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STATE OF CALIFORNIA  
NEW MOTOR VEHICLE BOARD

In the Matter of the Appeal of )  
BALBOA MOTORS, dba BALBOA DATSUN, )  
Appellant, ) Appeal No. A-75-76  
v. )  
DEPARTMENT OF MOTOR VEHICLES ) FILED: 1/11/78  
OF THE STATE OF CALIFORNIA, )  
Respondent. )

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Time and Place of Hearing:

September 14, 1977, 9:30 a.m.  
Room 4061, 722 Capitol Mall  
Sacramento, CA 95814

For Appellant:

Ernest S. Pierucci, Esq.  
Wright, Britton, Coder & Tuel  
3190 Clearview Way, Suite 210  
San Mateo, CA 94403

For Respondent:

Harry Towne, Esq.  
Staff Counsel, DMV  
2415 First Avenue  
Sacramento, CA 95818

FINAL ORDER

I. Procedural Background

Appellant, Balboa Datsun ("Balboa") is a corporation licensed to do business as a new motor vehicle dealer in California. The hearing officer found that the Department of

Motor Vehicles ("Department") established grounds, pursuant to Vehicle Code § 11705, to suspend or revoke appellant's dealers license and special plates. The Department adopted the decision of the hearing officer and the recommendation that Balboa's license be suspended for ten days all but three days stayed for a probationary period of one year. Balboa has appealed from this decision of the Department.

## II. Facts

The findings upon which the Department imposed discipline are as follows: Balboa represented three used vehicles as new;<sup>1/</sup> and overcharged license fees due to the Department on one occasion.<sup>2/</sup> Appellant bases his appeal on all statutory grounds.<sup>3/</sup>

Appellant contends that discipline should not have been imposed since there was no evidence of fraudulent intent, nor of damage to the consumer. While admitting that a "mistake" was made in one transaction by representing a used vehicle as new, appellant seeks to negate the effect of this error by

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1/ "A 'used' vehicle is a vehicle that has been sold and operated on the highways of this state or has been registered with the department, ..." (Vehicle Code §665)

2/ Vehicle Code § 11713(g).

3/ Vehicle Code § 3054.

the fact it was later corrected. In the other two transactions appellant asserts that the use of a "used vehicle report of sale" was sufficient to notify the buyers that those vehicles were used vehicles, despite the fact that the contracts indicated they were new vehicles.<sup>4/</sup> Both purchasers testified that they had never been told the vehicles were used.

Regarding the single overcharge of licensing and transfer fees appellant contends that this was the result of dealer confusion engendered by the wording of then Vehicle Code § 11713(g). That section permitted a dealer to charge the subsequent purchaser licensing or transfer fees only when the dealer had paid those fees to the state in order to avoid penalties.

Appellant finally contends that the Board should consider in mitigation of the penalty appellant's 20 years in business without any prior disciplinary action; its employee handbook; its support of and cooperation with the city government of National City; and the immediate steps that were taken by appellant to correct the situation that led to these disciplinary proceedings.

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<sup>4/</sup> One contract was marked both new and used, Exhibit 5(t) and Exhibit 4(g).

### III. Law and Discussion

Appellant's contention that the evidence is insufficient to support a finding of fraud is specious in that it completely misconceives the Vehicle Code sections which appellant has been found to have violated. The Department correctly points out that appellant was not accused of violating the Vehicle Code provision on fraud or deceit.<sup>5/</sup> Fraud need not have been committed in order for violations of Vehicle Code §§ 11713(a) and 11713(d) to have occurred. Appellant violated Vehicle Code §§ 11713(a) and (d) when it represented to the purchaser that a used vehicle was a new vehicle and when these vehicles were actually purchased without that misrepresentation having been dispelled.<sup>6/</sup> There is no "magic" that transforms a new vehicle into a used vehicle, nor is there any retransformation into a new vehicle by affording the buyer a new vehicle warranty. In Vehicle Code § 665 (see footnote 1) the legislature has explicitly set forth the conditions under which a vehicle is considered "used". The evidence shows that all three purchasers left the dealership under the erroneous impression that they had purchased new vehicles. This impression was created by appellant's description of the vehicles as being, in reality, new cars. Appellant's contention that when a vehicle is treated as new

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<sup>5/</sup> Vehicle Code § 11705(a)(14).

<sup>6/</sup> Wilshire Volkswagen v. DMV, Appeal No. A-74-76 at 4.

for purposes of warranty; and that when a vehicle looks, feels, drives, smells and has every other physical characteristic of a new car it is a new car, is tantamount to an admission that in all material respects the vehicles were in fact represented to these purchasers to be new.<sup>7/</sup>

Under Vehicle Code § 11713(g), as it read in 1975, the dealer was not permitted to pass on license and transfer fees to a subsequent purchaser on a rollback/unwind except where those fees had been paid to the state by the appellant to avoid penalties for late payment. The Board has indicated that § 11713(g) requires that both parts of the two-prong test be met, i.e. that the fees be paid to the state and that they be paid to avoid penalty.<sup>8/</sup> The fees in this case were paid pursuant to a sale and not to avoid a late penalty.

Appellant's contention that the evidence is insufficient to support the findings is completely unmeritorious. The record clearly establishes the occurrence of the acts constituting violations of the Vehicle Code.

Factors in mitigation of the penalty do not amount to a justification or an excuse for a wrongful act. They are, however, relevant to the determination of the appropriate administrative sanction to be imposed upon a licensee for Vehicle Code violations. It is a well established principle

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<sup>7/</sup> Appellant's Closing Brief at 5; Appellant's Opening Brief at 11.

<sup>8/</sup> 49'er Chevrolet v. DMV, Appeal No. A-70-76 at 7-8.

that administrative proceedings have as a primary purpose the protection of the public, not the punishment of the wrongdoer.<sup>9/</sup> Accordingly, in determining the penalty to be assigned for these Vehicle Code violations such factors as the appellant's 20 year history without disciplinary action, its community activities and especially its steps to prevent further Vehicle Code violations should be noted. (Appellant did take immediate steps to correct the practices which led to these violations.)

The Board has, on its own motion, canvassed its prior decisions and found that the most recent imposition of an actual three day closure was in a proceeding involving four used vehicles sold as new; four used vehicles sold as demonstrators; three license fee overcharges; one failure to report transfer within 40 days; and ten vehicles displayed without assigned license plates.<sup>10/</sup> An earlier Board decision upholding an actual three day closure involved 317 untimely notices of sale; one unlicensed salesman; one published advertisement improperly identifying a vehicle; one published advertisement depicting vehicles and equipment which were not available; and 48 license fee overcharges.<sup>11/</sup> In view of appellant's prompt remedial actions and his blameless record as a dealer, and in

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<sup>9/</sup> Coberly Ford v. DMV, A-25-72 at 9; Ready v. Grady 243 Cal. App. 2d 113; Borrer v. Dept. of Investment, 15 Cal. App. 3d 539.

<sup>10/</sup> Wilshire Volkswagen v. DMV, Appeal No. A-74-76.

<sup>11/</sup> King Dodge Sales, Inc. v. DMV, Appeal No. A-55-74.

light of the Board's prior decisions, the penalty is excessive.

The decision of the Department of Motor Vehicles is modified to provide that Balboa's license be suspended for ten days, and that all ten days be stayed for a probationary period of one year.

The decision of the Director is affirmed as modified.

This final order shall become effective 1/31/78.

THOMAS KALLAY

MELECIO H. JACABAN

JOHN B. OAKLEY

JOHN B. VANDENBERG

KATHLEEN O. TURNER

JOSEPH TREJO

RUDY A. PEREZ

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