



1 NEW MOTOR VEHICLE BOARD  
1507 - 21st Street, Suite 330  
2 Sacramento, California 95814  
Telephone: (916) 445-1888  
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6 STATE OF CALIFORNIA  
7 NEW MOTOR VEHICLE BOARD

8 In the Matter of the Protest and )  
9 Petition of )  
10 RAY FLADEBOE LINCOLN-MERCURY, )  
INC., )  
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Petitioner )  
vs. )  
Respondent. )  
**Petition No. P-344-95**  
**PROPOSED DECISION**

PROCEDURAL BACKGROUND

1. By letter dated August 15, 1994, Ford Motor Company, Lincoln-Mercury Division (hereinafter "Lincoln-Mercury") gave notice to Ray Fladeboe Lincoln-Mercury (hereinafter "Fladeboe"), pursuant to Vehicle Code Section 3060<sup>1</sup>, of Lincoln-Mercury's intention to terminate the Lincoln-Mercury franchise held by Fladeboe. The notice of termination was received by the Board on March 8, 1995.

2. Fladeboe is a licensed new motor vehicle dealer enfranchised to sell Lincoln-Mercury vehicles. Fladeboe is

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<sup>1</sup> All statutory references are to the Vehicle Code unless otherwise noted.

1 located at 16-18 Auto Center Drive, Irvine, California.

2 3. Ray Fladeboe is the dealer principal of Fladeboe.

3 4. Lincoln-Mercury is a manufacturer and distributor of  
4 new motor vehicles in California.

5 5. Fladeboe filed a protest on April 8, 1995 with the  
6 Board pursuant to § 3060.<sup>2</sup> The Board assigned Protest Number PR-  
7 1462-95.

8 6. Fladeboe filed a petition on October 13, 1995 with the  
9 Board pursuant to §§ 3050 and 11713.3. The Board assigned  
10 Petition Number P-344-95.

11 7. On October 27, 1995, Protestant filed a Motion to  
12 Change Place of Hearing from Sacramento to Los Angeles.

13 8. On October 30, 1995, the Board ordered the protest and  
14 petition consolidated for purposes of hearing.

15 9. On October 31, 1995, the Board denied the motion to  
16 change the place of hearing from Sacramento to Los Angeles.

17 10. On November 9, 1995, Protestant filed with the Orange  
18 County Superior Court a Peremptory Writ of Mandate seeking to  
19 compel the Board to set aside its decision denying Protestant's  
20 motion to change the place of hearing from Sacramento to Los  
21 Angeles. Protestant concurrently filed an Ex Parte Application  
22 for an Order Staying the Hearing Before the New Motor Vehicle  
23 Board in the Matter of Ray Fladeboe Lincoln-Mercury vs. Ford  
24 Motor Company, Lincoln-Mercury Division.

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25  
26 <sup>2</sup> Fladeboe's protest was originally received by the Board  
27 on February 24, 1995. Lincoln-Mercury failed to serve a copy of  
28 the notice of termination on the Board. This defect was cured by  
stipulation of the parties and the action was deemed filed on  
April 8, 1995.

1           11. On November 15, 1995, the Court denied Protestant's ex  
2 parte application for a stay of the administrative hearing before  
3 the Board.

4           12. On November 29, 1995, Protestant filed with the Board a  
5 Motion in Limine to Change Place of Hearing From Sacramento to  
6 Los Angeles or Orange County. The motion sought to move the  
7 place of the hearing or to at least conduct that part of the  
8 hearing involving witnesses from Southern California in either  
9 Los Angeles or Orange County.

10           13. Administrative Law Judge Drake issued an Order on  
11 November 29, 1995, granting Protestant's motion to have  
12 witnesses' testimony taken in Orange County on the condition  
13 Petitioner pay the expenses of the Board. The motion was granted  
14 for the convenience of non-expert and non-employee witnesses.

15           14. The hearing on the Peremptory Writ of Mandate was  
16 continued to November 29, 1995 before the Honorable Francisco F.  
17 Firmat. The peremptory writ of mandate was denied and  
18 Administrative Law Judge Drake's ruling on the motion to take  
19 witness testimony in Los Angeles was "well-reasoned and not an  
20 abuse of discretion."

