

NEW MOTOR VEHICLE BOARD
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STATE OF CALIFORNIA

NEW MOTOR VEHICLE BOARD

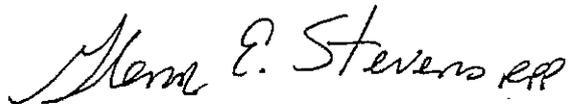
In the Matter of the Protest of)
)
DAUGHERTY LINCOLN MERCURY,) Protest No. PR-1798-02
)
) Protestant,)
)
) v.)
)
) FORD MOTOR COMPANY, LINCOLN)
) MERCURY DIVISION,)
)
) Respondent.)
)
_____)

DECISION

At its regularly scheduled meeting of April 24, 2003, the Public members of the Board met and considered the administrative record and Proposed Decision in the above-entitled matter. After such consideration, the Board adopted the Proposed Decision as its final Decision in this matter.

This Decision shall become effective forthwith.

IT IS SO ORDERED THIS 24th DAY OF APRIL 2003.



GLENN E. STEVENS
President
New Motor Vehicle Board

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11 In the Matter of the Protest of)
12 DAUGHERTY LINCOLN MERCURY,) Protest No. PR-1798-02
13 Protestant,)
14 v.) PROPOSED DECISION
15 FORD MOTOR COMPANY, LINCOLN)
16 MERCURY DIVISION,)
17 Respondent.)

18
19 FACTUAL AND PROCEDURAL BACKGROUND

20 Establishment of the Franchises

21 1. Protestant, Daugherty Lincoln Mercury, Inc. (hereafter
22 "Daugherty") is a California corporation doing business as Daugherty
23 Lincoln Mercury with its principal place of business at 2341 Fulton
24 Avenue, Sacramento, California. Michael D. Daugherty is the owner of
25 100% of the shares of Daugherty and is the President of the
26 corporation. His wife, Cindy Daugherty is the General Manager.
27 Respondent, Ford Motor Company, Lincoln Mercury Division (hereafter
3 "Lincoln Mercury"), is a Delaware Corporation with its principal place

1 of business at Dearborn, Michigan.

2 2. Daugherty was appointed a "Dealer" pursuant to a Lincoln
3 Sales and Service Agreement and a separate Mercury Sales and Service
4 Agreement, both dated June 22, 1999. Both were term agreements with
5 stated expiration dates of June 30, 2002. Lincoln Navigator vehicles
6 and Lincoln Blackwood vehicles were added to the Lincoln Agreement by
7 separate addenda.

8 Notice of Termination and Filing of Protest

9 3. By letter dated January 23, 2002, Ford Motor Company gave
10 notice of termination "of the Lincoln and Mercury Sales and Service
11 Agreements dated June 22, 1999, the Addendum to the Lincoln Sales and
12 Service Agreement for Lincoln Navigator dated June 22, 1999, the
13 Addendum to the Lincoln Sales and Service Agreement for Lincoln
14 Blackwood dated September 1, 2000 ... and any and all other agreements
15 between the Company and Daugherty."

16 In part, the notice recited that:

17 "This Notice of Termination is being issued pursuant to
18 Subparagraphs 17(b)(3), 17(c)(1) and 17(c)(5) of the
19 Agreements because of Daugherty's continued failure to
20 fulfill its responsibilities to: (1) function in the ordinary
21 course of business; (2) maintain stocks of current models of
22 such lines or series of VEHICLES, of an assortment and in
23 quantities as are in accordance with Company GUIDES therefor,
24 or adequate to meet the Dealer's share of current and
25 anticipated demand for VEHICLES in the DEALER'S LOCALITY, and
26 (3) maintain and employ in connection with his DEALERSHIP
27 OPERATIONS separately from any other business of the Dealer,
28 such total investment, net working capital, adequate lines of
wholesale credit and competitive retail financing plans for
VEHICLES as are in accordance with Company GUIDES therefore
and will enable the Dealer to fulfill all his
responsibilities. You have been requested to cure these
conditions and have never presented the Company with plans to
do so."

