

NEW MOTOR VEHICLE BOARD
1507 - 21st Street, Suite 330
Sacramento, California 95814
Telephone: (916) 445-1888

PR-713-84

STATE OF CALIFORNIA
NEW MOTOR VEHICLE BOARD

In the Matter of the Protest and)
Petitions of:)
)
RAY FLADEBOE LINCOLN-MERCURY INC.,) Protest No. PR-713-84
dba RAY FLADEBOE BRITISH MOTOR CARS,) Petition No. P-147-87
) Petition Nos. P-166-88
Protestant/Petitioner,) through P-173-88
)
vs.)
)
JAGUAR CARS, INC., et al.,)
)
Respondents.)

DECISION

The attached Proposed Decision of the Administrative Law Judge is hereby adopted by the New Motor Vehicle Board as its Decision in the above-entitled matter.

This Decision shall become effective forthwith.

IT IS SO ORDERED THIS 29th day of March, 1991.

By Liucija Mazeika
LIUCIJA MAZEIKA
Board Member
New Motor Vehicle Board

2. On October 25, 1984, Fladeboe filed a protest with the New Motor Vehicle Board ("Board") pursuant to Vehicle Code section 3060.^{2/}

3. On June 12, 1987, Fladeboe filed a petition with the Board pursuant to section 3050(c) naming Jaguar as the Respondent. On September 8, 1988, Fladeboe filed a First Amended Petition against Jaguar as well as petitions against the following Los Angeles/Orange County Jaguar dealers: Bauer Motors, Inc.; Southland Motors Corp.; Terry York Motor Cars, Ltd.; Charles H. Hornberg, Jr. Imported Motor Cars; Lee West Enterprises, Inc., dba Newport Imports, Inc.; Rusnak Volkswagen, Inc.; Whittlesey Motors, Inc., and; Dave Whittlesey (collectively referred to as the "Dealer Respondents").

4. Fladeboe's petitions allege seventeen causes of action as follows:

- 1) violation of Sherman Act (against all respondents)
- 2) violation of Cartwright Act (against all respondents)
- 3) unfair competition claim (against all respondents)
- 4) breach and tortious breach of implied covenant of good faith and fair dealing (against Jaguar alone)
- 5) negligent interference with prospective advantage (against Jaguar alone)
- 6) intentional interference with prospective advantage (against Jaguar alone)
- 7) unfair competition - false advertising (against Jaguar alone)

^{2/} All statutory references are to the California Vehicle Code unless otherwise indicated.

- 8) unfair competition - unfair business practice (against Jaguar alone)
- 9) breach of fiduciary duty (against all respondents)
- 10) violation of Vehicle Code section 11713(a) (against Jaguar alone)
- 11) violation of Vehicle Code section 11713.3(e) (against all respondents)
- 12) violation of Vehicle Code sections 11713.2(e), 11713.3(d) and 11713.3(e) (against Jaguar alone)
- 13) violation of Vehicle Code section 11713.3(a) (against all respondents)
- 14) violation of Vehicle Code sections 11713.3(1) and 3060 (against all respondents)
- 15) breach of contract claim (against Jaguar alone)
- 16) tortious interference with contractual relations (against all respondents)
- 17) intentional interference with prospective advantage (against all respondents).

Fladeboe has also filed these claims in an action pending in the United States District Court.

5. On May 12, 1990, the parties stipulated that the first, second, third, ninth, sixteenth and seventeenth causes of action in each of Fladeboe's petitions were stayed in their entirety, and that the hearing on the eleventh, thirteenth and fourteenth causes of action were also stayed as against the Dealer Respondents.^{3/} The stay of these claims will remain in effect until the Ninth Circuit Court of Appeal has ruled on an appeal taken by Fladeboe with respect to the District Court

^{3/} On November 1, 1990, in Fladeboe's Post-Hearing Brief and Proposed Findings of Fact and Determination of the Issues, Fladeboe waived the fifth, seventh, and tenth causes of action of its First Amended Petition.

proceedings.

6. The parties further stipulated that the issue of damages as claimed by Fladeboe was to be stayed pending a determination of the preliminary issue of whether Jaguar acted improperly in its relationship with Fladeboe.

7. On September 25, 1989, the hearing on the protest and petitions of Fladeboe and the protest and petition of Auto Trends, Inc. vs. Jaguar Cars, Inc. ("Auto Trends"), protest number 712-84 and petition number P-145-87, were partially consolidated for the purpose of presenting evidence as to the overall subject of the origin, methodology and implementation of Jaguar's Dealer Rationalization Program nationwide and in Los Angeles/Orange County.

8. The consolidated hearing was held before George R. Coan, Administrative Law Judge of the Board, on January 9-12, 16-19, February 1-2, and 5, 1990, at Los Angeles, California.

9. The specific hearing on the remainder of Fladeboe's protest and petition allegations followed the partially consolidated hearing as well as three days of the specific hearing on the remainder of the issues pertaining to Auto Trends.

10. Fladeboe's specific hearing was held before George R. Coan, Administrative Law Judge of the Board, on February 20-23, 26-28, March 1-2, 8-9, 12-16, and 19-23, 1990, at Los Angeles, California.

11. Fladeboe was represented by Gary Hoecker, Esq., and Thomas K. Buck, Esq., of Hoecker, McMahon & Wade, 612 South Flower Street, Suite 800, Los Angeles, California.