21           15. A fifteen (15) day hearing was held before Douglas H.  
22 Drake, Administrative Law Judge, commencing on November 29, 1995  
23 and ending on January 11, 1996.

24           16. Protestant was represented by A. Albert Spar, Esq. and  
25 Paige E. Budd, Esq. of Parker, Milliken, Clark & O'Hara, 333  
26 South Hope Street, 27th Floor, Los Angeles, California.

27           17. Lincoln-Mercury was represented by J. Keith McKeag,  
28 Esq. of Downey, Brand, Seymour & Rohwer, 555 Capitol Mall, 10th

1 Floor, Sacramento, California.

2 18. Lincoln-Mercury was also represented by David R.  
3 Kelleher, Esq., Office of the General Counsel, Ford Motor  
4 Company, 1500 Park Lane Towers West, 3 Park Lane Boulevard,  
5 Dearborn, Michigan.

6 19. Because there were two public member vacancies on the  
7 Board, there was not a quorum to conduct business with respect to  
8 petitions. Separate proposed decisions for the protest and  
9 petition were drafted to accommodate this. The proposed decision  
10 on the petition was held until such time as the Board constituted  
11 a quorum.

12 CONTENTIONS OF THE PARTIES

13 20. Fladeboe alleges Lincoln-Mercury unreasonably withheld  
14 approval of Bruce Fladeboe as the dealer and unreasonably failed  
15 to approve the executed Buy-Sell Agreement between Ray Fladeboe,  
16 Fladeboe, and Bruce Fladeboe. Fladeboe maintains the burden is  
17 on Lincoln-Mercury "to prove, by a preponderance of the evidence,  
18 that its refusal was reasonable."

19 21. Fladeboe further contends that it is entitled to both  
20 compensatory and punitive damages, attorney fees, and a mandatory  
21 injunction ordering Lincoln-Mercury to approve the Buy-Sell  
22 Agreement, and to approve Bruce Fladeboe as the dealer of  
23 Fladeboe with 100% control over the operation of the dealership.

24 22. Lincoln-Mercury contends the only burden imposed on  
25 Lincoln-Mercury is to "explain the basis for its determination,  
26 as supported by substantial evidence that the proposed  
27 transferees are materially deficient with respect to one or more  
28 appropriate, performance related criteria . . . Lincoln-Mercury

1 is required only to show that there is substantial evidence to  
2 support its reasons for rejecting the proposed transfer."

3 23. Lincoln-Mercury further contends that Fladeboe was  
4 rejected as a proposed transferee for several performance related  
5 criteria and Fladeboe failed to demonstrate by a preponderance of  
6 the evidence that Lincoln-Mercury's criteria were not performance  
7 based but rather were applied in an arbitrary and capricious  
8 manner.

9 ISSUES PRESENTED

10 24. Did Lincoln-Mercury violate § 11713.3(d) which  
11 provides, in relevant part, as follows:

12 It is unlawful and a violation of this code for any  
13 manufacturer, manufacturer branch, distributor, or  
14 distributor branch licensed under this code to do any  
of the following:

15 (d) To prevent or require, or attempt to prevent or  
16 require, by contract or otherwise, any dealer, or any  
17 officer, partner, or stockholder of any dealership, the  
18 sale or transfer of any part of the interest of any of  
19 them to any other person or persons. No dealer,  
20 officer, partner, or stockholder shall, however, have  
the right to sell, transfer, or assign the franchise,  
or any right thereunder, without the consent of the  
manufacturer or distributor except that the consent  
shall not be unreasonably withheld.

21 25. If Lincoln-Mercury violated § 11713.3(d) and the  
22 refusal to consent to the buy-sell was unreasonable, has Fladeboe  
23 suffered any compensable damages?

24 26. If Lincoln-Mercury's refusal to consent to the buy-sell  
25 was unreasonable, and if Fladeboe suffered damages as a result  
26 thereof, has Fladeboe incurred recoverable attorneys fees?