4. Because one of the recitals for the termination was the
failure to function in the ordinary course of business, the notice

1 stated that the termination would be effective 15 days after receipt of
2 the notice subject to stated alternative time periods which depended
3 upon whether Daugherty sought relief via the Ford Dealer Policy Board.
4 The notice also contained the language mandated by Vehicle Code Section
5 3060¹ including the following: "... You must file your protest with the
6 (New Motor Vehicle Board) within 10 calendar days after receiving this
7 notice or within 10 days after the end of any appeal procedure provided
8 by the franchisor or your protest right will be waived."

9 5. In response to the notice of termination, Daugherty initially
10 sought a hearing before the Ford Dealer Policy Board but, in April
11 2002, Daugherty withdrew its request for a hearing before that board.

12 6. No protest was filed with the New Motor Vehicle Board
13 (hereafter "Board") until March 13, 2002, which is long after 10 days
14 from receipt of the notice of termination dated January 23, 2002, but
15 prior to April 22, 2002, the time when Daugherty withdrew its request
16 for a hearing before the Ford Dealer Policy Board. Lincoln Mercury has
17 not raised the issue of timeliness of the filing of the protest before
18 the Board.

19 Petition P-442-02: Filing, Consolidation with
20 This Protest, and Subsequent Severance

21 7. On April 17, 2002, Daugherty filed a petition, pursuant to
22 section 3050(c), naming as respondents, Lincoln Mercury and Winter
23 Volvo Lincoln Mercury ("Winter"), another Lincoln Mercury dealer in
24 Sacramento. This petition, which charges various violations of the
25 California Business and Professions Code that allegedly contributed to
26 the cessation of business by Daugherty, was consolidated with the

27
3 ¹ All statutory references are to the California Vehicle Code
unless otherwise indicated.

1 protest. A hearing on the consolidated matters was set to commence on
2 January 6, 2003, before Anthony M. Skrocki, an administrative law judge
3 for the Board.

4 8. Subsequent to the order consolidating the protest and
5 petition for hearing, the California Court of Appeal, First District,
6 issued an opinion² which created serious questions as to whether the
7 Board had jurisdiction to resolve the alleged violations of the
8 California Business and Professions Code issues raised in the petition.

9 9. On January 3, 2003, a telephonic conference was held with
10 Administrative Law Judge Skrocki and counsel for the three parties
11 during which counsel were requested to be prepared at the time for the
12 hearing to address the effect of the Greenlining opinion on whether the
13 Board had jurisdiction to consider the issues raised by the petition.

14 10. On January 6, 2003, the date scheduled for commencement of
15 the hearing on the consolidated protest and petition, counsel for each
16 side requested time to make a final effort at settling both matters.
17 The last-minute settlement negotiations did not resolve the disputes.
18 Upon the failure of the settlement attempt, more off-the-record
19 discussion was had as to the effect of the Greenlining decision. It
20 was agreed that the proceedings would commence the following day,
21 January 7, 2003, and that the first item to be addressed would be
22 whether the protest and petition should remain consolidated.

23 11. On January 7, 2003, counsel for Daugherty, who had originally
24 filed the motion to consolidate the protest and petition, moved that
25 the petition be severed from the protest and that the petition be
26

27 ² In the matter of *The Greenlining Institute v. The Public*
28 *Utilities Commission of the State of California* (2002) 103 Cal. App. 4th
1324; 127 Cal. Rptr. 2d 736.

1 stayed to allow the issues raised in the petition to be addressed in a
2 civil action. A hearing on the motion for severance was held with
3 counsel for all three parties participating. Lincoln Mercury, which
4 had initially objected to the consolidation of the petition with the
5 protest, objected to the requested severance and stay. Counsel for
6 Winter, although uncertain as to the application of Greenlining to the
7 petition, had no objection to the severance and stay of the petition
8 proceedings. The administrative law judge granted the motion to sever
9 the petition from the protest and stayed the petition hearing pending
10 further order of the Board. This allowed the hearing on the protest to
11 proceed before the Board and suspended any proceedings before the Board
12 in regard to the petition pending the outcome of whatever action
13 Daugherty chooses to pursue in civil court as to the allegations
14 contained in the petition.

