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United States District Court, S.D. New York.

ARTHUR GLICK TRUCK SALES, INC., Plaintiff,
v.
HYUNDAI MOTOR AMERICA, Defendant.

22-CV-01213 (PMH)
|
Filed 08/29/2024

OPINION AND ORDER

Philip M. Halpern United States District Judge

***1** Arthur Glick Truck Sales, Inc. ("Plaintiff" or "Glick") initiated this action against Hyundai Motor America ("Defendant" or "HMA") on February 11, 2022, asserting the following claims for relief: (1) violation of Federal Automobile Dealers' Day in Court Act ("ADDCA"), 15 U.S.C. § 1222 *et seq.*; (2) violation of the Franchised Motor Vehicle Dealer Act, New York Veh. & Traf. Law ("VTL") §§ 460-473 (the "Dealer Act"); and (3) breach of contract. (Doc. 1, "Compl."). Defendant filed its answer on March 25, 2022, and the parties thereafter engaged in discovery, which was extended multiple times, pursuant to a Civil Case Plan and Scheduling Order (Doc. 18; Doc. 21; Doc. 27; Doc. 30; Doc. 33; Doc. 36).

Defendant served its motion for summary judgment in accordance with the briefing schedule set by the Court. (Doc. 45; Doc. 46; Doc. 47, "Def. Br."; Doc. 48, "Sullivan Decl."; Doc. 49). [1] Plaintiff opposed Defendant's motion (Doc. 50; Doc. 51, "Pl. Br."), and the motion was fully briefed with the filing of Defendant's reply papers (Doc. 52, "Reply"; Doc. 53). Defendant filed a revised Rule 56.1 Statement with Plaintiff's responses thereto on October 2, 2023, in accordance with the Court's directive. (Doc. 54; Doc. 55; Doc. 56, "56.1"). [2]

For the reasons set forth below, Defendant's motion for summary judgment is GRANTED in part and DENIED in part.

BACKGROUND

The Court recites the facts herein only to the extent necessary to adjudicate the extant motion for summary judgment and draws them from the pleadings, Defendant's Rule 56.1 Statement and Plaintiff's responses thereto, and the admissible evidence proffered by the parties. Unless otherwise indicated, the facts cited herein are undisputed.

HMA manufactures vehicles for the consumer-oriented passenger vehicle market, including sport utility vehicles, crossover vehicles, sedans, and compact cars. (Compl. ¶¶ 7-8). Plaintiff's business is to sell vehicles and is principally owned by Arthur Glick. (*Id.* ¶¶ 12-16). HMA and Glick were parties to a series of Hyundai Motor America Dealer Sales and Service Agreements (the "Dealer Agreement") from 2006 through 2020, pursuant to which Glick owned and operated a Hyundai dealership at 48 Bridgeville Rd., Monticello, NY. (56.1 ¶ 1). Section 5 of the Dealer Agreement provides in pertinent part that any change in ownership of the dealership "requires the prior written consent of HMA, which HMA shall not unreasonably withhold." (*Id.* ¶ 2).

On or about February 19, 2020, Glick entered into an Asset Sale Agreement (the "ASA") to sell its business assets, including its Hyundai, Kenworth, and GMC franchises, to Gabrielli Kenworth, LLC ("Gabrielli"). (*Id.* ¶ 3). Romolo Gabrielli was to be the Dealer Principal of the Hyundai dealership if the sale was approved. (*Id.* ¶ 5). Gabrielli's obligation to purchase the assets was contingent upon, *inter alia*, HMA's issuance and execution of a standard form and term Dealer Sales and Service Agreement. (*Id.* ¶ 6).

***2** HMA turned down the proposed transfer of the Hyundai franchise to Gabrielli via letter dated March 19, 2020, on the grounds that "[Gabrielli] and its principals do not meet HMA's normal, reasonable, and uniformly applied standards for the appointment of a new Hyundai dealer" and "HMA ... requires that dealer owner applicants have significant and successful experience owning and operating new car dealerships. The Proposed Owners of the Proposed Buyers do not meet this requirement. Indeed, while the Proposed Owners have experience operating heavy-duty truck dealerships, they do not have experience owning or operating a new car dealership." (*Id.* ¶ 7; Sullivan Decl., Ex.10 at HMA_000752). On July 27, 2020, Glick and Gabrielli entered into a Third Amendment to the ASA which

25 F.Supp.3d 432
United States District Court, S.D. New York.

CMS VOLKSWAGEN HOLDINGS, LLC and Hudson Valley Volkswagen, LLC, Plaintiffs,
v.
VOLKSWAGEN GROUP OF AMERICA, INC., and Lash Auto Group, LLC, Defendants.

No. 13–cv–03929 (NSR)
|
Signed June 6, 2014.

Synopsis

Background: Franchisee motor vehicle dealers brought action against franchisor seeking declaratory judgment and injunctive relief, alleging that incentive and bonus programs violated New York Franchised Motor Vehicle Dealer Act. Franchisor moved to dismiss and dealers moved to amend complaint.

Holdings: The District Court, Nelson S. Roḿan, J., held that:

[1] franchisor's bonus program qualified for safe harbor provision of Dealer Act;

[2] dealers stated claim against franchisor under section of Dealer Act making it illegal for franchisor to use unreasonable performance standard in determining dealer's compliance with franchise agreement;

[3] franchisor did not unreasonably withhold consent of dealers' sale or transfer of interest under Dealer Act; and

[4] dealers failed to state claim under provision of Dealer Act prohibiting unilateral modification of franchise agreement without notice.

Motions granted in part and denied in part.

Procedural Posture(s): Motion to Dismiss; Motion to Dismiss for Failure to State a Claim.

West Headnotes (8)

[1] **Federal Civil Procedure** Injustice or prejudice

Federal Civil Procedure Time for amendment

Federal Civil Procedure Form and sufficiency of amendment; futility

A court should grant leave to amend a complaint in the absence of any apparent or declared reason, such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, or futility of amendment. Fed.Rules Civ.Proc.Rule 15(a), 28 U.S.C.App.(2006 Ed.)

[2] **Antitrust and Trade Regulation** Practices prohibited or required in general

Franchisor's bonus program, which paid franchisee motor vehicle dealer a bonus of 2% of manufacturers sales retail price of each new vehicle sold if dealer met certain sales objectives, qualified for safe harbor provision of New York Franchised Motor Vehicle Dealer Act prohibiting franchisor from selling directly to franchised motor vehicle dealer motor vehicles at price lower than price franchisor charged all other franchised dealers; although franchisee argued it could not meet standards for bonus program due to consumer preferences, bonus program was offered on proportionately similar basis to all franchisees, and alleged consumer preferences were outside franchisor's control. N.Y.McKinney's Vehicle and Traffic Law § 463(2)(g).

[3] **Antitrust and Trade Regulation** Differential Pricing

Under the judicially-created doctrine of functional availability, the practice of conditioning price concessions and allowances upon the customer's purchase of a specific

quantity of goods will not give rise to a Robinson–Patman Act violation if the concessions are available equally and functionally to all customers. Robinson–Patman Act, § 1(a), 15 U.S.C.A. § 13(a).

1 Case that cites this headnote

[4] **Federal Courts** Trade, Business, and Finance

Case or controversy existed with respect to franchisee motor vehicle dealers' claim that franchisor violated section of New York Franchised Motor Vehicle Dealer Act making it illegal for franchisor to use an unreasonable, arbitrary, or unfair sales or other performance standard in determining franchised dealer's compliance with franchise agreement; dealer alleged that it was unable to attain score on index franchisor used to evaluate sales performance that met requirements of franchise agreement, and threat of dealers falling out of compliance with index could have resulted in termination of franchise agreement. U.S.C.A. Const. Art. 3, § 2, cl. 1; N.Y.McKinney's Vehicle and Traffic Law §§ 463(2)(gg), 469(1).

[5] **Antitrust and Trade Regulation** Practices prohibited or required in general

Franchisee motor vehicle dealers stated claim against franchisor under section of New York Franchised Motor Vehicle Dealer Act making it illegal for franchisor to use an unreasonable, arbitrary, or unfair sales or other performance standard in determining franchised motor vehicle dealer's compliance with franchise agreement, by alleging that index franchisor used to evaluate dealers' sales performance took into account different categories of vehicles, but not consumer preferences. N.Y.McKinney's Vehicle and Traffic Law § 463(2)(gg).

1 Case that cites this headnote

[6] **Antitrust and Trade Regulation** Transfer, sale, and assignment

Franchisor did not unreasonably withhold consent to franchisee motor vehicle dealers' sale or transfer of interest under New York Franchised Motor Vehicle Dealer Act; dealers did not seek approval of changes to ownership structure before they were carried out, and franchisor did consent to transfer of ownership interests, conditioning that consent on dealers performing certain actions, namely signing corporate guarantees, hold harmless agreements, dealer subordination agreements, and covenants not to sue. N.Y.McKinney's Vehicle and Traffic Law § 463(2)(k).

1 Case that cites this headnote

[7] **Antitrust and Trade Regulation** Transfer, sale, and assignment

Franchisee motor vehicle dealers adequately alleged claim under New York Franchised Motor Vehicle Dealer Act by claiming that requirements franchisor imposed on dealers relative to transfer of interests were unreasonable and burdensome. N.Y.McKinney's Vehicle and Traffic Law § 466(1).

1 Case that cites this headnote

[8] **Antitrust and Trade Regulation** Practices prohibited or required in general

Franchisee motor vehicle dealers failed to state claim against franchisor under provision of New York Franchised Motor Vehicle Dealer Act prohibiting franchisor's unilateral modification of franchise agreement without notice; although dealers claimed that it was unreasonable for franchisor to condition acceptance of ownership changes on dealers signing corporate guarantees, hold harmless agreements, dealer subordination agreements, and covenants not to sue, dealers were informed that franchisor intended to modify franchise agreement because doing so required dealers to sign addendums to franchise agreement. N.Y.McKinney's Vehicle and Traffic Law § 463(2)(ff).

Attorneys and Law Firms

***434** Russell Pries McRory, Robinson, Brog, Leinwand, Greene, Genovese & Gluck, New York, NY, for Plaintiffs.

Barry Werbin, Anna Michelle Hershenberg, Herrick Feinstein LLP, New York, NY, Randall L. Oyler, Steven J. Yatvin, Larah Kent Tannenbaum, Barack, Ferrazzano, Kirschbaum & Nagelberg LLP, Chicago, IL, for Defendants.

OPINION AND ORDER

NELSON S. ROMÁN, District Judge.

