

1 51. On July 14, 2000, Ford Motor Credit suspended Daugherty's
2 line of credit and Daugherty was placed on what is called "credit hold"
3 or "finance hold." The credit hold occurred after electronic funds
4 transfer drafts drawn on Daugherty by Ford Motor Credit were returned
5 for insufficient funds and an audit by Ford Motor Credit revealed that
6 Daugherty was out of trust. Daugherty's financial difficulties
7 continued and the credit hold was never lifted.

8 52. Sixteen months later, by letter dated September 7, 2001, Ford
9 Motor Credit notified Daugherty that Ford Motor Credit was terminating
10 the credit line effective November 9, 2001.⁵

11 53. When asked by Ford Motor Credit to "put more money into the
12 dealership" Mr. Daugherty declined to do so because "... at that point
13 the relationship was so strained that I - there wasn't any way I could
14 go forward with it."

15 54. Daugherty inquired of General Motors Acceptance Corporation
16 ("GMAC") but GMAC was not interested in extending a credit line for
17 Lincoln Mercury products and Daugherty made no other efforts to obtain
18 a line of credit.

19 55. Approximately seventy-five days after the November 9, 2001,
20 date stated in Ford Motor Credit's letter terminating Daugherty's
21 credit, Lincoln Mercury on January 23, 2002, gave notice of its
22 intention to terminate the franchises.

23 Findings as to Whether Daugherty Ceased Conducting Its
24 Sales and Service Operations as a Direct Result of the
25 Conduct of Representatives of Lincoln Mercury

26 56. Section 3061, in addition to the specifically listed factors,

27 ⁵ There was testimony by Mr. Daugherty that the credit termination
28 did not become finally effective until December 17, 2001. Pursuant to
Stipulated Fact #4, the credit termination was effective November 9,
2001, and therefore, this date will be used as the reference point.

1 requires that the Board consider "existing circumstances" in
2 determining whether good cause has been established for the termination
3 of a franchise.

4 57. Daugherty contends that its financial difficulties were
5 caused by an oversupply of vehicles that resulted in it being placed on
6 credit hold by Ford Motor Credit and that the oversupply was due to the
7 conduct of Lincoln Mercury in delivering too many vehicles.

8 58. To evaluate this contention, it is necessary to determine how
9 vehicles are ordered and eventually delivered to a dealership.

10 59. A dealership's orders for new inventory can be generated
11 either by Lincoln Mercury computers or by the dealership keying in its
12 orders through the dealership computers.

13 Orders Generated by Lincoln Mercury Computers

14 60. These are generated weekly by Lincoln Mercury based upon an
15 allocation system and are sent to the dealer electronically with the
16 right in the dealer to accept, reject, modify or put in a completely
17 different order.

18 Orders Submitted by Dealers

19 61. Dealers are free to order any units they want, but whether
20 they will be built is dependent upon availability. A dealer could
21 eventually receive fewer than what the dealer ordered. However, the
22 only time that Lincoln Mercury would override the dealer's orders to
23 increase the number above that ordered by the dealer is when the dealer
24 also submitted a "sold order" with the name of a retail customer.

25 Ordering and Receipt of Vehicles by Daugherty

26 62. The dealer principal, Michael Daugherty, has been in the
27 automobile business for 36 years and has been operating Daugherty
28 Chevrolet for many years.

1 63. Mr. Daugherty participated in the operation of Daugherty
2 Lincoln Mercury on a daily basis, and was "involved in everything".
3 Daugherty Chevrolet and Daugherty Lincoln Mercury are both located on
4 the 12 acres owned by Mr. and Mrs. Daugherty.

5 64. Daugherty Lincoln Mercury has one employee responsible for
6 the ordering of new vehicles. This person is also the same person
7 responsible for ordering new vehicles for Daugherty Chevrolet and has
8 been with Mr. Daugherty for almost 20 years. This person was not
9 identified nor called as a witness but was described by Mr. Daugherty
10 as being "very good at what he does."

11 65. When orders are placed, whether through the Lincoln Mercury
12 computer or by the dealer, the dealer receives, the next morning, an
13 acknowledgment of the order which specifies what was ordered. The
14 dealer also receives a second notice when the ordered vehicle is
15 scheduled to be built. A dealer will receive a third notice when the
16 vehicle is shipped. It takes approximately six weeks to two months
17 from time a vehicle is scheduled to be built until it is delivered to
18 the dealer.