12. Jaguar was represented by Carl J. Chiappa, Esq., and Matthew C. Mason, Esq., and Andrew Goldsmith, Esq., of Townley & Updike, 405 Lexington Avenue, New York, New York.

ISSUES PRESENTED

A. Fladeboe's Protest Claim.

13. Fladeboe alleges that good cause does not exist to permit Jaguar to refuse to continue the Fladeboe franchise in consideration of the following factors:

a. Amount of business transacted by the franchisee, as compared to the business available to the franchisee {section 3061(a)};

b. Investment necessarily made and obligations incurred by the franchisee to perform its part of the franchise {section 3061(b)};

c. Permanency of the investment {section 3061(c)};

d. Whether it is injurious or beneficial to the public welfare for the franchise to be modified or replaced or the business of the franchisee disrupted {section 3061(d)};

e. Whether the franchisee has adequate motor vehicle sales and service facilities, equipment, vehicle parts, and qualified personnel to reasonably provide for the needs of the consumers for the motor vehicles handled by the franchisee and has been and is rendering adequate service to the public {section 3061(e)};

f. Whether the franchisee fails to fulfill the warranty obligations of the franchisor to be performed by the franchisee {section 3061(f)};

g. Extent of franchisee's failure to comply with the terms of the franchise {section 3061(g)}.

B. Fladeboe's Petition Claims.

14. Fladeboe alleges that:

a. From 1983 through December 1989, Jaguar deprived Fladeboe of vehicles resulting in dollar losses;

b. Jaguar violated section 11713.3(1) in that Jaguar refused and failed to deliver new vehicles to Fladeboe in reasonable quantities;

c. Jaguar violated section 11713.3(1) in that Jaguar engaged in a de facto termination of Fladeboe's franchise by denying the Fladeboe access to substantial numbers of vehicles and also thereby modified and diminished Fladeboe's franchise;

d. Jaguar violated section 11713.3(d) and (e) in that Jaguar attempted to require Fladeboe to transfer or sell petitioner's interest in the Jaguar franchise to Jaguar and prevented and attempted to prevent Fladeboe from receiving fair and reasonable compensation for the value of the franchised business;

e. Jaguar violated Business and Professions Code section 17200 in that Jaguar misrepresented its allocation practices to Fladeboe and discriminated against Fladeboe in the allocation of vehicles. Fladeboe alleges that such misrepresentations were unlawful, deceptive, unfair and constituted business practices of Jaguar;

f. Jaguar breached its contract with Fladeboe and its implied covenant of good faith and fair dealing in that Jaguar failed to provide Fladeboe with its fair share of vehicles available to the Western Zone as well as misrepresented its allocation practices to Fladeboe;

h. Jaguar intentionally interfered with Fladeboe's prospective advantage in that Jaguar intentionally and unlawfully discriminated against Fladeboe in the allocation of vehicles and thereby diverted business from Fladeboe's competitors.

15. Pursuant to section 3066, Jaguar has the burden to establish good cause not to renew the franchise of Fladeboe. Fladeboe bears the burden of proof for its petition allegations.

FINDINGS OF FACT

I. Facts Relating To Fladeboe's Protest Claims.

A. Jaguar's Dealer Rationalization Program

15. From 1968 to 1980, approximately 95% of the vehicles imported and sold by Jaguar^{4/} were low and medium priced MG and Triumph sports cars. In the mid-1970's, sales of these cars were approximately 60,000 units per year. In contrast, sales of the high priced Jaguar luxury vehicles peaked at 7,000 units per year, constituting only a minor portion of Jaguar's and its dealers' business.

16. Jaguar's parent company in the United Kingdom ("Jaguar U.K.") was losing thousands of pounds on every MG it built. Facing these financial losses, Jaguar U.K. decided to cease production of the MG in 1979 and the Triumph in 1980.

^{4/} In 1968, a merger took place between Triumph, MG, Austin and Jaguar which was known as British Leyland Motors, Inc. ("British Leyland"). After several corporate reorganizations and name changes, Jaguar Cars Inc., emerged as the United States distributor.

17. In 1980, Jaguar was in substantial financial difficulty. Jaguar was losing about \$800,000 a week in the United States. Jaguar U.K. was losing about \$1.5 million a week^{5/}.

18. Jaguar also faced significant nonfinancial difficulties. During the 1970's, in spite of pressure from Jaguar on Jaguar U.K. to improve the Jaguar model line and the quality, very little improvement resulted. By 1980, Jaguar U.K. had earned a reputation for making an unreliable vehicle of very poor quality. Sales of Jaguar vehicles in the U.S. dropped to 3000 units in 1980, an average of 11 units per dealer.

19. Facing both these financial and nonfinancial obstacles, Jaguar attempted to stave off bankruptcy. By 1982, Jaguar had consolidated its operations and decreased its work force by 55%. In Jaguar's Western Zone, many employees, including the zone sales manager, the zone distribution manager and the training manager, were terminated, and their responsibilities were turned over to the remaining employees. Jaguar also reorganized itself at the wholesale level, taking over the operations of independent distributors such as British

^{5/} Jaguar U.K. was owned and operated at that time by the British Government, and Prime Minister Margaret Thatcher warned that Jaguar U.K. would be shut down if it could not begin to quickly turn a profit.

Motor Car Distributors^{6/} ("BMCD"). In addition, new management in the United Kingdom had begun to implement changes in production resulting in improved product quality.

