

NEW MOTOR VEHICLE BOARD
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STATE OF CALIFORNIA

NEW MOTOR VEHICLE BOARD

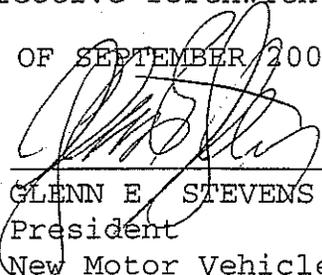
In the Matter of the Protest of)
)
RAY FLADEBOE LINCOLN-MERCURY,) **Protest No. PR-1880-03**
INC.,)
)
)
Protestant,)
)
)
v.)
)
)
AMERICAN ISUZU MOTORS, INC.,)
)
)
Respondent.)
_____)

DECISION

At its regularly scheduled meeting of September 30, 2004, the Public and Dealer 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 30th DAY OF SEPTEMBER 2004.



GLENN E. STEVENS
President
New Motor Vehicle Board

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8 STATE OF CALIFORNIA
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11 In the Matter of the Protest of)
12 RAY FLADEBOE LINCOLN MERCURY,) **Protest No. PR-1880-03**
13 INC., FLADEBOE AUTOMOTIVE GROUP,)
14 INC.,)
15 Protestant,) **PROPOSED DECISION**
16 v.)
17 AMERICAN ISUZU MOTORS, INC.,)
18 Respondent.)

19 PROCEDURAL BACKGROUND

20 1. Protestants, Ray Fladeboe Lincoln Mercury, Inc. and Fladeboe
21 Automotive Group, Inc. (hereinafter, *RFLM* and *Fladeboe A.G.*) filed
22 this protest¹ on October 21, 2003, alleging wrongful failure to pay
23 franchisor incentives in violation of Vehicle Code section 3065.1.²
24 2. Respondent, American Isuzu Motors, Inc. (hereinafter, *Isuzu*)
25 filed a motion to dismiss the protest on November 19, 2003.
26

27 ¹ Related Protest No. PR-1881-03 was filed and heard simultaneously with this
28 protest, but was not consolidated for decision.
² Except where stated, statutory citations herein are to the California Vehicle Code.

1 Respondent argued therein that neither RFLM nor Fladeboe A.G. had
2 standing to bring this protest before the Board. Pursuant to order of
3 the Board, the motion was briefed by the parties and then heard on
4 December 9, 2003. By ruling dated, January 2, 2004, Administrative
5 Law Judge (ALJ) Kenneth B. Wilson denied the motion as to RFLM. The
6 ALJ granted the motion as to Fladeboe A.G. upon a determination that
7 Fladeboe A.G. was not, and never had been a franchisee of Isuzu.³

8 3. On April 21, 2004, Isuzu filed a second motion to dismiss
9 which was, pursuant to order of the Board, briefed by the parties and
10 heard on May 5, 2004, before ALJ Wilson. Isuzu's second motion relied
11 on Duarte & Witting, Inc. v. New Motor Vehicle Board (2002) 104
12 Cal.App.4th 626 for its argument that the protest raised no contested
13 issues of material facts. The ALJ determined that the facts in this
14 protest were distinguishable from those in Duarte and, accordingly,
15 denied the motion.

16 4. Hearing on the merits of the protest was held before ALJ
17 Wilson on May 10, 11, 12, and concluded on May 26, 2004. Law Offices
18 of Michael M. Sieving, Michael M. Sieving, Esq., 350 University
19 Avenue, Suite 105, Sacramento, California represented Protestant.
20 Brian Cave LLP, Bruce L. Ishimatsu, Esq. and Kaye E. Chaffee, Esq.,
21 120 Broadway, Suite 300, Santa Monica, California and Isuzu counsel,
22 Paul M. Hirose, Esq., 13340 183rd Street, Cerritos, California,
23 appeared on behalf of Respondent.

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27 ³ This ruling was limited exclusively to the issue of Fladeboe A.G.'s standing as a
28 franchisee within the Board's jurisdiction.

1 through Mr. Fladeboe, declined to accept the terms of the new
2 agreement and refused to sign it.

3 9. Mr. Fladeboe then determined to transfer his Isuzu assets
4 from Fladeboe VW to Fladeboe A.G. In September 2002, Mr. Fladeboe
5 again sought Isuzu's approval, and on January 3, 2003, Isuzu withheld
6 consent, citing, among other things, the dissolution of RFLM and the
7 pre-approval transfer of the Isuzu assets to Fladeboe A.G.