19 66. The dealer also receives a weekly list showing the status of
20 ordered vehicles identified by vehicle identification numbers. This
21 status information is also accessible by the dealer at any time.

22 67. Daugherty has employees assigned to receive vehicles when
23 they are delivered and Daugherty is able to access its inventory by
24 computer at any time as soon as the vehicles are logged into its
25 internal system which usually takes 4 or 5 days.

26 68. Daugherty can also determine how many vehicles were delivered
27 each month by looking at its financial statement.

28 69. Daugherty also received itemized flooring statements from

1 Ford Motor Credit showing that the delivered vehicles had been financed
2 by Ford Motor Credit.

3 Credit Line and Ordered Inventory Prior to Being
4 Placed on Credit Hold on July 14, 2000

5 70. When established in June 1999, Daugherty had a credit line of
6 \$2,000,000 with Ford Motor Credit, which was the amount required by
7 Lincoln Mercury.

8 71. Within 5 or 6 months and by June 2000, Daugherty had over
9 \$7,600,000 in inventory all financed by Ford Motor Credit.

10 72. Daugherty contends that this "oversupply was a direct result
11 of the actions of Lincoln in building and shipping vehicles to
12 Daugherty which were neither ordered nor for which a viable funding
13 source existed at the time that they were delivered."

14 73. However, Daugherty's evidence was not persuasive that the
15 vehicles it received during this time period (June 1999 through June
16 2000) were not ordered nor wanted by Daugherty. As found above,
17 Daugherty would have received three notices pertaining to the orders
18 prior to delivery, had access to the order status at any time, and at
19 no time stated to anyone that the vehicles were not wanted.

20 74. The claim that there was no "viable funding source" at the
21 time they were delivered is not tenable because all of these vehicles
22 were delivered and paid for by Ford Motor Credit prior to Daugherty
23 being placed on credit hold which occurred on July 14, 2000. It was not
24 until July 14, 2000, that Ford Motor Credit suspended the credit and
25 placed Daugherty on "credit hold".

26 75. Although Mr. Daugherty denies that he requested an increase
27 from Ford Motor Credit in Daugherty's flooring line, he was aware that
28 it was being increased due to the shipment of vehicles which were being

1 received and billed to Daugherty's account by Ford Motor Credit.

2 76. Daugherty's financial difficulties resulted in electronic
3 drafts drawn by Ford Motor Credit upon Daugherty being returned for
4 insufficient funds and a Ford Motor Credit audit which revealed that
5 Daugherty was out of trust. A couple of days after the audit, Ford
6 Motor Credit suspended Daugherty's credit effective July 14, 2000.
7 Although this out of trust situation was resolved quickly, the
8 financial difficulties continued and the credit hold was never lifted
9 by Ford Motor Credit.

10 Ordered Inventory Between the Time When Ford Motor Credit
11 Suspended Daugherty's Credit on July 14, 2000 and When Ford
12 Motor Credit Finally Terminated Daugherty's Credit
13 Effective November 9, 2001

14 77. Daugherty asserts that "The vehicles that were delivered to
15 Daugherty after the dealership had been placed on credit hold clearly
16 were not ordered by Daugherty and directly resulted in the oversupply
17 of vehicles which caused the closure of the business." (Emphasis
18 added.)

19 78. Daugherty was placed on credit hold by Ford Motor Credit
20 effective July 14, 2000, and sixteen months later, effective November
21 9, 2001, Ford Motor Credit terminated Daugherty's line of credit.

22 79. Once a dealer is placed on credit hold, the Lincoln Mercury
23 computer will not generate orders for submission to the dealer for
24 acceptance, modification or rejection and the testimony from Lincoln
25 Mercury was that the orders would have to be placed from the
26 dealership.

27 80. Between July 14, 2000, and March 1, 2001, there were a total
28 of approximately 146 vehicles built for Daugherty.

81. How many of these 146 vehicles were actually delivered to

1 Daugherty is unclear. During the hearing, Daugherty's evidence was
2 that the deliveries were as shown below for "a total of 95", but the
3 total comes to 105. Another document showed that of the 146 vehicles
4 built for Daugherty, 53 were held back or canceled, which would mean
5 that Daugherty actually received 93. Of these 146 built vehicles,
6 Daugherty testified that deliveries were made as shown below.