27 27. If Lincoln-Mercury's refusal to consent to the buy-sell  
28 was unreasonable, is Fladeboe entitled to an injunction mandating

1 the approval of a transfer to Bruce Fladeboe?

2 28. If Lincoln-Mercury's refusal to consent to the buy-sell  
3 was unreasonable, has Fladeboe established it is entitled to an  
4 award of punitive damages?

5 **FINDINGS OF FACT**

6 a. Facts relating to the unreasonable withholding of  
7 consent to a buy-sell or assignment of the Fladeboe  
8 franchise.

9 29. Fladeboe is the owner of five automobile dealerships,  
10 including the Lincoln-Mercury dealership, located at the Irvine  
11 Auto Mall.

12 30. The buy-sell agreement provided that 51% of Fladeboe  
13 was to be sold to Bruce Fladeboe and 49% was to be retained by  
14 Ray Fladeboe.

15 31. The purchase and sale agreement did not set any price  
16 for the assets being purchased, but left all such evaluation for  
17 later appraisal. While the agreement provided for the transfer  
18 for goodwill, there was no price to be paid for that asset.

19 32. The purchase and sale agreement was not the entire  
20 agreement for the transfer of the franchise. Ray and Bruce  
21 Fladeboe actually had a stock swap agreement where Ray would  
22 receive 49% of the corporation owning a Chevrolet-Geo-Oldsmobile  
23 dealership in San Rafael and Bruce would own 51% of the  
24 corporation owning not only the Lincoln-Mercury dealership, but  
25 also Honda, Isuzu, Volkswagen, and Hyundai dealerships in Irvine.  
26 This agreement was not presented to Lincoln-Mercury for  
27 evaluation.

28 33. No evidence was presented by Fladeboe that it had ever  
entered into any agreement to transfer 100% of its interest in

1 the dealership to Bruce Fladeboe.

2 34. The Purchase and Sale Agreement and supporting  
3 documentation provided by Bruce Fladeboe as to some of his prior  
4 automotive management experience were reviewed by Forrest Brown,  
5 the Retail Development Manager for Lincoln-Mercury's Los Angeles  
6 Regional Sales office, and by John Mecke, the Los Angeles  
7 Regional Manager.

8 35. In reviewing and evaluating the proposed buy-sell  
9 agreement, Mr. Brown and Mr. Mecke used the same criteria  
10 Lincoln-Mercury normally uses to review and evaluate proposed  
11 transfers and applications by prospective dealers in the ordinary  
12 course of business.

13 36. Industry standards regarding a buy-sell agreement is  
14 that the manufacturer looks to the 4 "C"s: Capacity, Character,  
15 Capital, and Customer Satisfaction.

16 37. The criteria for a person buying in as a principal  
17 owner (a person with more than 20% ownership interest) are the  
18 four "C"s:

19 (1) Capacity: Past experience in the automotive industry  
20 and the various levels of experience. In those levels of  
21 experience, Lincoln-Mercury looks to how the applicant  
22 performed and how they performed in terms of market share  
23 compared to a comparable average group of dealers that are  
24 being used by a particular manufacturer;

25 (2) Customer Satisfaction: Lincoln-Mercury provides the  
26 same analysis as for Capacity;

27 (3) Character: Lincoln-Mercury looks at the character of  
28 the individual(s) proposing to be the new dealer; and

(4) Capital: Lincoln-Mercury looks at credit reports  
prepared by TRW or Equifax. Inquiries are made into whether  
a bankruptcy has been filed, whether the applicant has been  
sued, and whether the applicant is a felon. Lincoln-Mercury  
also looks at cash and capital resources. In the  
capitalization of a dealership the necessary equity.

1 requirements must be met, as well as, a debt-to-equity ratio  
2 of one-to-one.

3 38. Bruce Fladeboe orally represented to Lincoln-Mercury  
4 that he would have full control over the day-to-day operation of  
5 the dealership. Bruce Fladeboe and Ray Fladeboe were willing to  
6 enter into an agreement which provided Bruce Fladeboe was to have  
7 100% control of the Lincoln-Mercury dealership. However, no  
8 written agreement between Bruce Fladeboe and Ray Fladeboe was  
9 ever presented to Lincoln-Mercury which in any way would have  
10 limited Ray Fladeboe's right to take part in the management of  
11 the dealership.