15 Hearing of the Protest

16 12. A hearing on the protest was held on January 7 and January 9,
17 2003, before Anthony M. Skrocki, administrative law judge of the Board.
18 Daugherty was represented by Michael M. Sieving of the Law Offices of
19 Michael M. Sieving, 350 University Avenue, Suite 105, Sacramento,
20 California. Lincoln Mercury was represented by Cranston J. Williams of
21 Baker and Hostetler, LLP, 333 South Grand Avenue, Suite 1800, Los
22 Angeles, California.

23 ISSUE PRESENTED

24 Whether Lincoln Mercury Has Good Cause for the Termination of
25 Daugherty's Lincoln and Mercury Franchises³

26 13. Pursuant to section 3066(b), Lincoln Mercury has the burden
27

3 ³ Although there are two separate franchises involved in this
protest, they will be referred to in the singular.

1 to establish good cause for the termination of Daugherty's franchises.
2 In determining whether Lincoln Mercury has established good cause for
3 the termination, section 3061 requires that the Board consider the
4 "existing circumstances", including but not limited to all of the
5 following:

- 6 (a) Amount of business transacted by the franchisee, as compared
7 to the business available to the franchisee;
- 8 (b) Investment necessarily made and obligations incurred by the
9 franchisee to perform its part of the franchise;
- 10 (c) Permanency of the investment;
- 11 (d) Whether it is injurious or beneficial to the public welfare
12 for the franchise to be modified or replaced or the business
13 of the franchisee disrupted;
- 14 (e) Whether the franchisee has adequate motor vehicle sales and
15 service facilities, equipment, vehicle parts, and qualified
16 service personnel to reasonably provide for the needs of the
17 consumers for the motor vehicles handled by the franchisee
18 and has been and is rendering adequate services to the
19 public;
- 20 (f) Whether the franchisee fails to fulfill the warranty
21 obligations of the franchisor to be performed by the
22 franchisee;
- 23 (g) Extent of franchisee's failure to comply with the terms of
24 the franchise.

25 STIPULATED FACTS

26 14. At the commencement of the hearing on the protest, Daugherty
27 and Lincoln Mercury offered a number of stipulated facts which were
28 read into the record and accepted for the purposes of the protest

1 hearing. These stipulated facts consist of the following:

- 2 1. Daugherty acquired its Lincoln and Mercury franchises in
- 3 June, 1999, through a buy-sell with former Lincoln Mercury
- 4 dealer, Niello Lincoln Mercury.
- 5 2. Ford Credit was the only wholesale credit source used by
- 6 Daugherty for its flooring line.
- 7 3. In July, 2000, Ford Credit suspended Daugherty's access to
- 8 its credit line.
- 9 4. Daugherty's line of credit with Ford Credit was terminated
- 10 effective November 9, 2001.
- 11 5. Daugherty closed its doors as a seller of new Lincoln and
- 12 Mercury (sic) in December 2001.
- 13 6. Daugherty closed its doors as a servicer of Lincoln and
- 14 Mercury vehicles in mid-February 2002.
- 15 7. Since closing, Daugherty has not reopened as a seller and
- 16 servicer of Lincoln and Mercury vehicles.
- 17 8. As of at least May 2002, Michael Daugherty has been operating
- 18 a Hummer dealership out of the facilities that formerly
- 19 housed Daugherty.
- 20 9. Lincoln Mercury served its notice of termination on Daugherty
- 21 and the New Motor Vehicle Board on January 23, 2002.
- 22 10. In response to Lincoln Mercury's notice of termination
- 23 Daugherty initially sought a hearing before the Ford Dealer
- 24 Policy Board.
- 25 11. In April 2002, Daugherty withdrew its request for a hearing
- 26 before the Ford Dealer Policy Board.