DATE	NO. OF POST-CREDIT-HOLD VEHICLES DELIVERED
July 2000	24
August 2000	18
November 2000	9
December 2000	11
January 2001	15
February 2001	28
TOTAL	105

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15 Of the vehicles delivered, 37 were sold by Daugherty to customers, 4
16 were traded by Daugherty to other dealers, and 52 were picked up by
17 Lincoln Mercury from the dealership on March 1, 2001, when it was clear
18 that the difficulties with Ford Motor Credit were not going to be
19 timely resolved. (These numbers total 93, thus if 105 were delivered,
20 there are twelve vehicles unaccounted for.) Daugherty was credited for
21 the 52 vehicles that were picked up including the interest charges. In
22 addition to the vehicles that were delivered, there were 53 vehicles,
23 that although built for Daugherty, were neither delivered nor billed to
24 Daugherty. They likewise had been built in recognition of the need of
25 Daugherty to have a stream of vehicles available in the pipeline if the
26 credit was re-established but this did not happen. (See discussion
27 below.)

8 82. The 52 vehicles were picked up from the dealership because

1 Ford Motor Credit had not lifted the credit hold as had been
2 anticipated would occur prior to their delivery and Daugherty had not
3 obtained a line of credit elsewhere. The 53 vehicles that had been
4 built but not delivered were withheld because of the lack of a credit
5 line. These were held for Daugherty by Lincoln Mercury for some period
6 of time in the hope that the financial situation would be cleared, but
7 they were eventually sold by Lincoln Mercury to other dealers.

8 Why Vehicles Were Built and Delivered While Daugherty Was Still
9 On Finance Hold and Whether They Were Ordered by Daugherty

10 Model Year Changeover, Depletion of Inventory, and Lag
11 Time in Getting Vehicles Delivered after Orders Placed

12 83. There were meetings between Daugherty and Lincoln Mercury in
13 an effort to reconstruct an order bank for the 2001 model year
14 vehicles. There were shared concerns of Lincoln Mercury and Daugherty
15 that the orders had to be placed in time for the vehicles to be built
16 and delivered in order to maintain a flow of new product to Daugherty
17 even though Daugherty was on credit hold. That was necessary as Mr.
18 Daugherty stated, "Because the problem was, we had went through the
19 2000 model year, and if I was - if I was to continue with the dealer,
20 as a dealer, I would have no representation at model changeover in the
21 fall of the year."

22 Belief That Daugherty and Ford Motor Credit
23 Would Solve Their Problems

24 84. There was also a meeting between Lincoln Mercury and Ford
25 Motor Credit on August 22, 2000, during which Ford Motor Credit gave
26 Lincoln Mercury permission to build a "few units" even though Daugherty
27 was still on credit hold. During this meeting Ford Motor Credit gave
28 positive indications to Lincoln Mercury that things were improving with
Daugherty's financial situation.

1 85. One of the meetings between Daugherty and Lincoln Mercury was
2 in October 2000. By then, Daugherty had been reducing its inventory,
3 had hired a new manager, and was indicating that things were "going in
4 the right way" at the dealership and it was recognized that vehicles
5 would need to be in the pipeline to be delivered in early 2001.

6 86. Because of the discussions with Daugherty and with Ford Motor
7 Credit, Lincoln Mercury had reason to believe that Daugherty was going
8 to recapitalize and get in good standing with Ford Motor Credit.
9 Lincoln Mercury and Daugherty realized that new inventory was essential
10 to keeping Daugherty in business if the financial problems were solved
11 and it was expected that the problems would be solved prior to the
12 additional vehicles being delivered.

13 Daugherty's Participation in Ordering and
14 Receipt of These Vehicles

15 87. Mr. Daugherty at one point testified that no one from his
16 organization either directly or indirectly ordered any vehicles after
17 July 14, 2000, when Daugherty was put on credit hold. However, he also
18 testified as follows:

19 Q. Do you know whether your dealership keyed in individual
20 orders after the period of time that you'd been placed on
21 credit hold?

22
23 A. No, no, I - I - I don't. It's my belief that these
24 orders were generated out of the region.

25 88. Previous to this he had testified:

26 Q. Did you participate in the ordering of any of those
27 vehicles?

1 A. I don't recall.

2
3 ...

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5 Q. Did you have any discussion with anyone from Lincoln
6 Mercury regarding the ordering of these vehicles, these
7 ninety vehicles you just identified?

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9 A. And like I say, I don't know. I mean I can't say for
10 sure, so I say no, I can't say for sure."

11
12 89. When asked if he had agreed to accept the vehicles delivered
13 in late 2000 and early 2001, the reply was, "I accepted these vehicles,
14 yes".