20. Jaguar realized that its dealer network was not conducive to selling high priced Jaguar luxury vehicles. Its retail dealer network had been developed to sell and service high volume, low priced MG and Triumph sports cars.^{7/}

21. Jaguar decided that in order to be competitive with other luxury car distributors it had to improve customer satisfaction at the dealer level. To achieve that objective, Jaguar had to ensure that its dealers had the opportunity to make a profit sufficient to justify the type of investment in facilities, management, training and personnel to approximate the level of customer satisfaction achieved by the dealer body of Mercedes-Benz ("Mercedes"), its principal competitor.

22. Jaguar dealers' potential for investment in their dealerships was at a disadvantage based on average Jaguar versus Mercedes sales per dealer. In 1982, Jaguar's 205 United States dealers sold 10,349 vehicles, or an average of 49 units

^{6/} Fladeboe was appointed as a Jaguar dealer by BMCD, which was, at the time, the independent distributor for Triumph, MG and Jaguar vehicles in Southern California, which had complete authority to appoint dealers in its territory.

^{7/} In many instances, Jaguar had no direct involvement in the appointment of dealers in areas served by independent distributors. In the early 1970's, when distribution of all the British lines was consolidated, BMCD, then an independent distributor, took over the southern part of California. Jaguar was responsible for distribution into the northern part of California. BMCD's position was that it would give Triumph, MG and Jaguar franchises to all the dealers under their control.

per dealer.^{8/} The 413 U. S. Mercedes dealers sold 65,963 vehicles, or an average of 161 units per dealer.

23. The disparity in sales between Jaguar and Mercedes dealers in the L.A./Orange County market was even greater than the national average. In 1982, in the L.A./Orange County market, Jaguar and Mercedes both had 17 dealers, but Jaguar dealers sold an average of 73 vehicles per dealer while Mercedes dealers sold an average of 523. This pattern was repeated in most of the major cities in the United States.

24. The superiority in average sales per dealer allowed Mercedes to offer the kinds of facilities, locations, management, personnel and after-sales service necessary for the successful marketing of luxury vehicles.^{9/} In contrast, Jaguar dealers were not capable of committing comparable resources to their dealerships with average sales being significantly less than those of Mercedes dealers.

25. Jaguar's ability to improve its competitive situation was constrained by its limited product range and its restricted manufacturing capacity.^{10/}

^{8/} The increase in Jaguar sales between 1980 and 1982, was primarily the result of an improved product and the efforts of approximately 40-50 dealers who aggressively marketed Jaguar's products.

^{9/} In 1982, '83 and '84, Mercedes was number one in J.D. Powers' Annual Customer Satisfaction Survey.

^{10/} Jaguar's product range consisted of two models. In addition, the productive capacity of Jaguar U.K. was 50,000 to 60,000 units per year, and the United States took approximately one-half of the cars produced.

26. Jaguar determined that it could only achieve competitive levels of customer satisfaction with a substantially reduced dealer body, while providing sufficient vehicles to the retained dealers to enable them to commit the necessary resources for the successful marketing of Jaguar vehicles. To achieve these objectives, Jaguar developed the Dealer Rationalization Program.

27. In October 1982, Jaguar informed its dealers that it was evaluating the dealers' competitive situation. Jaguar also advised its dealers not to make any significant new investments in their Jaguar franchise without first consulting Jaguar.

28. Over a two-year period, Jaguar engaged in a dealer-by-dealer analysis, utilizing information compiled by both Jaguar personnel and outside consultants.^{11/}

29. The dealer surveys and studies were analyzed by Jaguar zone managers, who then formulated recommendations to senior management for reorganizing Jaguar's retail dealer network. Jaguar's senior management then determined for each

^{11/} Surveys of Jaguars dealers were compiled by Jaguar District Sales and Service Managers, in consultation with the dealer principals, to evaluate the sales, service and parts operation of each dealership. Jaguar also commissioned studies by J.D. Power & Associates to compare customer satisfaction levels of Jaguar's versus Mercedes' dealer body, as well as the relative performance of its dealers in L.A./Orange County and in other major markets. Jaguar utilized Mercedes as a basis of comparison because: 1) Mercedes was Jaguar's chief competitor; 2) the demographics of their customer bases were virtually identical; and 3) Mercedes' dealer body was the leader in customer satisfaction. Jaguar also hired Urban Science Applications, Inc. ("Urban Science") to determine the geographic optimal locations for Jaguar dealerships in major metropolitan markets.

market how many dealers to retain, where they should be located and the identity of the dealers to be retained.

30. Using Mercedes as a model, Jaguar developed a formula to be used as a guide to determine how many dealers could be supported by each market. The intention was to give each retained dealer a sales volume which would support the type of facilities and operation required for the sale of luxury vehicles. Mercedes and Jaguar new car registrations were compiled for each market for the years 1981, 1982, and through June of 1983 (the latest available data at that time). These market registrations were then expressed as a percentage of national registrations for both Mercedes and Jaguar in each of the appropriate years. The highest percentage derived was then applied against Jaguar's 1985 planned retail sales volume of 20,000 units nationally to deduce each market's 1985 planning volume. The then current average registrations per Mercedes dealer were divided into the 1985 Jaguar market planning volume to determine the approximate number of Jaguar dealers the market could support.

31. In the L.A./Orange County market, the formula yielded a calculation of 6.3 dealers; however, Jaguar also utilized its local knowledge of the market and evaluated the analysis done by Urban Science showing optimal dealer locations with six, seven, or eight dealers. Jaguar concluded that the L.A./Orange County market would support and be better served with seven dealers.