27 ///

28 ///

1 FINDINGS OF FACT

2 Findings Re: the Amount of Business Transacted by Daugherty
3 as Compared to the Business Available to it (Sec. 3061(a))

4 15. With regards to sales, Daugherty sold no new Lincoln or
5 Mercury vehicles during the months of November and December, 2001,
6 which are the two months prior to the issuance of the notice of
7 termination dated January 23, 2002.

8 16. Daugherty closed the doors of its Lincoln Mercury dealership
9 for sale of new Lincoln and Mercury vehicles on December 14, 2001.
10 Forty days later, on January 23, 2002, Lincoln Mercury, gave Daugherty
11 a fifteen-day notice of termination.⁴

12 17. Therefore, Daugherty had transacted no new Lincoln or Mercury
13 sales business for approximately eighty-three days prior to the date of
14 the notice of termination.

15 18. With regards to service, Daugherty closed its doors as a
16 servicer of Lincoln and Mercury vehicles in mid-February 2002.

17 19. By the time the hearing commenced in January 2003, Daugherty
18 had not transacted any sales business for over a year and had not
19 conducted any service business for almost eleven months.

20 Sales by Daugherty Prior to Closing its Doors on December 14, 2001

21 20. Prior to closing its doors on December 14, 2001, Daugherty
22 had sold 89 new cars and 31 new trucks for a total of 120 units in
23 2001.

24 _____
25 ⁴ Subject to qualifications, failure of a dealer to conduct its
26 customary sales and service operations for seven consecutive business
27 days is one of the events specifically enumerated in section
28 3060(a)(1)(B) that reduces the permissible effective date of termination
from sixty days to fifteen days from the date of notice, and also
reduces the time for a dealer to file a protest from thirty days to ten
days.

1 21. Daugherty's assigned planning volume for combined Lincoln and
2 Mercury cars and trucks was 530 units. Mr. Daugherty stated that it
3 was his understanding that he was obligated to sell in the range of 300
4 vehicles a year.

5 Findings Re: Investment Necessarily Made and Obligations Incurred by
6 the Franchisee to Perform its Part of the Franchise (Sec. 3061(b))

7 22. A separate corporation was established to own and operate the
8 Lincoln Mercury business.

9 23. Daugherty spent \$700,000 for the goodwill or "blue-sky"
10 element of the business upon its acquisition from the prior Lincoln
11 Mercury dealer, and thereafter invested \$453,000 to remodel the
12 facility for operation of the Lincoln Mercury franchises.

13 24. In addition, Daugherty was capitalized in the amount of
14 \$1,700,000. This consisted of a \$500,000 capital loan from Ford Motor
15 Credit and \$1,200,000 in used vehicles, leasehold improvements,
16 furniture, and fixtures. These capital amounts complied with Lincoln
17 Mercury requirements.

18 25. Daugherty also invested \$144,000 in a parts inventory, which
19 also complied with Lincoln Mercury requirements.

20 26. Daugherty applied for and received approval for a wholesale
21 flooring line in the amount of \$2,000,000, which was the amount
22 required by Lincoln Mercury.

23 Findings Re: Permanency of the Investment (Sec. 3061(c))

24 27. Lincoln Mercury presented no evidence to establish that the
25 \$700,000 paid by Daugherty for blue-sky was not permanent, or that the
26 \$500,000 capitalization loan from Ford Motor Credit was not permanent.

27 28. The \$453,000 spent on the renovation of the facility was done
28 exclusively for the Lincoln Mercury franchises.

1 29. The land upon which Daugherty was located is a portion of 12
2 acres owned by Mr. and Mrs. Daugherty and leased by them to Daugherty
3 under a three-year lease which provided for rent of \$25,000 per month.
4 In mid-2000, due to the financial difficulties of Daugherty, the rent
5 was reduced to \$15,000 per month but no rent has been paid by Daugherty
6 since that time.

7 30. The only evidence presented by Lincoln Mercury regarding the
8 absence of permanent investment was the change in use of the dealership
9 premises to house Mr. Daugherty's Hummer franchise. This occurred in
10 May, 2002, after Daugherty was served with the notice of termination in
11 this matter.