Hudson Valley Volkswagen, LLC ("Hudson Valley") and CMS Volkswagen Holdings LLC, doing business as Palisades Volkswagen ("Palisades") (together, "Plaintiffs"), brought this action against Volkswagen Group of America ("Defendant") [1] for violations of the New York Franchised Motor Vehicle Dealer Act ("Dealer Act"), N.Y. VEH. & TRAF. L. § 460 et seq. Before the Court is Defendant's motion to dismiss each claim of the Complaint and Plaintiffs' motion to amend its Complaint. For the following reasons, Defendant's motion and Plaintiffs' motion are both GRANTED in part and DENIED in part.

I. Background [2]

Hudson Valley is a Volkswagen dealership operating in Wappingers Falls, New York. Palisades is a Volkswagen dealership operating in Nyack, New York. Through its operating unit, Volkswagen of America, Inc. ("VWoA"), Defendant is the U.S. importer and distributor of Volkswagen brand motor vehicles. VWoA is a "franchisor" under the Dealer Act and enters into a Dealer Agreement with each of its U.S. dealerships, including both Hudson ***435** Valley and Palisades. Hudson Valley entered into a Dealer Agreement with VWoA in 1999 and Palisades entered into a Dealer Agreement in 2001.

The Dealer Agreement supplies the parameter by which VWoA evaluates each dealer's sales performance, called the Dealer Sales Index ("DSI"). The DSI is calculated by applying Volkswagen's regional segment-adjusted market share to a dealer's Primary Area of Influence ("PAI"). A dealer's PAI is a geographic area "corresponding to U.S. census tract information." Steven J. Yatvin Dec. Ex. C Art 16(6). Plaintiffs explain the calculation of DSI as follows: if there are 100,000 new vehicle registrations within a dealer's PAI and Volkswagen has a market share of 5%, that dealer must sell 500 new Volkswagens to be in compliance with the Dealer Agreement. This is a simplified version of the formula because in reality, VWoA only counts registrations of vehicles in segments in which Volkswagen competes (i.e., small sedans, large SUVs, etc.). This calculation is applied to all dealers when determining each individual dealer's DSI.

The DSI, in addition to being the benchmark by which sales performance is measured, is also used to set objectives for dealers in a program that Volkswagen calls the Variable Bonus Program ("VBP"). The VBP was initiated by VWoA in January 2011 and in relevant part, it pays dealers a bonus of 2% of the Manufacturers Sales Retail Price ("MSRP") of each new vehicle sold if a dealer meets certain sales objectives.

The Dealer Agreement also contains certain provisions regarding the ownership and management of the dealership. In Hudson Valley's Dealer Agreement, four individuals were listed as having an ownership interest in the dealership: Thomas Coughlin (70%), Richard Stavridis (10%), Sean Coughlin (10%), and John Matteson (10%). The same four individuals were listed as owners in Palisades' Dealer Agreement, entered into approximately two years later. In 2001, the ownership interests were transferred to Premier, a holding company, in which each owner had the same percentage interest as for the dealerships. In addition to the two Volkswagen dealerships, Premier also owns Audi, BMW, Jaguar, Land Rover, and Volvo dealerships. Since 2001, Thomas Coughlin has made a number of transfers of ownership shares to members of his family, for estate and gift tax planning purposes. These transfers include: an additional 6% interest to Sean Coughlin, Thomas Coughlin's son; a 2.5% interest to Patricia, Thomas Coughlin's daughter; 16% interest to CIC, LLC; and 3% interest to CICGR, LLC. CIC, LLC is an entity created for the purpose of giving gifts to Thomas Coughlin's children. Similarly, CICGR, LLC is an entity created for the purpose of giving gifts to Thomas Coughlin's grandchildren. Thomas Coughlin controls both CIC, LLC and CICGR, LLC.

Hudson Valley and Palisades informed VWoA of the changes to the ownership structure in December 2012 and January 2013. VWoA requested additional documentation regarding the change in structure, which Plaintiffs provided. Although VWoA consented in principle to the ownership changes, VWoA is also "demanding" that Plaintiffs sign new dealer agreements that contain additional agreements, including

corporate guarantees, hold harmless agreements, covenants not to sue, and dealer subordination agreements as a condition to consenting to the ownership changes.

Plaintiffs' Complaint asserts five causes of action. The first three causes of action are brought on behalf of Palisades and seek: (1) injunctive relief on the basis that ***436** the VBP violates section 463(2)(g) of the Dealer Act; (2) declaratory relief that the DSI violates Dealer Act Section 462(2)(gg) and permanent injunctive relief preventing VWoA from using that DSI as a benchmark for dealer performance; and (3) damages against VWoA on the basis that the VBP violates section 463(2)(g) of the Dealer Act. The Fourth and Fifth causes of action are brought on behalf of Hudson Valley and Palisades and seek declaratory and permanent injunctive relief that (4) VWoA has unreasonably withheld its consent to the transfer of ownership interests, in violation of section 463(2)(k) of the Dealer Act and (5) VWoA has made unreasonable modifications to the Dealer Agreements, in violation of section 463(2)(ff) of the Dealer Act. Finally, the Sixth cause of action seeks attorneys' fees, costs, and disbursements. Plaintiffs seek leave to amend the Complaint and provided the Court with a Proposed Amended Complaint ("PAC") which asserts additional factual allegations and additional statutory bases for its alleged causes of action.

II. Legal Standard

a. Motion to Dismiss

On a motion to dismiss for "failure to state a claim upon which relief can be granted," Fed.R.Civ.P. 12(b)(6), dismissal is proper unless the complaint "contain[s] sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.' " *Ashcroft v. Iqbal,* 556 U.S. 662, 678, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009) (quoting *Bell Atl. Corp. v. Twombly,* 550 U.S. 544, 570, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007)); *accord* *Hayden v. Paterson,* 594 F.3d 150, 160 (2d Cir.2010). "Although for the purposes of a motion to dismiss [a court] must take all of the factual allegations in the complaint as true, [it is] 'not bound to accept as true a legal conclusion couched as a factual allegation.' " *Iqbal,* 556 U.S. at 678, 129 S.Ct. 1937 (quoting *Twombly,* 550 U.S. at 555, 127 S.Ct. 1955). When there are well-pleaded factual allegations in the complaint, "a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief." *Id.* A claim is facially plausible when the factual content pleaded allows a court "to draw a reasonable inference that the defendant is liable for the misconduct alleged." *Id.* at 678, 129 S.Ct. 1937. Determining whether a complaint states a facially plausible claim upon which relief may be granted is "a context-specific task that requires the reviewing court to draw on its judicial experience and common sense." *Id.* at 679, 129 S.Ct. 1937.

b. Motion to Amend

[1] Under Fed.R.Civ.P. 15(a), a party may amend its pleading after a responsive pleading has been served "only by leave of court or by written consent of the adverse party." Fed.R.Civ.P. 15(a). "[T]he court should freely give leave when justice so requires." Fed.R.Civ.P. 15(a)(2). The court should grant leave to amend the complaint " '[i]n the absence of any apparent or declared reason—such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, [or] futility of amendment.' " *In re Alcon Shareholder Litigation,* 719 F.Supp.2d 280, 281–82 (S.D.N.Y.2010) (quoting *Foman v. Davis,* 371 U.S. 178, 182, 83 S.Ct. 227, 9 L.Ed.2d 222 (1962)). "A proposed amendment is futile if the proposed claim could not withstand a 12(b)(6) motion to dismiss." *Fortune v. Grp. Long Term Disability Plan for Emps. of Keyspan Corp.,* 588 F.Supp.2d 339, 341 (E.D.N.Y.2008), *aff'd* 391 Fed.Appx. 74, 80 (2d Cir.2010) (citation omitted).

***437** In deciding Plaintiffs' motion to amend, the Court analyzes the additional facts alleged in the PAC and additional statutory violations asserted under the stated 12(b)(6) motion to dismiss standard where relevant.

III. Discussion

a. First and Third Claims: Violation of § 463(2)(g)

Hudson Valley's first and third claims allege a violation of section 463(2)(g) of the Dealer Act, with the first claim seeking declaratory relief and the third claim seeking damages. Hudson Valley alleges that is that it is impossible

for it to meet the standards for the VBP due to the fact that consumer preferences in Rockland County disfavor German cars. The PAC adds facts as to the regional market bias that Hudson Valley alleges exists in Rockland County. The additional facts include a report from "Auto Outlook," a trade newsletter of the Greater New York Automobile Dealers Association. The publication indicates that Mercedes, BMW, Volkswagen, Audi, Porsche, and MINI all have lower market shares in Rockland County than in Westchester County.[3] The additional fact that the market shares of German brand vehicles tend to be lower in Rockland County than in Westchester County and all downstate counties is taken into consideration. However, the Court does not accept the conclusory allegation that from this data, the assumption must be that there is an anti-German brand bias in Westchester County.

Defendant argues that it cannot be liable for a violation of section 463(2)(g), even if it did fail to take into account the "unique" characteristics of the preferences of the market in which Plaintiffs operate. Section 463(2)(g) makes it unlawful

> [t]o sell or offer to sell any new motor vehicle to any franchised motor vehicle dealer at a lower actual price therefor than the actual price offered to any other franchised motor vehicle dealer for the same model vehicle similarly equipped or to utilize any device including, but not limited to, sales promotion plans or programs which result in such lesser actual price.... This paragraph shall not be construed to prevent the offering of incentive programs or other discounts provided such incentives or discounts are reasonably available to all franchised motor vehicle dealers in this state on a proportionately equal basis.

N.Y. VEH. & TRAF. L. § 463(2)(g).