8 10. On or about January 7, 2003, RFLM received written notice
9 from the Department of Motor Vehicles, Licensing Operations Division,
10 that it had been notified of the dissolution of RFLM and that
11 subsequent to the dissolution, new Isuzu vehicle sales had been
12 reported as transacted under the names of Fladeboe Isuzu, Ray Fladeboe
13 Isuzu, Fladeboe Honda and RFLM. On that basis, RFLM's license was
14 automatically cancelled.

15 11. Following the license cancellation, on January 24, 2003,
16 Isuzu deactivated RFLM's access to the Isuzu Communication System
17 (ICS). The ICS is a private computer network linking Isuzu with its
18 dealers for day-to-day business communications, including reports of
19 new vehicle sales and warranty claims. From that point on RFLM's
20 dealer access code could not be used to order new inventory or parts,
21 but remained available for other communications. In September 2003,
22 RFLM's access was terminated.

23 12. Sometime prior to July 31, 2003, Mr. Fladeboe directed his
24 accountant to examine the books and records of his corporations to
25 determine if there were any sales incentive and warranty reimbursement
26 claims that had not been paid by Isuzu, and if so, the amount thereof.
27 On September 15, 2003, the accountant reported a list containing nine
28 vehicle sales for which incentives had not been received, and 16

1 warranty claims outstanding, representing \$34,000 and \$11,398.88,
2 respectively, for a total amount of \$45,398.88 in all.⁶

3 13. On or about September 22, 2003, Mr. Fladeboe, as Chief
4 Executive Officer of Fladeboe A.G. mailed Isuzu a copy of the
5 accountant's report with a demand for prompt payment. Having received
6 no response from Isuzu, Protestant filed this protest one month later
7 on October 21, 2003.

8 **ISSUES PRESENTED**

9 14. Section 3065.1 provides, in essence, that all claims under a
10 franchisor incentive program must be approved or disapproved within 30
11 days of receipt. If a claim is disapproved, the franchisor must
12 notify the franchisee in writing with a statement of the specific
13 reason within that 30-day period. Any claim not specifically
14 disapproved is deemed approved on the 30th day. All approved claims
15 must be paid within 30 days following the date of approval.
16 Franchisee incentive claims may not be disapproved except for good
17 cause, such as ineligibility, lack of material documentation, or
18 fraud.

19 15. In accord with Section 3065.1, the only issues the Board may
20 consider are whether Isuzu notified RFLM of the specific reason for
21 disapproving the subject incentive claims within the statutory period,
22 and whether there was good cause for such disapproval.

23 16. Notwithstanding the above, both parties sought throughout
24 the course of this proceeding to present evidence and argument
25 pertaining to additional issues involving the corporate status of RFLM
26

27
28 ⁶ The outstanding warranty claims are the subject of the related Protest No. PR-1881-03.

1 and to Isuzu's conduct concerning the proposed transfers of RFLM's
2 Isuzu-related assets.⁷ The findings set forth render it unnecessary,
3 even if it were permissible under section 3065.1, for the Board to
4 determine these issues.⁸

5 FINDINGS AS TO WHETHER PROTESTANT WAS NOTIFIED
6 OF THE INCENTIVE CLAIM DISAPPROVALS

7 17. The testimony of Mr. Edwin T. Robinson⁹ established that
8 Isuzu's principal procedure for approving or disapproving incentive
9 claims involves the use of the ICS. Under that procedure, a dealer
10 inputs a report of sale into the database, and Isuzu's computer
11 compares that information to any applicable incentive programs that
12 are in effect. The incentive claim is then automatically approved or
13 disapproved. The ICS automatically reports its determination back to
14 the dealer in the middle and again at the end of each month.

15 18. At issue are nine incentive claims for vehicles sold during
16 the period between the end of 2002 and July 2003. Of these, four were
17 not reported as having been denied by the ICS because these sales were
18 not, in fact, new retail sales and RFLM had never entered them into
19 the ICS as such.¹⁰

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25 ⁷ On January 8, 2003, this Board considered and declined to grant RFLM's petition
26 requesting that the Board compel Isuzu to issue an OL 124 to Fladeboe A.G.

27 ⁸ It is understood that these issues are involved in litigation between the parties
28 pending in the Orange County Superior Court.

⁹ Mr. Robinson is Isuzu's operating manager for Isuzu's dealer network. A
substantial portion of his direct testimony was presented under examination by
Protestant's counsel under Evidence Code section 776 (adverse witness).

¹⁰ Three of the four non-retail vehicles were in fact titled to Mr. Fladeboe himself.