12 31. Mr. Daugherty's testimony that he has a current impairment in
13 excess of \$3,000,000 as a result of owning and operating the Lincoln
14 Mercury franchises was not refuted by Lincoln Mercury.

15 Findings Re: Whether it Is Injurious or Beneficial to the Public
16 Welfare For the Franchise to Be Modified or Replaced or the
17 Business of the Franchisee Disrupted (Sec. 3061)(d))

18 32. Daugherty sold no new vehicles for the last two months of
19 2001 and closed its doors for the sale of new vehicles on December 14,
20 2001. This was more than five weeks prior to the notice of termination
21 dated January 23, 2002.

22 33. Daugherty closed its service operations in mid-February 2002.

23 34. Daugherty has had no employees in the Sales Department since
24 December 2001, and no employees in the Service Department since
25 February 2002.

26 35. Since closing, Daugherty has not reopened for the sale or
27 servicing of Lincoln or Mercury vehicles.

28 36. If the protest is overruled, Lincoln Mercury intends to
establish a replacement Lincoln Mercury dealer.

1 Findings Re: Whether the Franchisee Has Adequate Motor Vehicle
2 Sales and Service Facilities, Equipment, Vehicle Parts, and
3 Qualified Personnel to Reasonably Provide for the Needs of the
4 Consumers for the Motor Vehicles Handled by the Franchisee and
5 Has Been and Is Rendering Adequate Services to the Public (3061(e))

6 Adequacy of Sales and Service Facilities

7 37. The Lincoln and Mercury Sales and Service Agreements were
8 issued as "Term Agreements" to expire on June 30, 2002, and included
9 the following:

10 ...

11 2. CONDITIONS - You understand that the reason for issuance
12 of the Term Agreements, as opposed to a Continuing Agreements
13 [sic], is that you have no record of performance with Ford
14 Motor Company for qualifying standards as evidenced by the
15 following: Market Share, Customer Satisfaction, and Facility.
16 Accordingly, you agree to provide:

17 ...

18 c. *Facilities* - Provide plans for the Dealership
19 facilities by June 30, 2002, for either a relocation to a
20 location approved by the Company and in accordance with
21 Company Guides or a remodel of the temporary premises
22 cited above in accordance with Company Guides. (Emphasis
23 in the original.)

24 ...

25 38. Although Daugherty's facilities were apparently inadequate to
26 qualify for an indefinite or Continuing Agreements, Lincoln Mercury is
27 not contending that a lack of sales or service facilities was
28 considered in the decision to issue the notice of termination of the
29 franchises.

30 39. The statutory factor captioned above, includes whether the
31 franchisee "has been and is rendering adequate services to the public"
32 (emphasis added).

33 40. Although Daugherty presented considerable evidence that its
34 sales and service facilities were adequate to provide for the needs of
35 Lincoln and Mercury owners prior to closing its doors, the fact is that
36 Daugherty closed its doors on December 14, 2001, as to sales, and in

1 February, 2002, for service. Therefore, since those dates at least,
2 Daugherty has not been rendering any services to the public.

3 Adequacy of Equipment, Vehicle Parts and Service Personnel

4 41. Daugherty presented evidence that it had adequate equipment,
5 vehicle parts and qualified service personnel while it was in
6 operation. However, what equipment and vehicle parts Daugherty may
7 still have is irrelevant, because the Lincoln Mercury business is
8 closed and there are no service personnel to make them available to the
9 public.

10 Findings Re: Whether the Franchisee Fails to Fulfill
11 Warranty Obligations of the Franchisor to Be
12 Performed by the Franchisee (3061(f))

13 42. Lincoln Mercury presented no evidence that prior to Daugherty
14 ceasing business operations that Daugherty had failed to fulfill its
15 warranty obligations. However, since the closure of its service
16 department in February 2002, Daugherty ceased providing any warranty
17 service and has provided none through the present time.