12 39. Lincoln-Mercury's policy is that it will not approve a  
13 buy-sell to a buyer with a Quality Commitment Performance (QCP)  
14 in the lower quartile.

15 40. During Bruce Fladeboe's tenure as the General Manager  
16 for Sonnen Lexus, the Customer Satisfaction Index (CSI)<sup>3</sup> for New  
17 Vehicle Sales Delivery Survey (NVSDS) was as follows:

NVSDS	<u>1991</u>	<u>1992</u>	<u>05/93 YTD</u>
Dealer	95.4	97.0	97.6
District	95.8	96.4	96.8
Area	96.3	96.9	97.1
National	96.7	97.3	97.5

22 41. CSI for the Lexus Service Survey (LSS) was as follows:

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27 <sup>3</sup> CSI which stands for Consumer Satisfaction Index is used  
28 by other franchisors as a measure of the public service provided  
by a particular franchise.

1	LSS	<u>1991</u>	<u>1992</u>	<u>05/93 YTD</u>
2	Dealer	94.4	95.1	94.8
3	District	93.6	95.5	95.7
4	Area	94.4	95.3	95.4
5	National	94.8	95.6	95.4

6       42. CSI for the Owner Satisfaction Index (OSI) was as  
7 follows:

8	OSI	<u>1991</u>	<u>1992</u>	<u>05/93 YTD</u>
9	Dealer	95.0	95.9	96.5
10	District	93.8	94.8	94.8
11	Area	94.5	94.9	95.1
12	National	95.3	95.6	95.6

13       43. QCP is Lincoln-Mercury's method of rating CSI, or  
14 Consumer Satisfaction Index.

15       44. Through May 1995, the Purchase and Delivery  
16 Satisfaction Survey for Fladeboe Chevrolet-Geo-Oldsmobile ranks  
17 the dealership seventh out of 37 dealers. The Service  
18 Satisfaction Survey for the same time period ranks the dealership  
19 eighth out of 37 dealers.

20       45. A lower quartile QCP standing is an unacceptable level  
21 of performance as far as Lincoln-Mercury is concerned and would  
22 result in automatic rejection of the dealer candidate.

23       46. Bruce Fladeboe's most recent experience, and only  
24 experience as a sole operator of a dealership, has been at  
25 Fladeboe Chevrolet-Geo-Oldsmobile in San Rafael. Since he took  
26 over operation of that dealership in October 1993, it has  
27 suffered an operating loss each year. In 1993, the operating  
28 loss was \$154,000, in 1994 the operating loss was \$185,000, and

1 in 1995 the annualized operating loss was anticipated to be in  
2 excess of \$250,000. While no ranking was performed by Chevrolet  
3 in 1994 because Bruce Fladeboe had recently purchased the  
4 dealership, data provided by Chevrolet showed that the  
5 dealership's sales penetration was well below the national  
6 average which Chevrolet uses as its comparison standard. In 1994  
7 and 1995, sales penetration figures for each line-make handled by  
8 the dealership were substantially below national average, based  
9 on Mr. Brown's analysis of R.L. Polk data for that time period.  
10 Lincoln-Mercury determined that Bruce Fladeboe did not have the  
11 capacity to become a Lincoln-Mercury dealer.

12 47. Lincoln-Mercury through Forrest Brown calculated the  
13 operating capital requirements for the Fladeboe dealership to be  
14 \$2,000,000.

15 48. Lincoln-Mercury's standards are that only 50% of the  
16 capital requirement for a dealership be borrowed, i.e. a 50%  
17 debt-equity ration. Therefore, Lincoln-Mercury required \$510,000  
18 for capital.

19 49. The total capital required is \$872,800 in working  
20 capital plus \$931,700 in total Lincoln-Mercury fixed assets which  
21 equals \$1,804,500 for a 100% buy-sell.

22 50. Bruce Fladeboe had only \$400,000 in liquid assets  
23 available for capital.