32. After Jaguar determined that the L.A./Orange County market could support seven dealers, Jaguar utilized the optimal

location analysis undertaken by Urban Science to decide where to locate those dealers.^{12/} Allowing for cost and availability of land, zoning requirements, natural boundaries, etc., Jaguar attempted to locate its dealers as close as practicable to Urban Science's "optimal locations".

33. After Jaguar determined approximately where its seven dealers should be located in the L.A./Orange County market, Jaguar decided which dealers would be asked to upgrade and which would not be renewed. If Jaguar had an existing dealership within reasonable proximity to an "optimal location" and that dealership had the kind of management, financial resources and track record necessary to potentially become a competitive Jaguar dealership, that dealership, provided it agreed to upgrade its existing facilities and operations, was renewed. If no Jaguar dealership existed at an "optimal location", Jaguar then selected from among all non-optimally located dealers in the L.A./Orange County market, the dealers who possessed the most potential to become the kind of dealers Jaguar wished to have. Such dealers, provided they agreed to relocate their existing facilities and upgrade their operations, were renewed.

34. In the L.A./Orange County market, the five existing Jaguar dealerships located at or close to an "optimal location"

^{12/} With the use of computers, Urban Science plots the locations of actual and potential customers and calculates the optimal geographic locations of a given number of dealerships in order to minimize the distance between the dealer and plotted customer locations.

and also had the potential to become competitive Jaguar dealerships were Southland; Terry York; Hornburg; Newport Imports; and Whittlesey.

35. With respect to the two "optimal locations" where no Jaguar dealer existed, Pasadena and Anaheim, Jaguar determined that of the twelve remaining dealers in the L.A./Orange County market, Rusnak and Bauer possessed the most potential to become competitive Jaguar dealers. Therefore, Rusnak and Bauer were renewed on condition that they agreed to relocate their existing facilities to Pasadena and Anaheim, respectively, and to upgrade their operations in conformance with Jaguar's standards. Jaguar then informed the ten remaining dealers that their franchises would not be renewed when they expired on December 31, 1984. Eight of those are no longer Jaguar dealers. The two remaining are Fladeboe and Auto Trends.

36. The seven renewed dealers in the L.A./Orange County market have spent or committed tens of millions of dollars in upgrades of their facilities, sales, service and parts operations. {In major metropolitan areas nationwide, approximately eighty dealers have completed upgrades of their facilities and operations at a cost of approximately \$200 million.

37. Under the Dealer Rationalization program, Jaguar has eight fewer authorized dealers in the L.A./Orange county market than it did in 1984, but the number of service stalls has more than doubled and there has been an overall increase in the number of mechanics and service advisors. In addition, service training has increased to 7000 student days from 300

student days in the early 1980's. The increased average size in Jaguar's dealerships also allows them to stock larger parts inventories so that repairs can be completed more quickly.

B. Good Cause Factors.

a. Facts Relating To The Amount Of Business Transacted By Franchisee, As Compared To The Business Available To The Franchisee.

{Section 3061(a)}

38. During the period from 1980 to 1981, the increase in sales for Fladeboe was better than any other dealership in Orange County, with the exception of Newport Imports. But from 1982 to 1983, there was a drop in sales made by Fladeboe, whereas there was an increase for the other three dealers in Orange County. Between 1981 and 1983, Fladeboe did not transact the amount of business that was available to it. Jaguar vehicles were in relatively free supply in 1981, 1982 and the beginning of 1983. Fladeboe's closest competitors, Newport Imports and Bauer, experienced continuous increases in retail sales during this period.

RETAIL SALES AND ANNUAL PERCENTAGE CHANGES
OF THE DEALERS IN ORANGE COUNTY,
THE WESTERN ZONE AND NATIONWIDE

	<u>1980</u>	<u>1981</u>	<u>% Change</u>	<u>1982</u>	<u>% Change</u>	<u>1983</u>	<u>% Change</u>
Fladeboe	11	21	91%	25	19%	20	(20%)
Bauer	36	45	25%	100	122%	120	20%
Newport	36	96	167%	168	75%	284	69%
Friedlander	5	4	(20%)	2	(50%)	3	50%
Western Zone	834	1,600	92%	2,587	62%	3,722	44%
National	3,029	4,695	55%	10,349	120%	15,815	53%

39. From November of 1981 to the middle of 1983, Fladeboe's sales performance was rated as inadequate by Jaguar personnel. In 1982, Fladeboe refused to purchase from Jaguar two vehicles which had been allocated to Fladeboe, during a time when many of its competitor Jaguar dealers were purchasing and selling vehicles aggressively. This served to depress Fladeboe's allocation percentage and thereby reduce its future vehicle allocations and sales.

40. Fladeboe's poor sales performance also served to depress its service and parts business. In 1982, Fladeboe was last among the four Orange County Jaguar dealers in average monthly repair orders.

NUMBER OF REPAIR ORDERS WRITTEN PER MONTH
THROUGH DECEMBER 1982

Fladeboe	57
Bauer	266
Newport Imports	105
Friedlander	106

b. Facts Relating To The Investment Necessarily Made And Obligations Incurred By The Franchisee To Perform Its Part Of The Franchise.

{Section 3061(b)}

41. Fladeboe is located in the Irvine Auto Mall, where it sells and services Hondas, Volkswagens, Izusus, Lincoln-Mercurys and Jaguars.