In the one case to interpret section 463(2)(g) in detail in the context of an incentive program, the Supreme Court of Suffolk County,[4] found that an Audi bonus program violated the statute because the program did not treat all dealers equally. Although not binding, *Audi of Smithtown v. Volkswagen Grp. of Am., Inc.*, 32 Misc.3d 409, 924 N.Y.S.2d 773 (N.Y. Sup.Ct., Suffolk County 2011), is instructive. In *Audi of Smithtown, Inc.,* the franchisor treated new dealerships differently than existing dealerships for the purposes of two incentive programs. The first incentive program, "Keep it Audi," gave discounts in varying amounts to dealers on ***438** the purchase of lease-return vehicles (cars being returned to the dealership at the end of the lease term) based upon meeting quarterly purchase objectives. Since new dealers did not have a portfolio of vehicles whose leases were maturing, new dealers were automatically placed in the highest qualifying level for three years, thereby achieving the highest possible discount. The "CPO Purchase Bonus" was a program through which Audi rewarded a dealer by paying them a bonus of a percentage of the MSRP for the sale of new vehicles. To qualify for this program, existing dealers were required to purchase a certain percentage of lease-return vehicles, calculated based on the total number of maturing lease-return vehicles. For the same reason that an exception was made for new dealers for the "Keep it Audi" program, new dealers qualified for the "CPO Purchase Bonus" by meeting a sales objective for the sale of certified pre-owned vehicles, rather than by meeting a purchasing requirement. The court found both programs to violate section 463(2)(g) of the Dealer Act because "[i]n effect, existing dealers are required to purchase most of their pre-owned vehicles at the highest cost if they are to have any opportunity to receive the benefits of these two incentive programs, while new dealers are free to purchase their pre-owned inventory at lower prices from auction houses and thereby secure the benefits of both programs." *Audi of Smithtown,* 924 N.Y.S.2d at 780; *see also* *Audi of Smithtown, Inc. v. Volkswagen of Am., Inc.*, 100 A.D.3d 669, 671, 954 N.Y.S.2d 106, 108 (2d Dep't 2012) ("Audi offered new vehicles to dealers at lower actual prices than it offered similar vehicles to dealers not qualifying for the program."). Therefore, the court found, the franchisor did not apply the incentive programs on a "proportionately equal basis" and the Keep it Audi and CPO Bonus Program did not qualify for the safe harbor provision of section 463(2)(g).

VWoA asserts that *Audi of Smithtown* supports dismissal of this claim because that court found that when a franchisor created an exception for certain dealers respective to incentive and bonus programs, that different treatment did not fall into the "proportionately equal basis" language of the safe harbor provision of section 463(2)(g). Plaintiffs assert that

Audi of Smithtown supports their position because the effect of the VBP is that Lash, Hudson Valley's nearest competitor, consistently earns the New Vehicle Sales Bonus, allowing it to purchase new vehicles at a lower price, which is the same outcome that the court in *Audi of Smithtown* found to violate section 463(2)(g). Although the circumstances here are not entirely analogous to those in *Audi of Smithtown,* the Court agrees with Defendant. The franchisor in *Audi of Smithtown* treated two categories of dealerships differently for purposes of the incentive and bonus programs, which was the reason the programs failed under the Dealer Act.

[2] Here, all dealers are treated equally. Plaintiffs do not argue that the VBP is inequitable on its face, but rather, factors outside its control cause the VBP to be inequitable in practice. The safe harbor of the statute is only violated where the bonus program is applied on a disproportionate basis, which is not the case here. *Cf. Audi of Smithtown,* 924 N.Y.S.2d at 780 ("There is no manner in which the bonus offered on new automobiles sales under the CPO program to new automobile dealers is proportionately similar to the bonus offered existing dealers."). VWoA's bonus program is offered on a proportionately similar basis to all franchisors.

Even with the additional facts alleged in the amended complaint, the claim fails. The safe harbor provision of ***439** section 463(2)(g) protects bonus programs so long as they are "reasonably available" to all dealers "on a proportionately equal basis." If the Court found that consumer preferences were required to be taken into consideration in order for the bonus program to be applied on a proportionately equal basis, that would defeat the objective standard that the safe harbor creates. Additionally, consumer preference is a variable that is apt to change over time and difficult to quantify. The statute clearly states that any price discounts that are made available to dealers through incentive programs must be "proportionately equal" and it is difficult to imagine how a franchisor would be expected to apply such programs taking consumer preferences into account. Whereas segments of vehicles are easily quantifiable through vehicle registrations, consumer preferences are not a stable benchmark.

The same conclusion was reached by Judge Hellerstein in a bench ruling in the case *Beck Chevrolet Co. v. General Motors, LLC.* Transcript of Proceedings re: TRIAL held on 9/24/2013 before Judge Alvin K. Hellerstein, *Beck Chevrolet Co., Inc. v. General Motors, LLC,* 11–cv–02856 (S.D.N.Y.2013), ECF No. 124 ("*Beck* 9/24/2013 Transcript"). In that case, General Motors used a Retail Sales Index ("RSI") to evaluate dealers' sales performance, which was calculated by taking the average market share of a dealer's sales area, taking into consideration the segments in which the franchisor sells vehicles. Plaintiff challenged the use of the a statewide basis for calculating the RSI because it failed to consider the popularity of imports, concentration of population, and other factors that exist in the downstate markets. Notably, Judge Hellerstein ruled, "A standard to be a standard must be objective. It cannot give rise to unique arguments of exceptions if the standard is to be generally applicable and not arbitrary as to particular dealers." *Id.* at 17.

[3] The Court also finds persuasive Defendant's analogy to price discrimination claims under the Robinson–Patman Act.[5] The Robinson–Patman Act states, "It shall be unlawful for any person engaged in commerce ... to discriminate in price between different purchasers of commodities of like grade and quality ..." 15 U.S.C. § 13(a). Under the judicially-created doctrine of "functional availability," "[t]he practice of conditioning price concessions and allowances upon the customer's purchase of a specific quantity of goods will not give rise to a Robinson–Patman violation if the concessions are available equally and functionally to all customers." *Bouldis v. U.S. Suzuki Motor Corp.,* 711 F.2d 1319, 1326 (6th Cir.1983). There is similarity between the functional availability doctrine and the safe harbor provision of the Dealer Act because both allow for exceptions to anti-price discrimination statutes where discounts are given on a "proportionately equal" or "functionally available" basis. In one case interpreting the functional availability doctrine, the Sixth Circuit held that "an outside influence, not in the control of [defendant distributor], i.e. plaintiffs' customer demands, ... does not render the discount functionally unavailable." *Smith–Wholesale Co., Inc. v. R.J. Reynolds Tobacco Co.,* 477 F.3d 854, 861 (6th Cir.2007). Similarly ***440** here, the alleged consumer preferences are outside the control of the franchisor and not taking this factor into consideration does not mean that the VBP was applied disproportionately.

The cases that Plaintiff cites addressing regional market share are inapposite because none of those cases dealt with incentive programs. In each case[6] the relevant court was faced with the termination or transfer of a dealer. Further, none of the cited cases dealt specifically with the New York Dealers Act. Finally, none of the cited cases are controlling and to the extent that they are contrary to this Court's decision, the Court disagrees with those courts.

Finally, Plaintiffs also allege that its nearest competitor, Lash Auto, located in Westchester County, occupies an artificially small PAI, because it borders an "open point." An open point, Plaintiff explains, occurs when a certain area is not assigned to any dealer because a previous dealer went out of business and the area was not reassigned. Being adjacent to an "open point" is an alleged unfair advantage because a dealer has the ability to sell into this area without it being taken into account in the dealer's PAI, therefore giving it a small sales objective but a large market into which it is able to sell. This is of no matter here because as the Court has stated, this does not indicate that VBP was applied disproportionately.

As indicated above, the additional allegations made in the PAC with respect to this claim also fail to state a claim under a 12(b)(6) motion to dismiss standard. Therefore, any amendment to the first cause of action would be futile. Defendant's motion to dismiss is granted and Plaintiffs' motion to amend is denied with respect to the first cause of action.

b. Second Claim: DSI (Violation of § 463(2)(gg))

The second claim of the Complaint and PAC is that the DSI violates section 463(2)(gg) of the Dealer Act, which makes it illegal for a franchisor "[t]o use an unreasonable, arbitrary or unfair sales or other performance standard in determining a franchised motor vehicle dealer's compliance with a franchise agreement." N.Y. VEH. & TRAF. L. § 463(2)(gg). Hudson Valley points to the fact that the DSI takes into account segments, or different categories of vehicles, in calculating the DSI, but not consumer preferences. Since Volkswagen does not manufacture pick-up trucks, for example, the number of newly registered pick-up trucks is omitted when the DSI is calculated. Hudson Valley also points to the fact that if small SUVs are less popular in a particular PAI, that is ***441** reflected in the DSI. Because the DSI adjusts for segments and not consumer preferences, Hudson Valley argues that "[VWoA]'s rigid adherence to regional market share, adjusted only for segment popularity and no other local consumer preferences, is the fundamental flaw with DSI and constitutes a violation of section 463(2)(gg) of the Dealer Act." Pls.' Opp. Br. 9.

Defendant argues that there is no case or controversy with regard to this issue, and that therefore, the claim should be dismissed for lack of jurisdiction. Hudson Valley alleges that it is "threatened with [the] irreparable harm" of falling out of compliance with the DSI requirements, and seeks declaratory relief that the DSI violates section 463(2)(gg). The New York Traffic and Vehicle Law provides that "[a] franchised motor vehicle dealer who is or may be aggrieved by a violation of this article shall be entitled to ... sue for, and have, injunctive relief and damages in any court of the state having jurisdiction over the parties." N.Y. VEH. & TRAF. L. § 469(1). In *Beck Chevrolet,* Judge Hellerstein rejected the argument that there was no case or controversy in similar circumstances. TRANSCRIPT of Proceedings re: CONFERENCE held on 7/11/2012 before Judge *Alvin K. Hellerstein* at 79–80, *Beck Chevrolet Co., Inc. v. General Motors, LLC,* 11–cv–02856 (S.D.N.Y.2012), ECF No. 75 ("So the statute says that a franchisee like Beck, who is or may be aggrieved by a violation, which he alleges in six and seven, shall be entitled to have injunctive relief against the violation. It doesn't seem to require irreparable damage. He shows prima facie a violation. It's clear that he has to spend more money and make more sales because of the alleged violation. So he may be aggrieved. He may suffer damages. That's aggrieved. You don't have to show irreparable damage in a final injunction, only in a temporary injunction."); *Beck* 9/24/2013 Transcript at 4 ("Beck feels aggrieved by being measured for its compliance with indices based on statewide jurisdiction, by statewide sales calculations and averaging, and brings its lawsuit under that section of the law. Hence, there is a real case and controversy, I so hold, and I deny Beck's arguments with respect to these threshold matters.")

[4] Similarly here, the threat of falling out of compliance with the DSI, which could result in the termination of the Dealer Agreement is enough of an injury to sustain jurisdiction. Plaintiffs claim that "Palisades has been unable to attain a DSI that meets the requirements of the franchise agreement." Compl. ¶ 32; PAC ¶ 34. Thus, there is a case or controversy and the Court has jurisdiction over the claim at this time. *See* *Bronx Auto Mall, Inc. v. Am. Honda Motor Co., Inc.,* 934 F.Supp. 596, 612 (S.D.N.Y.1996) ("The statute thus appears to reflect a legislative determination that a franchised dealer threatened with non-renewal does not have adequate legal remedies and is faced with the risk of irreparable injury.").

