

P. O. Box 1828
2415 First Avenue
Sacramento, CA 95809
(916) 445-1888

STATE OF CALIFORNIA

NEW CAR DEALERS POLICY & APPEALS BOARD

In the Matter of)
)
DON LEE THIEL, dba)
THIEL MOTORS,)
)
Appellant,) Appeal No. A-33-72
)
v.) FILED: November 23, 1973
)
DEPARTMENT OF MOTOR VEHICLES)
OF THE STATE OF CALIFORNIA,)
)
Respondent.)
_____)

Time and Place of Hearing: October 10, 1973, 10:30 a.m.
2570 - 24th St., Room 200A
Sacramento, CA 95818

For the Appellant: Harold C. Wright
Attorney at Law
Brown, Wright & Kucera
2600 El Camino Real, Suite 411
Palo Alto, CA 94306

For the Respondent: Honorable Evelle J. Younger
Attorney General
By: Joel S. Primes
Deputy Attorney General

FINAL ORDER

Don Lee Thiel, dba Thiel Motors, hereinafter referred to as "appellant", appealed to this board from a disciplinary action taken against the corporate license by the Department of Motor Vehicles following proceedings pursuant to Section 11500 et seq. Government Code.

The Director of Motor Vehicles, adopting the Proposed Decision of the Hearing Officer, found that: (1) appellant had during April 1971 advertised Datsun pickups available at \$2,098; that three persons sought to buy stripped-down Datsuns during that month but were unable to do so; that each, however, bought Datsuns with accessories; that appellant knew of the advertisement and knew that the vehicles, as advertised, would not be sold at the advertised price; that appellant, through his agents, refused to sell at the advertised price in April 1971 and his reason for not doing so was immaterial; (2) appellant failed in 21 instances to give written notice to the department within three days after transfer of vehicles; (3) appellant failed in 12 instances to mail or deliver reports of sale of vehicles (with documents and fees) to the department within 40 days; (4) appellant failed in 34 instances to mail or deliver reports of sale of vehicles (with documents and fees) to the department within 20 days; (5) appellant failed in one instance to mail or deliver reports of sale for vehicle (with documents and fees) to the department within 10 days; and (6) appellant in six instances charged purchasers of vehicles excessive registration fees.

Additional findings were made in pertinent part as follows: appellant, now 33 years of age, has been a motor vehicle dealer in the Modesto area for 13 years; he has

a sizeable business, grossing \$2,500,000 in 1971 and employing 35 employees and salesmen; in 1971 appellant sold 1,250 vehicles and his 1972 rate is about the same; evidence concerning timely reporting requirements and payment of fees fairly established that the appellant was negligent in this phase of the operation; appellant's business had been looked over by department investigators in late 1970; numerous instances were found where fee refunds were due purchasers; refund checks were made out but many were not mailed by appellant; instances of fee overcharges indicate appellant was lax in mailing refunds to purchasers.

The penalty imposed by the director was as follows: for false or misleading advertising, 15 days' suspension; for failure to give 3-day notices, 5 days' suspension; for failure to file reports of sale within 20 days, 5 days' suspension; for failure to file reports of sale within 40 days, 5 days' suspension; for failure to file report of sale within 10 days, 5 days' suspension; and for charging excessive registration fees, 5 days' suspension.

It was provided that the 15-day suspension for false or misleading advertising was to run consecutively with all other suspension, while other suspensions were to run concurrently, for a total period of suspension of 20 days.

Essentially this appeal is based on the contentions that the findings are not supported by the weight of the

evidence, the decision is not supported by the findings and that the penalty is not commensurate with the findings. The appeal is limited to the three areas in which the issues were decided adversely to the appellant; i. e., false or misleading advertising, late transfers and overcharge of fees.

Appellant further raises an ancillary issue contending that the hearing officer originally proposed a suspension of 15 days which the director modified to 20 days (by increasing the penalty for false or misleading advertising from 10 to 15 days) without complying with Government Code Section 11517 (b) and (c). From our examination of the record, we are entirely satisfied that appellant's contention is entirely devoid of merit. However, no useful purpose would be served by extended discussion of this issue as it is rendered moot by our decision with respect to the finding of false or misleading advertising.