15 90. Daugherty never contacted anyone at Ford Motor Credit to
16 state that it did not want the vehicles and did not tell anyone at
17 Lincoln Mercury that the vehicles were not wanted. Mr. Daugherty's
18 testimony was that he "... had two franchises that I was trying to keep
19 as an ongoing business, and I had employees here ..." and that he
20 wanted the vehicles that had been delivered.

21 91. There is no doubt that Daugherty was aware that these
22 vehicles were being ordered to be built and delivered and that
23 Daugherty not only desired them but required them in order to stay
24 operational. Daugherty was also aware that they had been financed
25 through Ford Motor Credit as Daugherty received itemized flooring

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1 statements showing the deliveries.⁶

2 92. Even though there is a dispute as to how the vehicles came to
3 be ordered, it is determined that Daugherty was an active participant
4 in their ordering and there is no doubt that the vehicles were wanted
5 and accepted by Daugherty.

6 Whether the Delivery of These Vehicles Caused
7 "The Closure of the Business" as Asserted by Daugherty

8 93. Between 93 and 105 of the allegedly unordered vehicles were
9 delivered between July 2000 and February, 2001. Approximately 37 of
10 these were sold by Daugherty to customers, and 4 were traded by
11 Daugherty to other dealers, at some time prior to March 1, 2001.
12 Fifty-two of these vehicles were picked up from Daugherty on March 1,
13 2001, by Lincoln Mercury, and Daugherty's account was re-credited by
14 Ford Motor Credit in full, including interest. By the time Daugherty
15 closed its doors on December 14, 2001, at least ten months, and perhaps
16 as much as sixteen months, had passed from when the 40 plus vehicles
17 had been sold or traded and almost ten months had passed from the time
18 the 52 vehicles were picked up on March 1, 2001. Because of the
19 subsequent disposition of these vehicles, and the length of time
20 involved, it was not the delivery of these vehicles, that caused the
21 closure of the business.

22 94. On December 14, 2001, nine and one-half months after the
23

24 ⁶ All of the above is in contrast to other testimony of Mr.
25 Daugherty that Lincoln Mercury delivered what he claimed to be unordered
26 vehicles over an 8-month period without any knowledge of any person in
27 management that they had arrived, that Mr. Daugherty was not personally
3 aware that the vehicles had arrived at his dealership until the latter
part of February, 2001, and that if he had been aware of their arrival
he would "probably" have turned them down. He also testified that he
had not told anyone at his dealership that Daugherty, after July, 2000,
should not be receiving any new vehicles should they happen to arrive as
that is something that one does not tell employees.

1 vehicles were picked up on March 1, 2001, the last of Daugherty's other
2 inventory was returned to Ford Motor Credit at the request of
3 Daugherty.

4 95. The closure that ultimately occurred on December 14, 2001,
5 was due to a lack of capitalization and the lack of a flooring line.

6 96. Ford Motor Credit asked Daugherty to put more money into the
7 dealership to re-open its line of credit. However, Mr. Daugherty
8 determined that "... at that point the relationship was so strained
9 that I - there wasn't any way I could go forward with it." Other than
10 an inquiry to GMAC, Daugherty made no other effort to obtain another
11 line of credit and Mr. Daugherty chose not to use his own funds.

12 **DETERMINATION OF ISSUES.**

13 97. Lincoln Mercury has established that Daugherty was not and is
14 not conducting an adequate amount of business as compared to the
15 business available to it. [Section 3061(a)]

16 98. Lincoln Mercury has not established that Daugherty did not
17 make the initial investment and incur obligations needed to perform its
18 part of the franchise. However, Lincoln Mercury has established that
19 Daugherty did not make further investment that became necessary to
20 continue to perform its part of the franchise. [Section 3061(b)]

21 99. Lincoln Mercury has not established that Daugherty's
22 investment was not permanent. [Section 3061(c)]

23 100. Lincoln Mercury has established that it would not be
24 injurious to the public welfare for the franchise to be replaced.
25 There has been no sales business conducted by Daugherty since it closed
26 its doors in December, 2001, nor service business conducted since
27 February, 2002. There have been no employees at Daugherty in those
28 departments and no revenue generated by Daugherty since those dates.

