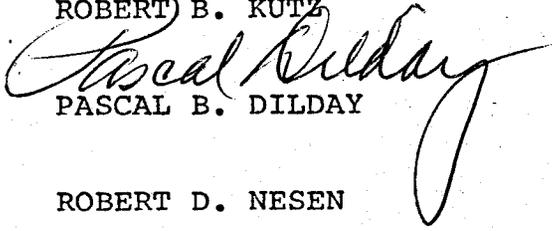
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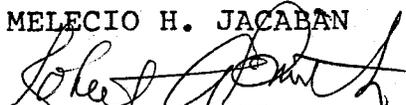
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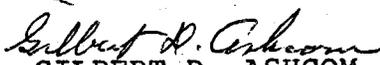
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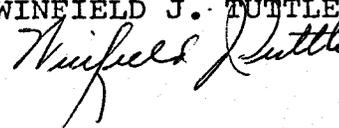
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