[5] Defendant also argues that the allegations under this claim fail to state a claim because of the same reasons stated against the first and third claims. However, at this stage of the proceedings, the Complaint plausibly states a claim under section 463(2)(gg) of the Dealer Act. Based on the allegations in the complaint, it is plausibly stated

that the DSI is "unreasonable, arbitrary or unfair." Although Judge Hellerstein ultimately found that "[a]ssignment of a market potential in the course of honest business judgment by a manufacturer to a dealer as a measure of expected performance within an area is not inherently unfair or arbitrary[,]" there were distinctions in *Beck* which preclude this ***442** Court from dismissing the claim here on a motion to dismiss.[7] *Beck* 9/24/2013 Transcript at 30. Therefore, Defendant's motion to dismiss this claim is denied and the Court will allow this claim to proceed. *See also JDN VW, LLC v. Volkswagen of America, Inc.,* Docket No. C–000026–13 (N.J.Super.Ct. Sussex County Feb. 4, 2014) (court held that at the motion to dismiss stage, allegations that Volkswagen's VBP violated the New Jersey Dealer Act were adequately pled).

c. Fourth Claim: Dealer Ownership Transfers (Dealer Act sections 463(2)(k), 466(1), 463(2)(ff), and 463(2)(j))

[6] Plaintiff alleges a violation of the Dealer Act Section 463(2)(k), which makes it unlawful for a franchisor to "unreasonably withhold consent to the sale or transfer of an interest, in whole or in part, to any other person or party by any franchised motor vehicle dealer or any partner or stockholder of any franchised motor vehicle dealer." N.Y. VEH. & TRAF. L. § 463(2)(k).

Defendants base their motion to dismiss the fourth claim on the fact that Plaintiffs never sought and obtained prior written consent for the ownership changes. The Complaint states that the transfer of ownership shares took place over a period of approximately ten years and were made for gift and estate tax purposes. According to the Complaint, it was not until after the ownership changes were made that Palisades and Hudson Valley notified Volkswagen of the changes. Compl. ¶ 41; PAC ¶ 44.

Because Plaintiffs did not seek approval of the changes to the ownership structure before they were carried out, Defendant could not have unreasonably withheld consent. The language of the statute implies that in order to violate this section, a request for approval must have been made before the changes were implemented. Indeed, there was no request made to which Defendant could have given consent. Instead, there was a request for an ex post approval of changes that had already been implemented. Under these set of facts, Defendants could not have violated section 463(2)(k). *See H–D Michigan, LLC v. Sovie's Cycle Shop, Inc.,* 626 F.Supp.2d 274, 279 (N.D.N.Y.2009) ("Because Sovie's never submitted a written request, together with supporting documentation, HDMC did not violate § 463(2)(k). HDMC cannot be said to have unreasonably withheld consent where it never received a proper request to transfer the franchise."). In addition, VWoA did not withhold consent. Plaintiffs' complaint states that VWoA did consent to the transfer of ownership interests, but rather conditioned that consent on Plaintiffs performing certain actions, namely signing corporate guarantees, hold harmless agreements, dealer subordination agreements, and covenants not to sue.

Plaintiffs' PAC adds a violation of Section 466(1) of the Dealer Act, entitled "Unreasonable Restrictions." Section 466(1) states,

> It shall be unlawful for a franchisor directly or indirectly to impose unreasonable restrictions on the franchised motor vehicle dealer relative to transfer, sale, right to renew or termination of a franchise, discipline, noncompetition covenants, site-control (whether by sublease, collateral pledge of lease or otherwise), right of first refusal to purchase, option to purchase, compliance with subjective standards and assertion of legal ***443** or equitable rights with respect to its franchise or dealership.

N.Y. VEH. & TRAF. L. § 466(1). Defendants argue that the claim also fails under this section because there was no pre-change request to implement the ownership changes.

[7] By the language of the statute, the New York Legislature prohibits a franchisor from "directly or indirectly impos[ing] unreasonable restrictions on the franchised motor vehicle dealer relative to transfer ... of a franchise." Plaintiffs adequately allege a claim under section 466 of the Dealer Act by claiming that the requirements VWoA imposed on Plaintiffs relative to the transfer of interests were unreasonable and burdensome. Plaintiffs are permitted to amend their Complaint to allege a violation of section 466(1). Although VWoA argues that Plaintiffs did not seek consent, this section does not refer to a franchisor "withholding"

consent and therefore does not imply that prior notice is a prerequisite to a violation of this section.

Plaintiffs also seek to add a claim under section 463(2)(j) of the Dealer Act. Section 463(2)(j) makes it unlawful for a franchisor

> [t]o prevent or attempt to prevent, by contract or otherwise, any franchised motor vehicle dealer from changing the capital structure of its dealership, or the means by or through which it finances the operation of its dealership, or finances the acquisition or retention of inventory, provided the dealer at all times meets any capital standards agreed to between the dealer and the franchisor and as applied by the franchisor to all other comparable franchised motor vehicle dealers of the franchisor located within the state.

N.Y. VEH. & TRAF. L. § 463(2)(j). The facts in the Complaint plausibly state a claim under this section and thus, at this stage of the proceedings, Plaintiffs will be allowed to amend the Complaint to add a violation of section 463(2)(j) of the Dealer Act. *See Smith Cairns Subaru v. Subaru Distributor Corp.,* 41 Misc.3d 1222(A), 981 N.Y.S.2d 638 (N.Y.Sup. Westchester County 2013) (plaintiff adequately alleged a violation of section 463(2)(j) where it claimed that defendant attempted to prevent it from changing the capital structure of its business, specifically with regard to the transfer of rights under the dealer agreement from one entity to another with defendant's knowledge).

[8] Plaintiffs' PAC consolidates what was the fifth cause of action in the Complaint into the fourth cause of action. The Fifth cause of action in the Complaint alleges that under section 463(2)(ff) of the Dealer Act, it is unreasonable for Volkswagen to condition the acceptance of ownership changes on Palisades and Hudson Valley signing corporate guarantees, hold harmless agreements, dealer subordination agreements, and covenants not to sue. This includes signing a new dealer agreement that makes Thomas Coughlin's children and grandchildren "Members of Dealer's Owner." Section 463(2)(ff) makes it illegal for a franchisor "[t]o modify the franchise of any franchised motor vehicle dealer unless the franchisor notifies the franchised motor vehicle dealer, in writing, of its intention to modify the franchise of such dealer at least ninety days before the effective date thereof, stating the specific grounds for such modification." N.Y. VEH. & TRAF. L. § 463(2)(ff)(1). The Court agrees with VWoA's assertion that the language of this section only prohibits the unilateral modification of a franchise agreement without notice. Here, Plaintiffs were informed that VWoA intended to modify the agreement because doing so required Palisades and Hudson Valley to sign certain addendums to the Franchise ***444** Agreement. Therefore, Plaintiffs do not state a plausible claim under this section of the Dealer Act.

IV. Fifth Claim: Attorneys' Fees, Costs, and Expenses

VWoA seeks dismissal of the claim seeking attorneys' fees, costs, and expenses because it argues that each of the preceding causes of action should be dismissed. Because claims remain, under section 469(1) of the Dealer Act, Plaintiffs have a right to seek attorneys' fees, costs, and disbursements. Thus, this portion of the motion to dismiss is denied.

V. Conclusion

Accordingly, Defendant's motion to dismiss is granted in part and denied in part and Plaintiffs' motion to amend the Complaint is granted and part and denied in part. Plaintiffs are given fourteen (14) days to file an Amended Complaint in accordance with this decision. Defendant will then have twenty-one (21) days from the filing of the Amended Complaint to file an Answer to the Amended Complaint.

The Clerk of the Court is respectfully requested to terminate the motions, Docket Nos. 31 and 34.

SO ORDERED.

All Citations

25 F.Supp.3d 432

Footnotes

1 Although this action was initially brought against VWoA and Lash Auto Group, Lash Auto Group was voluntarily dismissed from the action on September 6, 2013. Therefore, there remains only one defendant, VWoA.

2 The following facts are taken from Plaintiffs' Complaint except where noted otherwise and are accepted as true for purposes of this motion.

3 Mercedes has a 4.5 market share in Rockland County and 6.5 in Westchester County; BMW has a 3.9 market share in Rockland and 6.0 in Westchester; Volkswagen has a 2.2 market share in Rockland and 3.2 in Westchester; Audi has a 1.7 market share in Rockland and 3.0 in Westchester; Porsche has a 0.2 market share in Rockland and 0.6 in Westchester; and MINI has a 0.5 market share in Rockland and 0.7 in Westchester. Russell P. McRory Dec. Ex. A.

4 The decision was affirmed by the Second Department in *Audi of Smithtown, Inc. v. Volkswagen of Am., Inc.,* 100 A.D.3d 669, 671, 954 N.Y.S.2d 106, 108 (2d Dep't 2012).

5 Plaintiffs argue that these cases are not relevant because the Robinson–Patman Act is concerned with protecting competition and the Dealer Act is concerned with protecting competitors, namely dealers, and therefore there is no element of injury to competition in a Dealer Act price discrimination claim. This is irrelevant, however, because the Court is only addressing the Robinson–Patman Act with respect to the single element of price discrimination.

6 Plaintiffs cite *Sims v. Nissan North Am., Inc.,* Nos. 12AP–833, 12AP–835, 2013 WL 3270914 (Ohio Ct. of App. June 25, 2013) (with respect to termination of a dealership, court affirmed the Ohio Motor Vehicle Dealers Board's determination that specific dealer agreement required Nissan to take into consideration "any special local market conditions"), *Marquis v. Chrysler Corp.,* 577 F.2d 624, 632 (9th Cir.1978) (the failure to meet the Minimum Sales Responsibility, calculated as a percentage of new Dodge registrations to the total number of new cars during a certain period as the only factor in deciding to terminate a dealership violated the California Dealers Act under the specific facts "where the dealership operated at sub-MSR levels for a considerable period, during which the sales requirement consistently was treated as a goal, and where there is evidence that termination was motivated by other reasons, the dealers failure to satisfy MSR does not by itself establish that sales performance was so poor that termination could not violate the Act."), and *Ford Motor Co. v. Claremont Acquisition Corp.,* 186 B.R. 977, 989 (C.D.Cal.1995) (district court held that "[i]t was not an impermissible weighing of the evidence for the bankruptcy court to reject Ford's reliance on a regional average comparison as the sole measure of sales performance."), among others.