42. Based upon a 1984 appraisal, the land and facilities, upon which Fladeboe is located, were valued at \$3.7 million. Since the 1984 appraisal, Fladeboe invested approximately \$1 million upgrading the Volkswagen facility. Although Fladeboe

does not own the property, it has a forty-year lease of which thirty-five years remain. In 1989, Fladeboe's investment in furniture, fixtures, and equipment was \$879,846.

43. In 1989, Jaguar comprised the following figures which pertain to Fladeboe's four other line-makes:

<u>LINE-MAKE</u>	<u>SALES</u>	<u>TECHNICIAN</u>	<u>NUMBER OF REPAIR ORDERS</u>
Lincoln-Mercury	600	6	30 per day
Merkurs	15	(Lincoln-Mercury secondary franchise which was discontinued)	
Hondas	1000	7	35 per day
Volkswagens	500	6	30 per day
Izusus	450	2	15 per day
Jaguars	66	1.5	2.2 per day
TOTAL	2631	22.5	112.2

JAGUAR'S PERCENTAGE OF THE TOTAL

Vehicle Sales	2.5% (66 of 2,631)
Technicians	6.7% (1.5 of 22.5)
Repair Orders	1.96% (2.2 of 112.5)

c. Facts Relating To The Permanency of The Investment.

{Section 3061(c)}

44. In 1977, Fladeboe built a facility to house both Honda and what was then known as British Leyland. In 1982, Fladeboe moved Jaguar out of that facility and into the Lincoln-Mercury showroom. This move was prompted by a promise from Honda of increased vehicle allocations if Honda was provided an exclusive showroom. Therefore, the original investment made to build the facility continues to be used for Fladeboe's Honda operations.

45. Fladeboe spent less than \$40,000 moving Jaguar to the Lincoln-Mercury showroom, the principal cost being a new Jaguar sign for the showroom. Since the relocation, Jaguar has not required Fladeboe to make any major capital investments.

46. There has been frequent occasions in which the Jaguar area of the showroom was used for Lincoln-Mercury. It was only recently that Fladeboe segregated the Jaguar area so that it cannot be used for other lines.

47. Fladeboe has devoted eight service stalls to Jaguar. There have been times when the stalls were used for other line-makes.

d. Facts Relating To Whether It Is Injurious Or Beneficial To The Public Welfare For The Franchise To Be Modified Or Replaced Or The Business of The Franchisee Disrupted.

{Section 3061(d)}

48. Jaguar has nine dealers in Los Angeles/Orange County area. Fladeboe, Newport Imports, and Bauer are in Orange County. Newport Imports is 12 miles and Bauer is 17.7 miles from Fladeboe.

49. If the Fladeboe dealer point were eliminated, a person living in San Juan Capistrano, south of Fladeboe, would require seventeen additional minutes to get to Newport Imports, and twenty-four additional minutes to get to Bauer. Travel time at non-peak periods would be shorter.

50. Newport Imports' hours are Monday through Friday from 7:00 a.m. to 10:00 p.m. Customers can pick up their vehicles until 9:00 p.m. Bauer's service department is open Monday

through Friday from 7:30 a.m. to 5:30 p.m., however its customers can pick up their vehicles until 8:00 p.m.

51. Customers who purchased Jaguar vehicles from Fladeboe registered them an average of 14 miles from Fladeboe's dealership. If Fladeboe's Jaguar franchise is not renewed, and considering the seven renewed dealers at their present locations, average travel distance is reduced to 10.3 miles.

52. Newport Imports has the highest Customer Satisfaction Index ("CSI") of all the dealers in the L.A./Orange County market. Bauer is also a very qualified dealership with very good facilities and service reputation. In contrast, Fladeboe's sales to complaint ratio was the highest in the L.A./Orange County market.

- e. Facts Relating To Whether The Franchisee Has Adequate Motor Vehicle Sales And Service Facilities, Equipment, Vehicle Parts, And Qualified Service Personnel To Reasonably Provide For The Needs Of The Consumers For The Motor Vehicles Handled By The Franchisee And Has Been And Is Rendering Adequate Services To The Public.

{Section 3061(e)}

53. Through the early 1980's, Fladeboe was not able to hire or retain adequately trained Jaguar personnel.

54. From 1980 to 1983, Fladeboe had four different Service Managers and ten different Service Advisors for the Jaguar franchise.

55. In April of 1983, at the time of Jaguar's Dealer Surveys, neither the dealer principal, Ray Fladeboe, nor the General Manager allocated more than 15% of their time to Jaguar, and the Sales Manager spent approximately 5% of his

time on Jaguar. Fladeboe's Service Manager had been employed for only eight months and its General Manager for one year. Fladeboe also replaced its Parts Manager. Fladeboe's three Technicians had an average employment period of only ten months.

56. The Jaguar Dealer Survey concluded that Fladeboe did not provide an acceptable level of service and satisfaction, and that many customers called complaining about having to return their vehicle more than once for service repair. Of Fladeboe's three technicians, two were rated as "B" and one as "C" skill level, "C" being the lowest grade. Jaguar's Western Zone Manager gave Fladeboe's service department the lowest possible rating of "very negative". This was one of only four such ratings in his review of the seventeen L.A./Orange County dealers.

57. The Dealer Survey showed that Fladeboe did not stock all special service tools required by Jaguar, because the dealer principal, Ray Fladeboe, had not approved the order for missing tools. Although Fladeboe had all of the required shop equipment, not all the equipment worked, nor was it clean or well-maintained.