24 51. Lincoln-Mercury would not approve any sale in which Ray  
25 Fladeboe kept any interest, so it calculated the capital  
26 necessary as though Bruce Fladeboe was the sole purchaser.

27 52. Lincoln-Mercury calculated the unencumbered capital  
28 necessary if Bruce Fladeboe was the sole purchaser as

1 \$1,000,000.00.

2 53. Lincoln-Mercury determined that Bruce Fladeboe was  
3 unqualified to become a 100-percent dealer of the Fladeboe  
4 franchise. Bruce Fladeboe was deficient in two of the four  
5 "C's": (1) Capacity - as evidenced by the lack of financial  
6 operating profit and below average market-share performance at  
7 the dealerships he has been associated with; and (2)  
8 Capitalization - Bruce Fladeboe had \$400,000 in unencumbered  
9 funds. According to Lincoln-Mercury, a minimum of \$2 million was  
10 required in capitalization just for the Lincoln-Mercury  
11 franchise.

12 b. Facts relating to compensable damages, attorneys fees  
13 and punitive damages.

14 54. Both the Sales and Service Agreements and § 11713.3  
15 require that Lincoln-Mercury's consent be obtained for any  
16 transfer of rights under the franchise, but both also provide  
17 that such consent shall not be unreasonably withheld. If  
18 Fladeboe has sustained its burden of proving Lincoln-Mercury  
19 unreasonably withheld consent to the requested transfer, Fladeboe  
20 would be entitled, under both contracts and the statute, to  
21 recover its actual damages suffered as a result thereof. Under  
22 § 11726, if Fladeboe could show pecuniary loss, it would also be  
23 entitled to recover attorney fees. Such fees would, however, be  
24 limited to those incurred in prosecuting the Petition, since no  
25 recovery of attorneys fees is allowed for protesting a threatened  
26 termination. Nor can Fladeboe recover prospective damages and an  
27 injunction requiring Lincoln-Mercury to approve a transfer to  
28 Bruce Fladeboe, only past damages are recoverable.

1 55. Fladeboe presented no evidence of any pecuniary loss  
2 that it has suffered as a result of Lincoln-Mercury withholding  
3 consent to the proposed buy-sell between Ray Fladeboe and Bruce  
4 Fladeboe. The only evidence of expenses incurred are in the  
5 nature of attorney's fees and costs expended in prosecuting the  
6 Protest and the Petition.

7 56. Freeman & Mills, Inc. v. Belcher Oil Co. (Supreme Court  
8 of California, 1995) 44 Cal. Rptr. 2d 420 overruled Seaman's  
9 Direct Buying Service, Inc. v. Standard Oil Co., 36 Cal.3d 752,  
10 206 Cal. Rptr. 354, 686 P.2d 1158 and held tort recovery does not  
11 lie in action for noninsurance contract breach, in absence of  
12 violation of independent duty arising from principles of tort law  
13 other than bad faith denial of existence of, or liability under,  
14 breach of contract.

15 **DETERMINATION OF ISSUES**

16 57. The burden of proving that Lincoln-Mercury acted  
17 unreasonably in refusing to consent to the buy-sell agreement  
18 between Ray Fladeboe and Bruce Fladeboe is on the party so  
19 contending, Ray Fladeboe Lincoln-Mercury.

20 58. Fladeboe failed to meet this burden of proof.

21 59. During day one of the evidentiary hearing, the  
22 Administrative Law Judge ruled that no evidence would be taken on  
23 tort damages. Evidence would be taken on statutory and contract  
24 damages. Furthermore, the Administrative Law Judge ruled that  
25 loss of goodwill is a contract damage.

26 60. Fladeboe has failed to prove any contract or statutory  
27 damages. Fladeboe is not legally entitled to punitive damages.  
28 Fladeboe is not entitled to attorney fees. Fladeboe is not

1 entitled to a mandatory injunction.

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**PROPOSED DECISION**

1. The petition is overruled.

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

DATED: May 29, 1996

By   
DOUGLAS H. DRAKE  
Administrative Law Judge