7 For example, the parties in *Beck* signed a Participation Agreement which supplemented its dealer agreement following GM's bankruptcy.

756 F.3d 204
United States Court of Appeals,
Second Circuit.

GIUFFRE HYUNDAI, LTD., d/b/
a Giuffre Hyundai, Plaintiff–Appellant,
v.
HYUNDAI MOTOR AMERICA, Defendant–Appellee.

Docket No. 13–1886.
|
Argued: March 20, 2014.
|
Decided: June 25, 2014.

Synopsis

Background: Automobile dealer brought action against franchisor alleging that termination of its dealership violated New York's Vehicle and Traffic Law. The United States District Court for the Eastern District of New York, Jack B. Weinstein, J., 2013 WL 1968371, entered summary judgment in franchisor's favor, and dealer appealed.

[Holding:] The Court of Appeals, Sack, Circuit Judge, held that franchisor was not required to provide dealer with opportunity to cure before terminating contract.

Affirmed.

Procedural Posture(s): On Appeal; Motion for Summary Judgment.

West Headnotes (7)

[1] **Federal Courts** Anticipating or predicting state decision

Federal Courts Withholding Decision; Certifying Questions

It is job of federal court sitting in diversity to predict how forum state's highest court would decide issues before it, and, as consequence, it will not certify questions of law where sufficient precedents exist for Court of Appeals to make determination.

10 Cases that cite this headnote

[2] **Antitrust and Trade Regulation** Duration, termination, and renewal

Under New York law, as predicted by the Court of Appeals, state court's determination that automobile dealer had engaged in fraudulent, illegal, and deceptive business practices established as matter of law incurable, material breach of reasonable and necessary provision of motor vehicle dealership franchise contract, and thus franchisor was not required to provide dealer with opportunity to cure before terminating contract, notwithstanding New York's Vehicle and Traffic Law's notice-and-cure provision, where contract provided that it could be terminated if dealer "or any Owner, officer, or General Manager of [dealer], is convicted of any felony or for any violation of law which in [franchisor's] sole opinion tends to adversely affect the operation, management, reputation, business or interests of [dealer] or [franchisor], or to impair the good will associated with [franchisor's] Marks," and breach was not one that subsequent good behavior could have corrected. N.Y.McKinney's Vehicle and Traffic Law § 463.

4 Cases that cite this headnote

[3] **Statutes** Prior or existing law in general

Statutes Common or civil law

New York courts presume that state's legislators were aware of law in existence at time of enactment and intended to abrogate common law only to extent that clear import of statute's language requires.

[4] **Contracts** Rights and liabilities on defective performance

New York common law will not require strict compliance with contractual notice-and-cure provision if providing opportunity to cure would be useless, or if breach undermines entire

contractual relationship such that it cannot be cured.

16 Cases that cite this headnote

[5] **Contracts** Conditions Precedent to Rescission

New York law permits party to terminate contract immediately, without affording breaching party notice and opportunity to cure when breaching party's misfeasance is incurable and when cure is unfeasible.

10 Cases that cite this headnote

[6] **Contracts** Conditions Precedent to Rescission

Under New York law, when contracting parties agree to notice-and-cure provision, it is reasonable to assume that they do so with assumption that breaches that would be used to terminate contract would be curable breaches.

9 Cases that cite this headnote

[7] **Statutes** Relation to plain, literal, or clear meaning; ambiguity

Under New York law, although statutes will ordinarily be accorded their plain meaning, courts should construe them to avoid objectionable, unreasonable, or absurd consequences.

Attorneys and Law Firms

***205** Eric L. Chase (Ronald J. Campione, on the brief), Bressler, Amery & Ross, P.C., New York, NY, for Plaintiff–Appellant.

Frederick Liu, Hogan Lovells U.S. LLP, Washington, DC (John J. Sullivan, Hogan Lovells U.S. LLP, New York, NY, on the brief), for Defendant–Appellee.

Before: STRAUB, SACK, and LOHIER, Circuit Judges.

Opinion

SACK, Circuit Judge:

The plaintiff, Giuffre Hyundai, Ltd. ("Giuffre"), was an authorized dealer of Hyundai automobiles pursuant to a contract with that company's domestic affiliate, Hyundai Motor America ("HMA"). HMA terminated its contract with Giuffre after a New York State court concluded that the dealer had engaged in fraudulent, illegal, and deceptive business practices—a clear breach of the contract terms. Giuffre responded by bringing suit in the United States District Court for the Eastern District of New York seeking to enjoin the termination. Giuffre relied in pertinent part on section 463 of the New York Vehicle and Traffic Law, which provides protections to motor vehicle franchisees in their dealings with automobile manufacturers. Giuffre claimed that section 463 required HMA to provide it with notice of and an opportunity to cure the breach occasioned by the state court's ruling. ***206** The district court (Jack B. Weinstein, *Judge*) disagreed, concluding that the breach here was incurable and that HMA was therefore entitled to terminate the contract immediately, notwithstanding the terms of the Vehicle and Traffic Law. Because we conclude that section 463 does not abrogate the common law with respect to incurable breaches of contract, we affirm the district court's grant of summary judgment for HMA.

BACKGROUND

Giuffre Hyundai was a franchised Hyundai dealer based in Brooklyn, New York. It sold Hyundai cars pursuant to a Dealer Sales and Service Agreement ("DSSA") with HMA. That contract included provisions stipulating that "HMA has selected [Giuffre] because of the reputation of its Owner(s) and the General Manager ... for integrity and their commitment to fair dealing." DSSA 10(C)(2). It required Giuffre to refrain from "engag[ing] in any misrepresentation or unfair or deceptive trade practices." *Id.* HMA reserved the right to "terminate [the DSSA] immediately" if

> [Giuffre] or any Owner, officer, or General Manager of [Giuffre], is convicted of any felony or for any violation of law which in HMA's sole opinion tends to adversely affect the operation, management, reputation,

> business or interests of [Giuffre] or HMA, or to impair the good will associated with the Hyundai Marks.[1] Such violations of law may include, without limitation, any finding or adjudication by any court of competent jurisdiction or government agency that [Giuffre] has engaged in any misrepresentation or unfair or deceptive trade practice[.]

Id. 16(B)(1)(b).

Giuffre's Conduct and HMA's Notice of Termination

In December 2010, New York's Attorney General brought a civil suit against Giuffre; its owner, John Giuffre; and three other dealerships he owned, alleging that they had engaged in a pattern of fraudulent and deceptive business practices. *See People v. Giuffre Motor Car Co.,* No. 30163/2010 (N.Y.Sup.Ct.2010).

The New York Supreme Court, Kings County, eventually granted summary judgment for the Attorney General, ruling that the dealerships had "engaged in fraudulent and illegal business practices[,] ... deceptive acts[,] ... and false advertising" in violation of several New York statutes and the federal Truth in Lending Act, 15 U.S.C. § 1601 *et seq.* *See* Decision/Order at 7, *Giuffre Motor Car Co.,* No. 30163/2010 (N.Y.Sup.Ct. Dec. 7, 2011). Concluding that the evidence "describe[d] a common practice of strong-arm sales methods and unethical conduct," *id.* at 4, the court commented: "The list of grievances is extensive and unsettling. Multiple statutory violations appear in several individual transactions. The Court is struck by the similarity of the claims being made [by the customers] and the brazen nature of the sales persons," *id.* at 5. In response to what it called these "credible allegations of deceptive and fraudulent business practices," the court found that John Giuffre had "offered nothing more than conclusory statements in a general denial which is insufficient to defeat an award of summary judgment." *Id.* at 7.

The court enjoined the dealerships from committing further violations and ordered ***207** both restitution and civil penalties. *See* Order, *Giuffre Motor Car Co.,* No. 30163/2010 (N.Y.Sup.Ct. Feb. 22, 2012). The Attorney General eventually agreed to a total payment of $500,000 in satisfaction of the judgment. *See* Consent Order and Judgment, *Giuffre Motor Car Co.,* No. 30163/2010 (N.Y.Sup.Ct. Sept. 14, 2012).

HMA apparently learned of the Attorney General's suit and the court's decision for the first time from an October 2012 article in the *New York Post* headlined "Car biz slapped for fraud." Kevin Sheehan and Mitchel Maddux, *Car Biz Slapped for Fraud,* N.Y. Post, Oct. 1, 2012. On October 3, 2012, an HMA executive wrote to Giuffre, enclosing a copy of the article. The letter notified Giuffre that the court's findings "are extremely serious and constitute a breach of [the DSSA]." Letter from Ken Bloech, Regional General Manager, Eastern Region, HMA, to John Giuffre (Oct. 3, 2012). Following an exchange of correspondence among counsel, on December 3, 2012, HMA sent Giuffre a letter indicating that it would terminate the DSSA in ninety days. Letter from Ken Bloech, Regional General Manager, Eastern Region, HMA, to John Giuffre (Dec. 3, 2012) (the "Notice of Termination"). The Notice of Termination asserted that "Giuffre Hyundai is in material and incurable breach of its obligations under the [DSSA]. HMA cannot and will not voluntarily allow its products to be sold and marketed by an organization that has been found to have preyed on the consuming public ... in the manner [Giuffre] did." *Id.* at 4.

Proceedings Before the District Court

As the termination date approached, Giuffre filed suit in the United States District Court for the Eastern District of New York, seeking, among other things, "to permanently enjoin HMA from terminating [the DSSA]" and "to declare unlawful HMA's Notice of Termination." Compl., *Giuffre Hyundai, Ltd. v. Hyundai Motor Am.,* No. 13–CV–0520 (E.D.N.Y. Jan. 29, 2013), ECF No. 1. In addition to state and federal statutory and common law claims not relevant here,[2] Giuffre asserted that HMA violated section 463 of New York's Vehicle and Traffic law by failing to provide it with notice of and an opportunity to cure its breach of the DSSA. *Id.*

Section 463 requires a motor vehicle franchisor—notwithstanding the terms of any contract—to provide a dealer franchisee written notice "of its intention to terminate ... the franchise of such dealer at least ninety days before the effective date thereof, stating the specific grounds for such termination." N.Y. Veh. & Traf. Law § 463(2)(d)(i). The franchisee facing termination may then challenge the franchisor's decision by filing suit. *Id.* § 463(2)(e)(i).

> The issues to be determined in [such] an action ... are whether the franchisor's notice of termination was issued with due cause and in good faith. The burden of proof shall be upon the franchisor to prove that due cause and good faith exist. The franchisor shall also have the burden of proving that all portions of its current or proposed sales and service requirements for the protesting franchised new motor vehicle dealer are reasonable.
>
> The determination of due cause shall be that there exists a material breach by a ***208** new motor vehicle dealer of a reasonable and necessary provision of a franchise if the breach is not cured within a reasonable time after written notice of the breach has been received from the manufacturer or distributor.