58. In November of 1983, Fladeboe was unable to give Jaguar's Parts Representative either an inventory of parts on hand or an analysis of its inventory turnover rate, because no physical inventory had been conducted for over two and one-half years. Jaguar's personnel had repeatedly commented to Fladeboe that its Jaguar parts business was not being run properly and was apparently of secondary importance to the other line-makes.

59. Fladeboe's service problems continue to exist. In 1989, Fladeboe had a one and one-half month period with no Jaguar Technician trained to service or repair Jaguar vehicles. During this period, Fladeboe's service advisor asked that no Jaguar owners be directed to Fladeboe in connection with Jaguar's emergency road assistance program. As a result, the owners had to be directed to Newport Imports.

f. Facts Relating To Whether The Franchisee Fails To Fulfill The Warranty Obligations Of The Franchisor To Be Performed By The Franchisee.

{Section 3061(f)}

60. Spot audits conducted by Jaguar have revealed that Fladeboe has not been following warranty procedures. Fladeboe's service customers have been mishandled, turned away or sent elsewhere for warranty work. Jaguar auditors found excessive labor charges for electrical repairs, unsubstantiated repair claims, improperly maintained parts disbursement records, and inaccurate time-clock compliance.

61. Fladeboe's warranty claim administration area was poorly organized and poorly run.

62. The dealer principal, Ray Fladeboe, acknowledged that there were problems with the warranty claim submissions and its ability to substantiate those claims. Ray Fladeboe further admitted that warranty charge-backs have occurred.

63. In September of 1988, it was the conclusion of Jaguar's Western Zone Manager that Fladeboe's apparent lack of organization, commitment and understanding of the product made any attempts at further training of dubious value.

g. Facts Relating To The Extent Of Franchisee's Failure To Comply With The Terms Of The Franchise.

{Section 3061(g)}

64. In 1982, Fladeboe decided to move its Jaguar operations into the same facility in which it housed Lincoln-Mercury, a move that had not been discussed or approved by Jaguar. This relocation was motivated by a promise from American Honda Motor Company of an additional allocation of Honda vehicles, of approximately sixty units, which were provided to Fladeboe in exchange for committing an exclusive showroom to Honda operations. This unauthorized relocation was in violation of the provisions of the Jaguar franchise. However, under the circumstances, it was not alleged by Jaguar that this violation was significant.

II. Facts Relating To Fladeboe's Petition Claims.

A. Jaguar's Allocation System

65. Jaguar adopted its current vehicle allocation system in 1979. The system is based upon the calculation of "allocation percentages" for each of Jaguar's authorized dealers. These allocation percentages are derived by dividing each dealer's rolling 12-month retail sales by the total of all reported retail sales in the dealers' zone during that period.

66. Allocation percentages are recalculated at the beginning of each month based on the most recent rolling 12-month retail sales figures.^{13/} The resulting allocation

^{13/} In the early 1980's, the allocation percentage was recalculated each quarter. In late 1984 or early 1985, Jaguar changed to calculating the allocation percentage every month.

percentages are applied to determine the next allocation of vehicles to dealers by multiplying the number of vehicles available for allocation in the zone by each dealer's allocation percentage. The actual vehicle allocations are made when the new Jaguars arrive into Southern California by ship, which occurs approximately eighteen to twenty times a year.

68. Several factors influence the number of vehicles available for allocation by Jaguar. The principle factor is the number of vehicles manufactured by Jaguar U.K. and the percentage of such vehicles allocated and shipped to the United States.

69. Certain vehicles on each ship are vehicles to which the dealers' allocation percentages are not applied. These vehicles are not available for dealer allocation because they may be reserved for use by Jaguar employees, used as a replacement or promotional vehicle, or set aside for Jaguar's ongoing market programs.

70. Jaguar generally distributes "company cars" to dealers after they have been in use by Jaguar personnel for approximately 6000 miles. Jaguar gives the dealer immediate retail credit in its allocation system as if the dealer has already sold the vehicle. As such, Jaguar does not include the vehicle in the dealer's current inventory. In 1985, Fladeboe did receive such a company car.

71. Each year, Jaguar distributes a certain number of vehicles to replace those previously sold to unsatisfied customers. Through the end of 1987, in the Western Zone, Jaguar credited the dealer for both the original sale and the

"replacement sale". The number of vehicles designated as "replacement vehicles" directly impacts those which are available for dealer allocation. As of the time of the hearing, Fladeboe had not been required to replace any vehicles which it had previously sold.

72. Jaguar reserves the right to utilize up to approximately 5% of its United States allocation of vehicles for marketing programs. Three categories of dealers received vehicles for these marketing programs, which include dealers who received an additional allocation after completing an upgrade, nonrenewed dealers who received increased allocations as part of agreements to surrender their franchises, and nonrenewed dealers upon whom a "vehicle surcharge" (as discussed infra) was imposed.

73. Jaguar distributed vehicles to renewed dealers who had completed upgrades of their facilities and operations. In these situations, the calculation of the dealer's allocation percentage was not based on the analysis of that dealer's rolling 12-month sales. Instead, the dealer was assigned a planning volume. The planning volume was used in lieu of that dealer's rolling 12-month sales for all or part of the dealer's first year of operation. Thereafter, the dealer is allocated vehicles based on its actual rolling 12-month sales. The purpose behind the planning volume is to provide the dealer with a 12-month opportunity to increase its retail sales, so as to offset the higher overhead resulting from the upgrade. Fladeboe did not fall within this category of dealers and

therefore was not entitled to receive its allocation based upon planning volume.