Section 3054, subsection (d), Vehicle Code, requires us to use the independent judgment rule when reviewing the evidence. Pursuant to this rule, we are called upon to resolve conflicts in the evidence in our own minds, draw such inferences as we believe to be reasonable and make our own determination regarding the credibility of witnesses' testimony in the transcript of the administrative proceedings (Park Motors, Inc. v. Department of Motor Vehicles, A-27-72; Holiday Ford v. Department of Motor Vehicles, A-1-69; and Weber and Cooper v. Department of

Motor Vehicles, A-20-71.)

Applying the weight of the evidence rule, we find insufficient support for the Director's Finding IV (false or misleading advertising).

Our concern with the lack of evidence preponderating in favor of the department is grounded in several areas; first, the ambiguity inherent in the advertisement when related to the evidence and the controlling law; second, the paucity of evidence establishing the knowledge or intent requisite to a finding of a violation of Section 11713(a) Vehicle Code; and, third, the comparatively weak and conflicting posture of the probative evidence establishing the false or misleading nature of the advertisement.

The sections of the Vehicle Code which deal with false or misleading advertising (Secs. 11713(a) and (b)) essentially proscribe two courses of conduct. (1) Making any untrue or misleading statements about a vehicle or making such statements as part of an intentional plan or scheme not to sell a vehicle at the advertised price; and (2) advertising for sale a vehicle not on the premises or available to the dealer from the manufacturer or distributor. The advertisement involved read as follows: "'71 Datsun Pickups Now Available. \$2098. Thiel Motors. 608 10th St. 524-6304."

The ambiguity which concerns us arises from the use of the words "Now Available" appearing in the advertisement. These

words could reasonably be interpreted as conveying the representation that such vehicles were physically present at the dealer's premises, that the dealer was regularly receiving them from the factory or distributor and could make delivery within an acceptable time or that, on order, they were "available" in that they could be obtained from the factory or distributor. Considering this in light of the evidence, it was established without contradiction that, during April 1971, appellant at times was receiving shipments of these specific vehicles from the factory or distributor. Thus, when viewed against the controlling law, the advertisement was not in contravention of either Section (a) or (b) of 11713 V.C. with regard to availability.

The problem of ambiguity of the advertisement is further compounded by the absence therein of any language whatever with respect to accessories. Consequently, to hold that the advertisement in effect offered '71 Datsun pickups for sale "stripped" (i.e., without accessories) is to resort to speculation, which we will not do. The appellant advertised the price of pickups as \$2098, and the evidence amply supports the fact that such vehicles were sold at that price during April 1971, albeit accessories were additional.

The crux of the department's contention, as found established by the director, is that during April 1971 appellant knew of the advertisement but refused to sell the vehicles "stripped" and at the advertised price. The department predicated its case

on the advertisement which appeared in the Modesto Bee on April 2, 27 and 28, 1971. It was established, however, that the same 3-line advertisement appeared not only on these dates but on every day of publication of the paper from December 1, 1970, through July 30, 1971, and was inserted in this manner to obtain a favorable daily advertising rate. It was additionally established that during the entire running of the advertisement, except during April 1971, approximately 26 Datsun pickups were sold, some at \$2098 and other at a lesser figure and some that sold at \$2098 included accessories such as radios or bumpers. Confirming that such sales were made, appellant on his own behalf testified that if a customer did not want accessories, he could purchase or order a pickup "stripped". Considering all of this in light of our previous discussion, we are not satisfied that the appellant possessed the guilty knowledge or intent as part of a scheme or plan within the contemplation of Section 11713(a) Vehicle Code.

We next turn to the evidentiary posture of the case with particular attention to the findings of the director that, "Three persons in April 1971 sought to buy 'stripped down' Datsuns from respondent for \$2098. Each was unable to purchase a vehicle as requested." The three persons referred to were the three witnesses called by the department to establish the false or misleading nature of the advertisement. These were

Mr. Alton, Mr. Jordan and Mrs. Harvey.

Although Mr. Alton testified that he was informed by a salesman that he had to buy an air conditioner or camper shell in order to purchase a vehicle that was then in stock, he also testified that the same salesman told him he could get a "stripped" model, if he "would just wait a little while" at the price of \$2098. Mr. Alton also admitted that at the time he first considered buying a pickup, he wanted a radio and wrap-around bumper.

As to Mr. Jordan, at the time he visited appellant's premises, he advised the salesman he would like to have a pickup "just as it comes", which meant to convey "without bumper". At that time, all they had was a demonstrator. Subsequently he was called by the salesman who informed him that a purchaser had backed out of a sale and that a pickup was available but that it was equipped with a bumper and radio. Mr. Jordan replied, "Fine, that's all right. I will take it." Prior to making the purchase, he had had no discussion with anyone at Thiel Motors as to whether or not he had to purchase extra equipment.