Id. § 463(2)(e)(2).

HMA moved for summary judgment, and Giuffre cross-moved for partial summary judgment on its section 463 claim. The district court granted judgment for HMA. *Giuffre Hyundai, Ltd. v. Hyundai Motor Am.,* No. 13–CV–0520, 2013 WL 1968371, 2013 U.S. Dist. LEXIS 67795 (E.D.N.Y. May 10, 2013). In a discussion confined to Giuffre's section 463 claim, the court found that the Vehicle and Traffic Law "does not modify or displace the state common law principle that a party commits a material breach of its contract with another party when it violates a provision going to the root of their agreement." *Id.* at *3, 2013 U.S. Dist. LEXIS 67795, at *7–8. A breach of this kind "is the basis for the aggrieved party to revoke or terminate the agreement without providing the other party an opportunity to cure." *Id.* at *4, 2013 U.S. Dist. LEXIS 67795, at *8.

Moreover, the district court reasoned, New York common law does not require a chance to cure "when 'doing so would amount to a useless gesture.' " *Id.* at *4, 2013 U.S. Dist. LEXIS 67795, at *9 (quoting *Grocery Haulers, Inc. v. C & S Wholesale Grocers, Inc.,* No. 11 Civ. 3130(DLC), 2012 WL 4049955, at *15, 2012 U.S. Dist. LEXIS 131598, at *41 (S.D.N.Y. Sept. 14, 2012) (collecting cases)) (some internal quotation marks omitted). Finding that section 463 did not abrogate the common law in this respect either, the district court concluded that, after Giuffre's "egregious breach, further notice and opportunity to cure were not required because no cure was possible.... Anything less than termination might have frustrated—[HMA] could reasonably conclude—its attempts at rehabilitation of the public's trust in Hyundai, which was essential for a successful vendor of automotive products." *Id.* at *4, 2013 U.S. Dist. LEXIS 67795, at *10–11.

On appeal, Giuffre argues that section 463 gives franchisees an absolute right to an opportunity to cure a breach of a motor vehicle dealership franchise contract, and that material disputes of fact exist regarding the materiality of Giuffre's breach and the sufficiency of HMA's Notice of Termination. In the alternative, Giuffre asks us to seek guidance on the meaning of section 463 from the New York Court of Appeals by certifying that question to the court.

DISCUSSION

"We review an order granting summary judgment *de novo* and resolve all ambiguities and draw all permissible factual inferences in favor of the party against whom summary judgment is sought." *Lederman v. N.Y.C. Dep't of Parks & Recreation,* 731 F.3d 199, 202 (2d Cir.2013) (internal quotation marks and brackets omitted), *cert. denied,* —— U.S. ——, 134 S.Ct. 1510, 188 L.Ed.2d 376 (2014). Summary judgment is appropriate when, "construing the evidence in the light most favorable to the non-movant, 'there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.' " *Psihoyos v. John Wiley & Sons, Inc.,* 748 F.3d 120, 123–24 (2d Cir.2014) (quoting Fed.R.Civ.P. 56(a)).

[1] The central issue in this appeal is whether HMA's termination of Giuffre's franchise complied with New York's Vehicle and Traffic Law. In an action seeking to enjoin termination of a franchise agreement under section 463, the franchisor must establish that it acted with "due cause." N.Y. Veh. & Traf. Law § 463(2)(e)(2). Due cause exists where ***209** there has been "a *material breach* by a new motor vehicle dealer of a reasonable and necessary provision of a franchise if the breach is not *cured within a reasonable time* after written notice of the breach." *Id.* (emphases added). While we have not found or been pointed to a published decision construing this portion of the statute, there is ample common law precedent interpreting the operative terms under New York law. We therefore need not, and decline to, certify any questions of law to the New York Court of Appeals. *See DiBella v. Hopkins,* 403 F.3d 102, 111 (2d Cir.) ("Issues of state law are not to be routinely certified to the highest court of New York simply because a certification procedure is available." (alterations omitted)), *cert. denied,* 546 U.S. 939,

126 S.Ct. 428, 163 L.Ed.2d 326 (2005). Indeed, "it is our job to predict how the forum state's highest court would decide the issues before us," and, as a consequence, "we will not certify questions of law where sufficient precedents exist for us to make this determination." *Id.* (internal quotation marks omitted).

[2] We therefore proceed to address the merits of Giuffre's appeal. We conclude that HMA's termination of the DSSA was lawful, that the record presents no genuine dispute as to any material fact, and that HMA was therefore entitled to summary judgment.

[3] New York courts presume that the state's legislators were "aware of the law in existence at the time of an enactment and [intended to] abrogate[ ] the common law only to the extent that the clear import of the language of the statute requires." *B & F Bldg. Corp. v. Liebig,* 76 N.Y.2d 689, 693, 563 N.Y.S.2d 40, 564 N.E.2d 650, 652 (1990); *accord* *Arbegast v. Bd. of Educ. of S. New Berlin Cent. Sch.,* 65 N.Y.2d 161, 169, 490 N.Y.S.2d 751, 480 N.E.2d 365, 371 (1985). Moreover, the legislature itself has instructed that "[w]ords of technical or special meaning are construed according to their technical sense, in the absence of anything to indicate a contrary legislative intent." N.Y. Stat. Law § 233. Thus, "words [that] have a distinct and well-defined meaning in the jurisprudence of the State ... must be deemed to have the same meaning when used in the statutes." *Skeels v. Paul Smith's Hotel Co.,* 195 A.D. 39, 42, 185 N.Y.S. 665, 668 (3d Dep't 1921); *accord Moran Towing & Transp. Co. v. N.Y.S. Tax Comm'n,* 72 N.Y.2d 166, 173, 531 N.Y.S.2d 885, 527 N.E.2d 763, 767 (1988) (citing N.Y. Stat. Law § 233).

[4] New York common law will not require strict compliance with a contractual notice-and-cure provision if providing an opportunity to cure would be useless, or if the breach undermines the entire contractual relationship such that it cannot be cured.[3] *See, e.g., Wolff & Munier, Inc. v. Whiting–Turner Contracting Co.,* 946 F.2d 1003, 1009 (2d Cir.1991) (compliance with cure provision "is not required where it would amount to a 'useless gesture' "); *Miller v. Wells Fargo Bank, N.A.,* No. 13–CV–1541, 2014 WL 349723, at *6 n. 6, 2014 U.S. Dist. LEXIS 14060, at *15 n. 6 (S.D.N.Y. Jan. 30, 2014) (opportunity to cure is not required where futile); *7–Eleven, Inc. v. Khan,* 977 F.Supp.2d 214, 230 (E.D.N.Y.2013) ("Under New York law, the law governing this case, a contract may be terminated without notice and opportunity to cure where there is sufficient evidence of fraud, even where contractual provisions require such notice."); ***210** *Southland Corp. v. Froelich,* 41 F.Supp.2d 227, 246–48 (E.D.N.Y.1999) (compliance with cure provision not required where franchisee's alleged fraud undermined the "very essence of the contract").

[5] **[6]** In particular, " 'New York law permits a party to terminate a contract immediately, without affording the breaching party notice and opportunity to cure ... when the [breaching party's] misfeasance is incurable and when the cure is unfeasible.' " *Sea Tow Servs. Int'l, Inc. v. Pontin,* 607 F.Supp.2d 378, 389 (E.D.N.Y.2009) (quoting *Needham v. Candie's, Inc.,* No. 01 Civ. 7184(LTS)(FM), 2002 WL 1896892, at *4, 2002 U.S. Dist. LEXIS 15144, at *11–12 (S.D.N.Y. Aug. 16, 2002), *aff'd,* 65 Fed.Appx. 339 (2d Cir.2003) (citations omitted)); *accord Hicksville Mach. Works Corp. v. Eagle Precision, Inc.,* 222 A.D.2d 556, 557, 635 N.Y.S.2d 300, 302 (2d Dep't 1995) (asserted "right to cure" irrelevant where "there was no evidence in the record to support the proposition that a cure was possible"); *see also* *Delvecchio v. Bayside Chrysler Plymouth Jeep Eagle, Inc.,* 271 A.D.2d 636, 639, 706 N.Y.S.2d 724, 726 (2d Dep't 2000) (employee's misfeasance was "not ... curable," and would not have been subject to a notice-and-cure provision had the contract contained one). When contracting parties agree to a notice-and-cure provision, it is reasonable to assume that they do so with the assumption "that the breaches which would be used to terminate the contract would be *curable* breaches." *In re Best Film & Video Corp.,* 46 B.R. 861, 874–75 (Bankr.E.D.N.Y.1985) (emphasis in original) (quoting Corbin on Contracts, 1982 Supplement by Colin K. Kaufman, Part 2, § 1266, at 369–70). It is no less reasonable to presume that the legislature operated under the same expectation in drafting section 463.

[7] Even without considering the common law backdrop against which section 463 was drafted, New York law is clear that, "[a]lthough statutes will ordinarily be accorded their plain meaning, ... courts should construe them to avoid objectionable, unreasonable or absurd consequences." *Long v. State,* 7 N.Y.3d 269, 273, 819 N.Y.S.2d 679, 852 N.E.2d 1150, 1153 (2006) (citation omitted); N.Y. Stat. Law § 143 ("Generally, statutes will be given a reasonable construction, it being presumed that a reasonable result was intended by the Legislature."). Section 463 speaks in terms of a "reasonable time" to cure. It would be patently unreasonable to require a franchisor to endure an incurable breach in

service of an empty "opportunity" to cure. Similarly, the legislature is unlikely to have intended that courts be drawn into such absurdities as what constitutes a "reasonable time" to accomplish that which cannot be accomplished. We see no reason to depart from the common sense common-law doctrine of incurable breach in interpreting section 463. *See* *H. Kauffman & Sons Saddlery Co. v. Miller,* 298 N.Y. 38, 44, 80 N.E.2d 322, 325 (1948) (rejecting "an interpretation of [a statute's] words which would so clearly offend against common sense").

Turning to the facts of this case, we conclude that the state court's judgment established as a matter of law an incurable, material breach of a reasonable and necessary provision of the DSSA. *See* N.Y. Veh. & Traf. Law § 463(2)(e)(2). This provided HMA with due cause to terminate the Agreement without further delay. First, the provision at issue here was self-evidently reasonable and necessary. We will not ascribe to the legislature the intent to bar HMA from conditioning its commercial relationships on basic standards of honesty and fair dealing. *See* N.Y. Stat. Law § 152 ("A construction of a statute which tends to sacrifice or prejudice the public interests will be avoided.").