74. Jaguar distributed an increased allocation of vehicles to dealers in Los Angeles and Orange County who had agreed to close their operations. Fladeboe did not fall within this category of dealers and therefore did not receive any of these "settlement vehicles".

75. Jaguar distributed the surcharge vehicles to the seven renewed dealers in Los Angeles and Orange Counties in order to compensate them for paying a \$600 surcharge for each car they received for a period of over a year.^{14/} Jaguar used this surcharge to fund settlement payments Jaguar agreed to make to the Los Angeles/Orange County dealers who protested their termination. Fladeboe did not fall within this category of renewed dealers and therefore received no surcharge vehicles from Jaguar.

76. Jaguar increased the number of cars allocated to the Western Zone by 10% to offset the surcharge vehicles that were being allocated to the renewed dealers. These vehicles were taken from the national allocation. This had the effect of increasing shipments to the Western Zone by over 650 vehicles during the period of the surcharge. However, only approximately 510 additional vehicles were distributed as a

^{14/} Jaguar U.K.'s Board of Directors approved ten million dollars to be used to fund buy-outs or settlements with nonrenewed dealers. This money proved to be insufficient to resolve all of the disputes which had arisen. Jaguar could not go back to the Board of Director's for more money, and the only other viable source for the funds was the renewed dealers in the United States.

result of the surcharge system. The net result was that approximately 160 additional vehicles were brought into the Western Zone for distribution to all of Jaguar's dealers, including Fladeboe.

77. Jaguar's allocation system is summarized by the following mathematical formula:

$$N = (V-P) \times D/Z$$

N = the number of cars allocated to a specific dealer.

V = the number of vehicles arriving on a specific ship.

P = the number of cars designated for company use, marketing programs, etc.

D = the specific dealer's rolling 12-month retail sales.

Z = the zone's rolling 12-month sales.

100 D/Z = the specific dealer's allocation percentage

78. Each Jaguar dealer in a zone competes against every other dealer in that zone for a limited supply of Jaguar vehicles. The effectiveness of that competition is measured by how quickly any given dealer can sell, and report the sale of, the vehicles allotted to it on any given allocation as compared to how quickly all the other dealers sell, and report the sale of, the vehicles they receive. Therefore, the system works to decrease allocations to dealers who either fail to sell vehicles or are slow to report sales.

79. Jaguar's allocation system provides credit only for retail sales. Therefore, dealers who purchase vehicles from other dealers and thereafter sell those vehicles at retail increase their allocation percentages and future allocation entitlements. The same is true for those dealers who purchase,

and then sell at retail, those vehicles declined for purchase by other dealers. In contrast, dealers who wholesale their vehicles to other dealers or decline vehicles allocated to them, decrease their allocation percentages and future allocation entitlements.

80. From 1980 through 1983, the supply for Jaguars exceeded demand. During this period of time, Fladeboe did not take any additional vehicles offered to it. In late 1982, Fladeboe also declined two cars that Jaguar had allocated to it. In addition, Fladeboe wholesaled two more vehicles to other dealers than it purchased for resale from such dealers. These sales opportunities missed by Fladeboe were seized by some of its competitors.

81. Fladeboe's poor sales performance throughout this period of time was accentuated by the fact that when vehicles were sold they were not reported as sold, or they were reported as sold but with the incorrect information on the Retail Delivery Report ("RDR").

82. From late 1983 through 1987, when demand for Jaguars exceeded supply, Fladeboe's allocation percentages were still depressed because Fladeboe continued not to sell the vehicles it received with any degree of regularity. In order for Fladeboe to have increased its allocation percentages during this period of high demand, it would have had to sold, and reported as sold, its vehicles at a faster rate than other dealers in the zone.

83. From 1983 through 1987, when demand exceeded supply, Fladeboe's average day's supply^{15/} was higher than the other dealers in the Western Zone. This means that Fladeboe's allocation could not have grown at the same rate as the zone because it was tracking at a much slower rate.^{16/} The fact that Fladeboe was a smaller dealership should have made it easier for Fladeboe to have a lower day's supply than the zone, because all it had to do was sell three vehicles for two months and two vehicles a month from thereon.

84. Fladeboe claims that prior to 1986, Jaguar misled Fladeboe with respect to the nature of the allocation system. While it is true that it was not until November of 1986 that Jaguar published a comprehensive description of its retail allocation system, Fladeboe previously received the same basic information about Jaguar's allocation policies as every other Jaguar dealer.^{17/} Furthermore, Ray Fladeboe admitted that prior to 1986, he understood the allocation system used by Jaguar.

^{15/} Jaguar's standard for gauging the efficiency of a dealership's sales performance is the "day's supply" calculation. The calculation involves dividing a dealership's inventory by the number of cars the dealer sells on an average day.

^{16/} There is nothing in Jaguar's allocation system that guarantees an individual dealer's allocation will grow in proportion to its zone, or that it will grow at all.

^{17/} In the Fall of 1986, Jaguar published a detailed written description of the allocation system and sent it to the dealer body. This description memorialized the allocation system as it had existed since 1981.

84. Fladeboe acknowledged that Jaguar did not discriminate against it in terms of vehicle allocations prior to 1983. Fladeboe also admitted that Jaguar allocated vehicles in accordance with Fladeboe's allocation percentage beginning in 1983 and thereafter.