1 [Section 3061(d)]

2 101. Lincoln Mercury has established that Daugherty, from prior to
3 the time of the notice of termination to the present, did not and does
4 not now have any facilities being utilized for the sale of Lincoln
5 Mercury products, and from February, 2002, Daugherty did not and does
6 not now have service facilities nor qualified service personnel to
7 reasonably provide for the needs of the consumers of Lincoln and
8 Mercury vehicles. Lincoln Mercury has also established that Daugherty
9 is not rendering adequate services to the public. [Section 3061(e)]

10 102. Lincoln Mercury did not establish that Daugherty failed to
11 fulfill the warranty obligations of Lincoln Mercury prior to the
12 closing of Daugherty's service department in February 2002. However,
13 Lincoln Mercury has established that, since that date, Daugherty has
14 failed to fulfill the warranty obligations of Lincoln Mercury that were
15 to be performed by Daugherty. [Section 3061(f)]

16 103. Lincoln Mercury has established that Daugherty has failed to
17 comply with the terms of the franchise in respect to the reasons stated
18 in the notice of termination as follows:

- 19 Failure to function in the ordinary course of business;
- 20 Failure to maintain an adequate stock of vehicles;
- 21 Failure to maintain adequate net working capital; and
- 22 Failure to maintain adequate lines of wholesale credit. [Section
23 3061(g)]

24 104. It was established that the cessation of business by
25 Daugherty was not caused by conduct of representatives of Lincoln
26 Mercury.

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1 RELIEF REQUESTED BY DAUGHERTY

2 105. During the hearing, Mr. Daugherty testified that he could
3 re-open the Lincoln Mercury business "tomorrow", but he has not done so
4 due to the pendency of the protest and because the relationship has
5 been "so strained from July 14."

6 106. This is in stark contrast to the relief requested by
7 Daugherty from the Board (as stated in Daugherty's Post-Hearing Brief
8 and Post Hearing Reply Brief) which is that the Board "sustain the
9 current protest, on the condition that Daugherty reopen the facility
10 within 2 years of the effective date of the Board's decision." This
11 would mean a reopening not until sometime in 2005 or later. As more
12 than a year has already passed since the closing of Daugherty's
13 business, if this specific relief were to be granted, it would have the
14 effect of depriving Lincoln Mercury of representation and depriving the
15 buyers and users of Lincoln Mercury products of sales, service, and
16 parts for a period of more than three years since Daugherty closed its
17 doors.

18 107. This additional three-year time period would be on top of the
19 time that had elapsed prior to the notice of termination during which
20 Daugherty was in operation but in violation of its franchise
21 requirements and would result in a total time period covering five
22 years as explained below.

23 108. Daugherty encountered difficulties with its capital
24 requirements starting as early as July 2000, and had negative working
25 capital from August 2000, until it closed its doors in December 2001.
26 Daugherty therefore was seriously deficient in its capital requirements
27 for a time period of at least a year and five months before the notice
28 of termination on January 23, 2002. Since 2002 has already passed, as

1 well as part of 2003, providing an additional two years to reopen
2 (sometime in 2005) would mean that Lincoln Mercury would not have had
3 an adequately capitalized dealer for a period of five years.

4 109. Daugherty was put on credit hold by Ford Motor Credit on July
5 14, 2000. The credit hold was never lifted by Ford Motor Credit and
6 the line of credit from Ford Motor Credit was finally terminated in
7 late 2001. Since Daugherty was on credit hold from July 2000, this
8 means that Daugherty had been without an available line of credit for a
9 total of eighteen months prior to the date of the notice of termination
10 of its Lincoln and Mercury franchises. Again, since 2002 has passed as
11 well as part of 2003, providing an additional two years to reopen
12 (sometime in 2005) would mean that Lincoln Mercury would not have had a
13 dealer with available wholesale financing for five years.

14 110. As for sales, obviously Daugherty sold no new Lincoln or
15 Mercury vehicles in 2002 nor in what has so far passed in 2003.
16 Granting two years to reopen would mean that there would be no new
17 Lincoln Mercury sales (or warranty service provided) by Daugherty for a
18 cumulative period of over three years.

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1 PROPOSED DECISION

2 Based on the evidence presented and the findings herein, it is
3 hereby ordered that the Protest is overruled. Lincoln Mercury has
4 established good cause for the termination of the Lincoln and Mercury
5 franchises of Daugherty and has met its burden of proof under section
6 3066(b).

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

15 Dated: April 9, 2003

16 

17 By _____
18 ANTHONY M. SKROCKI
19 Administrative Law Judge
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27 Steven Gourley, Director, DMV
28 Terri Thurlow, Chief,
Licensing Branch, DMV