Second, the breach here was material and not susceptible of cure. The state ***211** court judgment established that Giuffre was "engaged in fraudulent and illegal business practices ... deceptive acts ... and false advertising" in violation of state and federal law. *See* Decision/Order, *Giuffre,* No. 30163/2010, at 7. Indeed, the court found that Giuffre and its related dealerships had "a common practice of strong-arm sales methods and unethical conduct." *Id.* at 4. Giuffre never appealed or otherwise legally challenged these findings and conclusions, and the time to appeal that decision has long since passed. *See* N.Y. C.P.L.R. § 5513 (time to appeal is generally thirty days from service of a judgment on the party bringing the appeal). There was, therefore, not merely "evidence" of fraudulent conduct on the part of Giuffre—it was an adjudicated fact.

That judgment is conclusive evidence of Giuffre's breach of the unambiguous terms of the DSSA, which provides that the Agreement may be terminated if Giuffre "or any Owner, officer, or General Manager of [Giuffre], is convicted of any felony or for any violation of law which in HMA's sole opinion tends to adversely affect the operation, management, reputation, business or interests of [Giuffre] or HMA, or to impair the good will associated with the Hyundai Marks." DSSA 16(B)(1)(b). Setting aside the references to HMA's "sole opinion" and "immediate" termination, which Giuffre contends are displaced by the Vehicle and Traffic Law, Giuffre remains in clear breach of the DSSA, which defines the relevant "violations of law" to include "any finding or adjudication by any court of competent jurisdiction or government agency that [Giuffre] has engaged in any misrepresentation or unfair or deceptive trade practice." *Id.* Moreover, because the Agreement speaks in terms of adjudicated misfeasance, rather than simple conduct, the breach is not one which subsequent good behavior could correct.

CONCLUSION

For these reasons, we agree with the district court that the judgment of the state court was a "reputation poisoning" incapable of cure. *Giuffre Hyundai,* No. 13–cv–0520, 2013 WL 1968371, at *4, 2013 U.S. Dist. LEXIS 67795, at *11; *see also In re Best Film & Video Corp.,* 46 B.R. at 875 ("Courts, using their good sense, will be able to tell breaches which excuse the obligation to give notice from breaches which do not." (quoting Corbin on Contracts, 1982 Supplement by Colin K. Kaufman, Part 2, § 1266, at 369–70)). Having provided Giuffre with the statutorily required written notice of termination ninety days before terminating the DSSA, HMA was under no obligation to further extend its dealings with a franchisee who had been adjudged to have "engaged in fraudulent and illegal business practices [,] ... deceptive acts[,] ... and false advertising."[4]

We therefore AFFIRM the judgment of the district court.

All Citations

756 F.3d 204

Footnotes

1 The DSSA defined the “Hyundai Marks” to include the various trade and service marks and logos used to market Hyundai's products. DSSA 20(H).

2 The district court's memorandum opinion addressed only Giuffre's claim under section 463, and Giuffre has abandoned its remaining claims by failing to give them more than cursory treatment in its brief on appeal. *See* *Niagara Mohawk Power Corp. v. Hudson River–Black River Regulating Dist.,* 673 F.3d 84, 107 (2d Cir.2012) (“It is a settled appellate rule that issues adverted to in a perfunctory manner, unaccompanied by some effort at developed argumentation, are deemed waived.” (internal quotation marks omitted)).

3 Contract case law is all the more pertinent here since section 463 is self-evidently a statute intended to supply what are essentially mandatory contract terms in agreements where they do not otherwise exist.

4 Giuffre also argues that it was never given sufficient notice, beyond the 90–day Notice of Termination, to allow an opportunity to cure. Because we conclude that Giuffre's breach was incurable, we need not address this argument. We observe nonetheless that HMA's letter of October 3, 2012, notified Giuffre that the state court's findings “are extremely serious and constitute a breach of [the DSSA]” two months before HMA issued the Notice of Termination. Letter from Ken Bloech, Regional General Manager, Eastern Region, HMA, to John Giuffre (Oct. 3, 2012).

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Navigating Partnership Disputes and Litigation

By: Michael S. Horn, Esq.
Archer & Greiner P.C.
Cell Phone: (315) 491-5669
Work Phone: (201) 498-8517
Email: mhorn@archerlaw.com

Rafael A. Llano, Esq.
Archer & Greiner P.C.
Cell Phone: (201) 618-2189
Work Phone: (201) 498-8517
Email: rllano@archerlaw.com

Navigating Partnership Disputes and Litigation

I. Statutory Legal Framework Governing LLCs and Corporations

- Model Acts
  - Model Business Corporation Act ("MBCA")
  - Uniform Limited Liability Company Act
  - Revised Uniform Limited Liability Company Act
  - Uniform Partnership Act
  - Revised Uniform Partnership Act
  - Comments to Uniform Acts maintained by Uniform Law Commission and case law interpreting similar Uniform Acts can be instructive.
- New Jersey
  - New Jersey Revised Uniform Limited Liability Company Act, *N.J.S.A.* 42:2C-1, et seq.
  - New Jersey Business Corporation Act, *N.J.S.A.* 14A:1-1, et seq.
  - New Jersey Uniform Partnership Act, *N.J.S.A.* 42:2A-1 et seq.
- New York
  - New York Limited Liability Company Law § 101, et seq.
  - New York Business Corporation Law § 1, et seq.
  - New York Partnership Law § 1, et seq.

II. Relevant Features of Ownership Structures

- Ownership Agreements
  - Shareholder Agreement (corporation) or an operating agreement (LLC) governs the rights, responsibilities, and obligations of the owners of the company, including decision-making, dispute resolution, share/interest transfer, and dissolution.
  - Bylaws: rules governing the internal management and operations of a corporation. Outline the rights and responsibilities of shareholders, directors, and officers. Typically adopted by incorporators or board of

directors at the corporation's inception and can be amended. See MBCA § 2.06.

- LLC Operating Agreement - Written, Oral or Implied?
  - *NY LLCL* § 102: "'Operating agreement' means any written agreement of the members concerning the business of a limited liability company and the conduct of its affairs…"
  - *N.J.S.A.* 42:2C-2: "'Operating agreement'" means the agreement, whether or not referred to as an operating agreement and whether oral, in a record, implied, or in any combination thereof…"
  - Relevant statutes enumerate terms that cannot be modified by operating agreement
- Transfers of Equity
  - Need for Manufacturer/Franchisor Approval
    - Required for any transfer of principal assets or change in dealership ownership.
  - Evaluation Criteria:
    - Qualifications of New Owners
    - Potential effects on market competition
  - Approval Process
    - Notification Requirement
  - Potential Conditions for Approval:
    - Transferee agreement to terms
    - Facility Requirements
    - Requirements for Current Ownership: termination of existing agreement; release of claims; settlement of outstanding balances
- Applicable Law
  - MBCA § 6.27 – Restrictions on the Transfer of Shares

- New York: *NY LLCL* § 1211: generally requires approval of a majority of members unless otherwise provided in operating agreement.

- New Jersey: LLC members' economic rights may be transferred; full rights, including voting and management rights, may be transferred only with approval of all members, unless otherwise provided in operating agreement. *N.J.S.A.* 42:2C-31, 41-42.

- Information Rights:

  - Manufacturer Information Requirements

    - Financial

    - Business Background

    - Operational/Inventory

    - Legal/Compliance

    - Insurance

  - Member Rights to Information

    - Common Law Rights

    - MBCA § 1620 – Inspection Rights of Shareholders - each shareholder entitled to inspect all documents that deal with the shareholder's interest in the corporation.

    - MBCA § 16.04 – Court-Ordered Inspection

    - MBCA § 1620 – Financial Statements for Shareholders

    - New York: *NY LLCL* § 1102(a) sets forth records the LLC is required to maintain. Members have right to inspect and copy records for purposes reasonably related to the member's interest as a member pursuant to NY LLCL § 1102(b)

    - New Jersey: Members, managers and even dissociated members have certain rights to receive information about the LLC. *N.J.S.A.* 42:2C-40. An operating agreement may restrict such rights, or the duties to provide such information, but may not do so unreasonably. *N.J.S.A.* 42:2C-11(C)(6). In addition to restrictions or conditions in an operating agreement, an LLC may impose reasonable restrictions and

conditions on access to and use of records and information, including designating information as confidential and imposing nondisclosure and safeguarding obligations on the recipient. *N.J.S.A.* 42:2C-40(G)

- Dissolution/Expulsion of Member
  - Manufacturer Involvement/Notification
  - Removal of Corporate Directors
    - MBCA § 8.08. Removal of directors by shareholders
    - MBCA § 8.09. Removal of directors by judicial proceeding
  - New York:
    - Removal of Member as Permitted by LLC Operating Agreement. *Garcia v Garcia*, 187 AD3d 859 (2d Dept 2020)
    - No express statutory right to expel member. *See Man Choi Chiu v Chiu*, 71 AD3d 646, 647 [2d Dept 2010]
  - New Jersey:
    - Removal of LLC Member as Permitted by Operating Agreement
    - Voluntary Dissociation - N.J.S.A. 42:2C-46(a)
    - Judicial Dissociation/Expulsion
      - N.J.S.A. 42:2C-46(e)(1)-(3)
      - See *Flor v. Greenberg Farrow Architectural Inc.*, 2023 WL 7036278 (N.J. Super. Ct. App. Div. Oct. 26, 2023)
  - Fiduciary Duty Disputes
    - Duties Owed by Directors, Officers (Corporations) and Members (LLCs)
      - Business Judgment Rule
      - MBCA § 8.31 – Standards of Liability for Directors
      - Duty of Care
        - The duty of care requires that a member "refrain from engaging in grossly negligent or reckless

conduct, intentional misconduct, or a knowing violation of the law." *N.J.S.A.* 42:2C-39(c)

- Duty of Loyalty (Self-dealing, Conflicts of Interest, Usurping Business Opportunity)
  - The fiduciary duty of loyalty includes, but is not limited to, the duties to account to the company in the conduct of its activities, to account for the use of the company's property, and the obligation to refrain from dealing with the company's activities "as or on behalf of a person having an interest adverse to the company." *N.J.S.A.* 42:2C-39(b).
- Duty of Good Faith and Fair Dealing
  - Applicable Statutes
  - <u>New Jersey</u>:
    - LLCs: *N.J.S.A.* 42:2C-39
  - New York:
    - LLCs: NY LLCL § 409(a))
    - *See Berman v. Sugo LLC*, 580 F. Supp. 2d 191, 204 (S.D.N.Y. 2008) ("members of a limited liability company, like partners in a partnership, owe a fiduciary duty of loyalty to fellow members")
- Common Law Fiduciary Duties
  - *E.g. F.G. v. MacDonell*, 150 N.J. 550 (1997) (a fiduciary relationship exists when one party is "under a duty to act for or give advice for the benefit of another on matters within the scope of their relationship.").
  - Impact on Relationship with Manufacturers

o Shareholder Oppression

- Oppression occurs when the majority shareholders in a corporation or members in an LLC take action that unfairly prejudices the position of minority shareholders/members.
- New Jersey
  - "The RULLCA provides judicial recourse for minority members who have been "oppressed" by the majority

members." *Namerow v. PediatriCare Associates, LLC,* 461 N.J. Super. 133, 144–45 (Ch. Div. 2018) (citing N.J.S.A. 42:2C-48(a)(5)). "[O]ppression has been defined as frustrating a [member's] reasonable expectations" and "is usually directed at a minority [member] personally ...." *Id.* (*quoting Brenner v. Berkowitz,* 134 N.J. 488, 506 (1993)). "Thus where a minority member's reasonable expectations have been frustrated by the majority members, the minority member has been oppressed and has a genuine claim for judicial recourse under the RULLCA." Id.