85. Fladeboe claimed that Jaguar should have acted to increase Fladeboe's allocations above its actual allocation percentage by implementing a provision of the allocation system which allows for Jaguar to use discretion, under certain specified conditions, to increase the allocation to a specific dealer on a one-time basis.

86. The discretionary provision of the Jaguar allocation system allows Jaguar to modify its allocations for the following, among other, reasons:

- (a) there are too many vehicles in the late end of the model run;
- (b) there is a restricted supply due to acts of God, strikes or shipping accidents;
- (c) periods of serious economic problems;
- (d) when there are dealers with very low day's supply and dealers with very high day's supply; or
- (e) when the market has shifted to certain geographic areas of the country.

87. Jaguar's intent is to make such temporary modifications only in response to unusual market conditions and to promote the interest of the buying public and its retail body as a whole. This provision has never been used to benefit only a single dealer.

88. In 1989, the day's supply modification of Jaguar's allocation system was used four times.^{18/} Each time the effect upon Fladeboe was such that it received extra vehicles.

DETERMINATION OF ISSUES

1. General Determinations.

In consideration of the foregoing, it is hereby determined that:

a. The scope of the Board's inquiry in determining whether good cause has been established for permitting Jaguar to not renew the franchise of Fladeboe is not limited to the seven enumerated factors in section 3061. By its express terms, section 3061 requires the Board to "take into consideration the existing circumstances, including but not limited to . . ." those factors which are set forth thereafter.

b. "Good cause" under section 3061 may include a reduction in the number of dealers if such reduction was undertaken in good faith for legitimate and sound business reasons and was implemented in a fair and non-discriminatory manner.

c. Jaguar's Dealer Rationalization Program constituted "good cause" because it was implemented under severe economic circumstances which threatened its future competitive survival.

d. The evidence established that the Dealer

^{18/} When there are dealers who have a day's supply that exceeds the zone by ten days, Jaguar takes a certain number of vehicles from those dealers next allocation. Jaguar offers those vehicles to dealers whose day's supply is less than the zone by ten days.

Rationalization Program was undertaken in good faith for legitimate business reasons and was implemented in a fair and non-discriminatory manner.

2. Determination of Protest Issues.

It is further determined that:

a. Jaguar has established that Fladeboe does not transact an adequate amount of business compared to the business available to it. (Section 3061(a))

b. Jaguar has established that Fladeboe has not incurred the necessary investment and obligations to perform its part of the franchise. (section 3061(b))

c. Jaguar has established that Fladeboe has no permanency of investment. (section 3061(c))

d. Jaguar has established that it would not be injurious or that it would be beneficial to the public welfare for the franchise to be modified or replaced or the business of the franchisee disrupted. (section 3061(d))

e. Jaguar has established that Fladeboe does not have adequate motor vehicle sales and service facilities, equipment, vehicle parts, and qualified service personnel to reasonably provide for the needs of the consumers for the motor vehicles handled by Fladeboe, and that Fladeboe has not been and is not rendering adequate services to the public. (section 3061(e))

f. Jaguar established that Fladeboe has failed to fulfill the warranty obligations of Jaguar. (section 3061(f))

g. Jaguar has not established that Fladeboe has significantly failed to comply with the terms of the franchise. (section 3061(g))

2. Determination of Issues Pertaining to Petition Allegations.

It is further determined that:

a. Fladeboe failed to establish that from 1983 through December of 1989, Jaguar deprived Fladeboe of vehicles resulting in dollar losses;

b. Fladeboe failed to establish that Jaguar violated section 11713.3(1) in that Jaguar refused and failed to deliver new vehicles in reasonable quantities;

c. Fladeboe failed to establish that Jaguar violated section 11713.3(1) in that Jaguar engaged in a de facto termination of Fladeboe's franchise by denying Fladeboe access to substantial numbers of vehicles and also thereby modified and diminished Fladeboe's franchise;

d. Fladeboe failed to establish that Jaguar violated section 11713.3(d) and (e) in that Jaguar attempted to require Fladeboe to transfer or sell Fladeboe's interest in the Jaguar franchise to Jaguar and prevented and attempted to prevent Fladeboe from receiving fair and reasonable compensation for the value of the franchised business;

e. Fladeboe failed to establish that Jaguar violated Business and Professions Code section 17200 in that Jaguar misrepresented its allocation practices to Fladeboe and discriminated against Fladeboe in the allocation of vehicles; such misrepresentations being unlawful, deceptive, unfair and constituted business practices;

f. Fladeboe failed to establish that Jaguar breached its contract with Fladeboe and its implied covenant of good faith

and fair dealing in that Jaguar failed to provide Fladeboe with its fair share of vehicles available to the Western Zone and misrepresented its allocation practices to Fladeboe;

h. Fladeboe failed to establish that Jaguar intentionally interfered with Fladeboe's prospective advantage in that Jaguar intentionally and unlawfully discriminated against Fladeboe in the allocation of vehicles and thereby diverted business to Fladeboe's competitors.

PROPOSED DECISION

THEREFORE, the following proposed decision is respectfully submitted:

1. The protest is overruled. Jaguar shall be permitted not to renew the franchise of Fladeboe.
2. The relief sought by the petitions is denied.

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

DATED: March 15, 1991



GEORGE R. COAN
Administrative Law Judge
New Motor Vehicle Board