Lastly, as to Mrs. Harvey, she and her son went to Thiel Motors to buy a pickup with as few accessories as they could. They didn't want a radio or bumper. Although she was told she would have to buy an air conditioner, radio and bumper to

get one of the pickups on the lot, she did not ask if she could order one without accessories. They paid \$2098 for the pickup plus the additional cost of the accessories.

Of significance is the fact that none of the three witnesses went to Thiel Motors in response to the advertisement although Mr. Alton and Mrs. Harvey subsequently read it. It is evident that none of the witnesses were misled by the advertisement; none requested to place an order for a "stripped" vehicle; Mr. Alton was told he could get one if he waited a little while; the sale price of the pickup, without accessories, was \$2098; and both Mr. Alton and Mr. Jordan were completely satisfied with buying a radio and bumper.

In our view of the sum total of the evidence, there is a lack of evidentiary support for a finding that appellant advertised falsely or in a manner to mislead the public.

Accordingly, Findings of Fact IV and Determination of Issues II are reversed. The remaining findings of fact and determination of issues are affirmed.

Pursuant to Sections 3054(f) and 3055 Vehicle Code, the New Car Dealers Policy and Appeals Board amends the Decision of the Director of Motor Vehicles as follows:

WHEREFORE, the following order is hereby made:

The vehicle dealer's license, certificate and special plates (D-5022 and MC-904) heretofore issued to appellant,

Don Lee Thiel, dba Thiel Motors, are suspended for a period of five (5) days, with three (3) days of the suspension stayed for a period of one year during which time appellant's license, certificate and special plates shall be placed on probation to the Director of Motor Vehicles upon the following terms and conditions:

Appellant, and its officers, directors and stockholders shall comply with the laws of the United States, the State of California and its political subdivisions, and with the rules and regulations of the Department of Motor Vehicles.

If appellant, or any of appellant's officers, directors or stockholders, is convicted of a crime, including a conviction after a plea of nolo contendere, such conviction shall be considered a violation of the terms and conditions of probation.

In the event appellant shall violate any of the terms and conditions above set forth during the period of the stay, then the Director of Motor Vehicles, after providing appellant due notice and an opportunity to be heard, may set aside the stay and impose the stayed portion of the suspension, or take such other action as the director deems just and reasonable in his discretion. In the event appellant does comply with the terms and conditions above set forth, then at the end of the one-year period, the stay shall become permanent and appellant's license fully restored.

This Final Order shall become effective December 10, 1973 .

PASCAL B. DILDAY

AUDREY B. JONES

JOHN ONESIAN

MELECIO H. JACABAN

THOMAS KALLAY

W. H. "Hal" McBRIDE

ROBERT A. SMITH

WINFIELD J. TUTTLE

A-33-72

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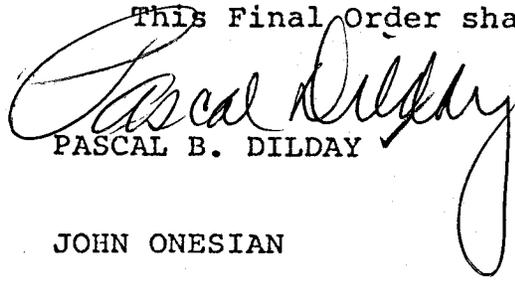
ROBERT A. SMITH

WINFIELD J. TUTTLE ✓

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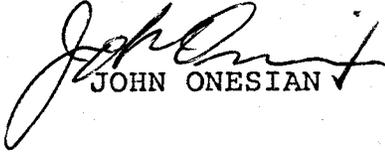
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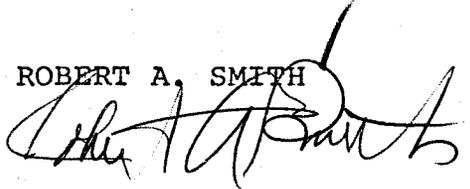
MELECIO H. JACABAN

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ROBERT A. SMITH

WINFIELD J. TUTTLE

A handwritten signature in cursive script, appearing to read "Robert A. Smith", is written over the typed name "ROBERT A. SMITH".

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AUDREY B. JONES

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