1 19. The remaining five claims were entered into the ICS but were
2 automatically denied and reported by Isuzu's computer as ineligible
3 because RFLM had not enrolled in Isuzu's incentive program for 2003.
4 In addition, some of the claims involved sales in which the purchaser
5 had elected to receive a subvened (reduced) finance interest rate
6 instead of the dealer receiving a cash incentive.¹¹

7 20. Protestant offered no evidence to show that the four non-
8 retail sales had actually been entered into the ICS. Neither of
9 Protestant's two witnesses, Linda Colletti, RFLM's business manager
10 until February 14, 2003, and Debbie Davies, her replacement after
11 February 17, 2003, were responsible for entering reports of sales into
12 the ICS.

13 21. As to the remaining five incentive claims Protestant does
14 not deny receiving notice through the ICS reports. The witness
15 Colletti appears to have regularly used the reports in her work. The
16 witness Davies was never able to use the ICS and could not have
17 directly known what they contained.¹²

18 **FINDINGS AS TO WHETHER THERE WAS GOOD CAUSE**
19 **FOR DISAPPROVING THE INCENTIVE CLAIMS**

20 22. Respondent established that each of the disputed claims was
21 disapproved as ineligible for one or more of the following reasons:
22 (1) the particular vehicle was never reported as a new retail sale,
23 (2) the vehicle was sold during the incentive program for 2003, for
24 which RFLM had not enrolled, or (3) the sale was made under an
25

26 ¹¹ Two of the claims appear to be for sales that occurred after RFLM's dealer license
27 had been cancelled.

28 ¹² Whatever it was that prevented Mrs. Davies from logging onto the ICS, the
testimony of Mr. Robinson established that the January 24, 2003 deactivation of
RFLM's dealer code would not have precluded RFLM from reading the notices of denial.

1 incentive program option that allowed for subvented customer financing
2 in lieu of a dealer incentive payment.¹³ The following summarizes the
3 nine incentive claims:

CLAIM	AMOUNT	REASON FOR DISAPPROVAL
1	\$4,500	Not sold, titled to Fladeboe.
2	\$4,500	Not sold, titled to Fladeboe
3	\$4,000	Not enrolled in incentive program for 2003.
4	\$2,000	Not sold, titled to Fladeboe.
5	\$4,000	Not sold, titled to Fladeboe.
6	\$4,000	Not enrolled in incentive program for 2003.
7	\$3,000	Subvented customer financing in lieu of dealer cash.
8	\$4,000	Not enrolled in incentive program for 2003.
9	\$4,000	Subvented customer financing in lieu of dealer cash.

14
15 23. Protestant did not dispute that Isuzu's reasons for
16 disapproving the nine incentive claims constitute good cause. Nor did
17 Protestant establish that the reasons were not valid as to any of
18 the vehicle sales.

19 24. Protestant's witness Davies testified that the four vehicle
20 sales that were not reported on the ICS were, in fact demonstrators
21 which were registered to Fladeboe AG and sold as used vehicles after
22 RFLM's dealer's license had been cancelled.

23 25. Protestant's witness Colletti testified that it was her
24 belief that it was necessary to enroll annually in Isuzu's incentive
25 programs and had no personal knowledge whether or not RFLM had
26

27 ¹³ The disapprovals were made by the ICS without particular human intervention.
28 Respondent's counsel characterized the process as "an electronic, emotionless
exchange of information."

1 enrolled in 2003. Despite the fact that RFLM could have retroactively
2 enrolled in the 2003-year incentive program as late as 60 days after
3 its first retail sale in that year, it failed to do so. That RFLM
4 never did so was unrelated to the deactivation of its ICS dealer code.

5 DETERMINATION OF ISSUES

6 26. The Board finds that Isuzu provided written notice as
7 required by Section 3065.1.

8 27. The Board finds that there was good cause for each of the
9 contested incentive claim disapprovals.

10 CONCLUSION

11 As noted above, both parties in this proceeding applied
12 considerable time and effort to the question of RFLM's status after
13 its corporate dissolution. In so far as all the disputed claims
14 involved vehicles that were sold *after* RFLM filed its certificate of
15 dissolution, the question may be said to possess a certain legal
16 intrigue. However, the evidence presented at the hearing conclusively
17 establishes that RFLM's corporate status was never considered nor did
18 it have any effect on these incentive claim disapprovals. Therefore,
19 the Board herein makes no finding or determination concerning RFLM's
20 corporate status.

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1 Having determined that Isuzu did not fail to notify RFLM of the
2 subject franchisor incentive claim disapprovals, and having found that
3 good cause existed for each one, the Board concludes that RFLM is not
4 entitled to the amount claimed or any part thereof. The protest is
5 overruled.

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

15 DATED: September 7, 2004

16 By: *Kenneth B. Wilson*
17 KENNETH B. WILSON
18 Administrative Law Judge

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27 Chon Gutierrez, Director, DMV
28 Mary Garcia, Manager
Occupational Licensing, DMV