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STATE OF CALIFORNIA  
NEW MOTOR VEHICLE BOARD

In the Matter of the Appeal of )

HUBACHER CADILLAC, INC., )  
a Delaware Corporation, )

Appellant, )

vs. )

DEPARTMENT OF MOTOR VEHICLES )  
OF THE STATE OF CALIFORNIA, )

Respondent. )

Appeal No. A-63-75

FILED: October 10, 1975

Time and Place of Hearing:

1:30 p.m., September 10, 1975  
Room 4061, 722 Capitol Mall  
Sacramento, CA 95814

For Appellant:

David A. Riegels, Esq.  
Diepenbrock, Wulff, Plant &  
Hannegan  
455 Capitol Mall, Suite 800  
Sacramento, CA 95814

For Respondent:

Honorable Evelle J. Younger  
Attorney General  
By: Frank A. Iwama  
Deputy Attorney General

FINAL ORDER

Hubacher Cadillac, Inc., a Delaware corporation, enfranchised as a new car dealer, hereinafter referred to as "appellant", appealed to this board from a disciplinary action taken against its corporate license by the Department of Motor Vehicles following proceedings pursuant to Section 11500 et seq. of the California Government Code.

The Director of Motor Vehicles, adopting the proposed decision of the hearing officer, found that: (1) On April 15, 1973, appellant caused to be published in the Sacramento Union, a newspaper of general circulation in the Sacramento, California, area, an advertisement containing the following:

"During the month of April ... all '73 Demonstrators have been placed on sale."

"Save up to \$1400 from window sticker prices."

Subsequently, Department Investigator Stanley Scott contacted appellant's president, Elmer Hubacher, and notified him that the Department of Motor Vehicles considered the advertisement to be misleading.

(2) On Wednesday, November 14, 1973, appellant caused to be published in the Sacramento Bee, a newspaper of general circulation, an advertisement containing the following:

"Demonstrator Sale Save \$1600."

"Save \$1600 off the sticker price of the below listed 1973 Cadillac Demonstrators - all carry original factory warranty - plus an extended 24,000 mile warranty on all power-train components."

The advertisement was placed by appellant corporation without the personal knowledge of its president, Elmer Hubacher.

The hearing officer made additional findings, which were adopted by the director, as follows:

1. A demonstrator is a vehicle used by the dealership to demonstrate such vehicles to prospective customers.

2. A demonstrator is not a new vehicle.

3. The "sticker price" mentioned in the advertisements was intended by the appellant to be the price specified in the "label" required by Federal law to be attached to a new automobile by the manufacturer disclosing price information.

4. The purchase of a demonstrator for \$1,400 or \$1,600 off the "sticker price" does not constitute a savings of \$1,400 or \$1,600. The reduction in each case results in a sales price which approximates the market value of the used vehicle (demonstrator).

The director also adopted the hearing officer's determinations of the issues, as follows:

1. Appellant, through its agents and employees, has violated Section 11713(a), Vehicle Code, in the particulars set forth in the Findings of Fact.

2. Cause for suspension of the license, certificate and special plates has been established under Section 11705(10), Vehicle Code.

3. Cause has not been established under Section 11721(c) Vehicle Code.

4. A probationary order would be appropriate under the circumstances.

The director, adopting the hearing officer's proposed decision, imposed a penalty of five days' suspension with five days' stayed for a period of one year's probation under the usual terms and conditions.

Appellant raises four issues on appeal, as follows:

1. The director's decision is not supported by the evidence.
2. The director exceeded his authority in finding two violations when only one violation of the Vehicle Code was alleged.
3. The penalty is excessive.
4. The decision violates appellant's rights under the First and Fourteenth Amendments.

The decision of the board is directed primarily toward the merits of the appellant's first contention.

The department argues that the specified savings of \$1,400 or \$1,600 reflect the fair market value of the Cadillacs as used cars and, therefore, any comparison to the "savings off the sticker price" is misleading. The department further contends that "save" always implies savings off the market price and that it is misleading to use "save" in conjunction with the "sticker price" of a demonstrator, which is by definition, a used vehicle.

Appellant emphasizes that the ad clearly referred to the vehicles as demonstrators, and that such a comparison of the demonstrator price and the "sticker price" is one which the reasonable consumer would make; hence, such a comparison is reasonable and not misleading to the ordinary consumer. The appellant asserts that the advertisements simply indicate that the consumer can save \$1,400 or \$1,600 by buying a demonstrator rather than a comparable new car.

Though the respondent, at the administrative hearing, argued that the standard to be applied to misleading advertising is whether the "ignorant, unthinking, and credulous" would be misled, respondent's appeal brief (page 14) indicates that the test is greater than the "ignorant, unthinking, and credulous", but something less than the "reasonable man" standard which is advanced by the appellant.

No case law has developed under Vehicle Code Section 11713 as to the proper test to be applied to misleading advertising. Respondent would now have the board adopt the "likelihood of confusion" test that has been applied to Section 17500 of the California Business and Professions Code and which, respondent argues, by analogy should apply to Vehicle Code Section 11713 because of the similarity of language in the two sections.

The board has carefully considered the advertisements which are the subject of this accusation. In arriving at their decision, the board evaluated the advertisements in the light of the above-mentioned arguments. The board finds that the subject advertising did not mislead and is not misleading. This finding is the same, using either the standard advocated by the respondent (i.e., the "likelihood of confusion" test) or by the appellant (i.e., the "reasonable man" test). A purchaser would very likely read the ads and find it advantageous to purchase a demonstrator, rather than the comparable new car. The "sticker price" would be very relevant to the prospective purchaser of a demonstrator and would not be misleading.

While it is not material to this decision, the board further finds no wilfullness or intent to publish misleading advertisements on the part of the appellant. With regard to appellant's contention that the director exceeded his scope of authority in finding two violations when only one violation was charged, the board finds that the appellant was fully apprised of the charges against it by virtue of paragraphs 3, 4 and 5 of the accusation. The language of the accusation gave the appellant sufficient written notice of the charges involved, and to that extent, allowed appellant to prepare an adequate defense, as required by Section 11507 of the Government Code.

In view of its holdings on the above issues, the board does not reach the constitutional issues raised by the appellant.

For the reasons stated, we do not find sufficient evidence to support the findings of the director. The decision of the Director of Motor Vehicles is hereby reversed in its entirety.

This Final Order shall be come effective when served upon the parties.

JOHN ONESIAN

MELECIO H. JACABAN

WINFIELD J. TUTTLE

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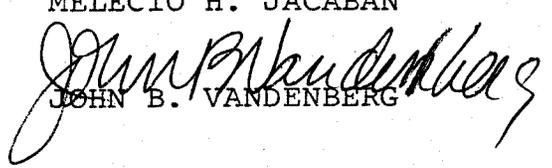
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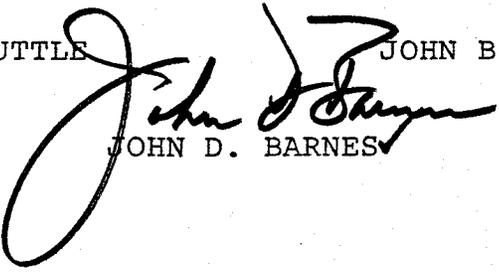
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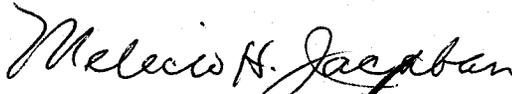
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