18 Findings Re: Extent of Franchisee's Failure to Comply
19 With the Terms of the Franchise (3061(g))

20 43. In its notice of termination dated January 23, 2002, Lincoln
21 Mercury asserted that the notice was issued due to Daugherty's failure
22 to comply with three provisions of the Sales and Service Agreements.

23 44. These were identified as subparagraphs:

24 17(b)(3) - failure to "function in the ordinary course of
25 business;"

26 17(c)(1) - failure to "maintain stocks of current models of
27 such lines or series of VEHICLES, of an assortment and in
28 quantities as are in accordance with Company GUIDES therefor,
or adequate to meet the Dealer's share of current and

1 anticipated demand for VEHICLES in the DEALER'S LOCALITY; and
2 17(c) (5) - failure to "maintain and employ in connection with
3 his DEALERSHIP OPERATIONS separately from any other business
4 of the Dealer, such total investment, net working capital,
5 adequate lines of wholesale credit and competitive retail
6 financing plans for VEHICLES as are in accordance with
7 company GUIDES therefore and will enable the Dealer to
8 fulfill all his responsibilities."

9 Failure to Function in the Ordinary Course of Business

10 45. Daugherty closed its doors to the sales operations on
11 December 14, 2001, which means that Daugherty had failed to function in
12 the ordinary course of business for forty days prior to the January 23,
13 2002, notice of termination. Daugherty had not reopened as of the date
14 of the hearing in January 2003, more than a year from the closure in
15 December 2002, and Daugherty remains closed to the present.

16 Failure to Maintain Adequate Stocks of Vehicles

17 46. The following are the number of new vehicles (Lincoln and
18 Mercury) that were in stock at Daugherty at the ending of the month
19 indicated.

20 ///

21 ///

22 ///

23 ///

24 ///

25 ///

26 ///

27 ///

3 ///

DATE	NO. OF CARS	NO. OF TRUCKS
July 2000*	149	38
August 2000	128	35
September 2000	90	24
October 2000	73	19
November 2000	67	20
December 2000	46	18
January 2001.	45	15
February 2001	41	29
March 2001	31	24
April 2001	27	24
May 2001	15	10
June 2001	13	5
July 2001	12	3
August 2001	8	2
September 2001	0	0
October 2001	5	2
November 2001**	5	2
December 2001	0	0
January 2002***	0	0

- * Ford Motor Credit suspended credit line on July 14, 2000.
- ** Ford Motor Credit terminated credit line on November 9, 2001.
- *** Notice of termination given by Lincoln Mercury on January 23, 2002.

Failure to Maintain Net Working Capital

47. Daugherty was required to maintain net working capital in the amount of \$1,700,000.

48. Daugherty's actual net working capital varied as indicated below.

///

///

DATE	NET WORKING CAPITAL
July 2000*	\$65,570
August 2000	<\$177,724>
September 2000	<\$184,499>
October 2000	<\$256,618>
November 2000	<\$311,138>
December 2000	<\$561,599>
January 2001	<\$600,119>
February 2001	<\$576,325>
March 2001	<\$562,375>
April 2001	<\$544,660>
May 2001	<\$595,974>
June 2001	<\$552,178>
July 2001	<\$556,891>
August 2001	<\$580,416>
September 2001	<\$616,045>
October 2001	<\$822,569>
November 2001**	<\$842,218>
December 2001	<\$847,546>
January 2002***	<\$1,000,534>

"< >" indicates negative working capital

* Ford Motor Credit suspended credit line on July 14, 2000.

** Ford Motor Credit terminated credit line on November 9, 2001.

*** Notice of termination given by Lincoln Mercury on January 23, 2002.

Failure to Maintain an Adequate Wholesale Line of Credit

49. Daugherty when established in June, 1999, received a credit line in the amount of \$2,000,000 from Ford Motor Credit. This was the amount required by Lincoln Mercury.

50. In June of 2000, Daugherty's inventory had risen to over \$7,600,000, all financed through Ford Motor Credit.