- New York
  - Oppression arises "when the majority conduct substantially defeats expectations that, objectively viewed, were both reasonable under the circumstances and were central to the [minority shareholder]'s decision to join the venture." *Matter of Kemp & Beatley, Inc.*, 64 N.Y.2d 63, 73 (1984). Operating a company to the exclusion of a majority shareholder has been found to constitute as oppression because it "substantially defeated the [minority shareholder's] reasonable expectations for cooperation and disclosure of relevant business information between the parties." *In re Dissolution of Clever Innovations, Inc.*, 94 A.D.3d 1174, 1176 (3d Dept 2012). A finding of oppression also "may be based on the complaining shareholder's frustrated expectations in such matters as continued employment or a share in the profits and management of the corporation, such that [he or] she feels that the other shareholders have deprived [him or] her of a reasonable return on [his or] her investment." *Matter of Parveen,* 259 A.D.2d 389, 391 (1st Dept 1999).

- Lawsuits
  - Direct Action: Shareholder/Member action to enforce legal duties owed to him or her. Addresses personal losses resulting from company's or other shareholders'/members' breach of duty.
    - See *N.J.S.A.* 42:2C-67 (LLC Member Direct Action)
  - Derivative Action: Shareholder/Member action to enforce legal duties controlling directors or members owe to the entity. Derivative suits are claims brought on behalf of the entity by Shareholders/Members who act as its representatives.
    - Standing

- Demand
- Futility
- Special Litigation Committee
- New Jersey: *N.J.S.A.* 42:2C-68 (LLC Member Derivative Action); *In re PSE & G S'holder Litig.*, 173 N.J. 258, 286 (2002)
- New York: *Business Corporation Law* § 626; *Tzolis v. Wolff*, 884 N.E.2d 1005 (N.Y. 2008)

- Entity Indemnification of Officer/Member
- Potential for Manufacturer Termination or Adverse Action

III. Common Issues Leading to Disputes Among Owners

- Financial Disputes:
  - Capital contributions
  - Member/Owner Compensation
- Management Disputes:
  - Decision-Making Authority
  - Delegation of responsibilities
- Fraud/Mismanagement
  - Waste
  - Misappropriation of Corporate Assets

IV. Collateral Consequences to Relationships with Manufacturers, Vendors, Lenders and Landlords Arising Out of Disputes:

- Claims/Termination by Manufacturers Resulting from Change in Direct or Indirect Ownership of Dealer
  - Potentially Applicable Provisions
    - Representations to Manufacturer Regarding Owners and Executives
    - Requirement of Notification and Approval for Transfer of Principal Assets or Change in Ownership

- Termination Provisions
  - Upon Dissolution or Liquidation
  - Attempts to Transfer Ownership Without Consent
  - Owner Criminal Conviction/Finding of Unfair or Deceptive Business Practices
  - Material Misrepresentations Regarding Ownership
  - Disputes and/or Disagreements Between Owners and Executives
- Implication of Franchise Practices Acts
  - States regulate the manufacturer/dealer relationship, however, regulatory oversight is not uniform.
  - N.Y. VEH. & TRAF. Law § 463(2)(k) - unlawful for a franchisor to "unreasonably withhold consent to the sale or transfer of an interest, in whole or in part, to any other person or party by any franchised motor vehicle dealer or any partner or stockholder of any franchised motor vehicle dealer."
  - N.Y. Veh. & Traf. Law § 466(1) - It shall be unlawful for a franchisor directly or indirectly to impose unreasonable restrictions on the franchised motor vehicle dealer relative to transfer, sale, right to renew or termination of a franchise, discipline, noncompetition covenants, site-control (whether by sublease, collateral pledge of lease or otherwise), right of first refusal to purchase, option to purchase, compliance with subjective standards and assertion of legal or equitable rights with respect to its franchise or dealership.
  - New Jersey FPA: *N.J.S.A.* 56:10-6: It shall be a violation of this act for any franchisee to transfer, assign or sell a franchise or interest therein to another person unless the franchisee shall first notify the franchisor of such intention by written notice setting forth in the notice of intent the prospective transferee's name, address, statement of financial qualification and business experience during the previous 5 years. The franchisor shall within 60 days after receipt of such notice either approve in writing to the franchisee such sale to proposed transferee or by written notice advise the franchisee of the unacceptability of the proposed transferee setting forth material reasons relating to

> the character, financial ability or business experience of the proposed transferee. If the franchisor does not reply within the specified 60 days, his approval is deemed granted. No such transfer, assignment or sale hereunder shall be valid unless the transferee agrees in writing to comply with all the requirements of the franchise then in effect.

- Cases:
  - *CMS Volkswagen Holdings, LLC v Volkswagen Group of Am., Inc.*, 25 F Supp 3d 432 (SDNY 2014), ("[b]ecause Plaintiffs did not seek approval of the changes to the ownership structure before they were carried out, Defendant could not have unreasonably withheld consent.") *vacated and remanded*, 669 Fed Appx 602 (2d Cir 2016).
  - *Arthur Glick Truck Sales, Inc., Plaintiff, V. Hyundai Motor America, Defendant.*, 2024 WL 3992387, at *8 (S.D.N.Y. Aug. 29, 2024) (requirement that proposed transferee have prior car dealership experience not unreasonable restriction on dealer's ability to transfer franchise).
  - *Kings Autoshow, Inc. v Mitsubishi Motors of N. Am., Inc.*, 2023 WL 5200398 (EDNY Aug. 14, 2023) (where agreement provided that any "impairment of the reputation or financial standing of Dealer of any of its management" constituted breach, court stated "here any discourteous, deceptive, misleading, or unethical practice breaks Plaintiff's general obligation").
  - *Giuffre Hyundai, Ltd. v Hyundai Motor Am.*, 756 F3d 204 (2d Cir 2014) (manufacturer "was under no obligation to further extend its dealings with a franchisee who had been adjudged to have "engaged in fraudulent and illegal business practices [,] ... deceptive acts[,] ... and false advertising.")
  - *Maple Shade Motor Corp. v. Kia Motors Am., Inc.*, 260 Fed. Appx. 517 (3d Cir. 2008) (rejection of proposed transfer not prohibited by NJFPA where transferee could not demonstrate ability to meet requirements of existing franchise agreement).
  - *Horn v. Mazda Motor of Am., Inc.*, 265 N.J. Super. 47 (App. Div. 1993) (proposed transferee's failure to disclose pending criminal action on application for approval of transfer constituted material misrepresentation).
- Regulatory Compliance Issues
  - Licensure
    - Changes in Ownership
    - *N.J.A.C.* 13:21-15.2:

(n) All licensees must notify the Commission immediately, in writing, if there is a change in any officer, director, or person with a controlling interest in or of the licensed dealer. Notification shall include the name and residence address of the new officer, director, or person with a controlling interest and the officer, director, or person with a controlling interest who has been succeeded. Notification must be on forms prescribed by the Commission and sent to the Commission at the address shown on the forms.

1. A new license application must be submitted and approved whenever there is a change in ownership of the licensed dealer by adding a partner, removing a partner, forming a new partnership, changing the corporate structure, or the sale or transfer of more than 20 percent ownership interest. Applicants, pursuant to this section, must submit an application to the Commission for approval within 30 days of any change in ownership. Failure to apply for a new dealer license upon any change of ownership shall result in the immediate suspension of the existing dealer license pursuant to N.J.A.C. 13:21–15.15 and all property of the Commission must be immediately surrendered to the Commission.

- N.Y. Comp. Codes R. & Regs. Title 15, § 78.6

(a) Change in members of a partnership or officers of a corporation.

(1) The Department of Motor Vehicles must be notified immediately, in writing, if there is a change in either the members of a partnership, or the officers of a corporation, registered as a dealer. Notification must contain the name and residence address of the new member or officer and the member or officer who has been succeeded. Notification must be sent to the Department of Motor Vehicles at the address shown on the amendment form.

(2) The registration of a dealer in the names of two or more persons as partners or otherwise shall not expire on change in ownership as long as one person named as a partner remains the owner or part owner. This policy applies also where two or more partners increase the number of partners, but does not apply where an individual forms a partnership nor where a corporation is involved.

(3) In effecting a change, it is necessary for the dealer to submit an amendment form, MV-82, with the required number of certificate stubs, the certificate of registration and the stubs in the old name.

(4) In those cases where a partnership is dissolved, the partner leaving the firm is required to affix his signature to the amendment form in addition to the signatures of the remaining partners.

(b) Change of address, name or status. The Department of Motor Vehicles must be notified on the amendment form:

(1) within 30 days of any change of address; and
(2) immediately if the name of the dealership or the name of the individual owner, a partner, or a stockholder of more than 10 percent of the share changes.

- Loan Agreements and Attempts to Secure Financing
- Potential Landlord/Tenant Issues
- Potential Impact on Insurance Products
    - Potential claims and coverage disputes arising from disputes or changes in ownership

V. Options for Resolving Disputes

- Use of Experts to Detect Financial Fraud and Mismanagement
    - Forensic Accountant
        - Tracing Use of Funds
        - Business Valuation
    - Economist
        - Evaluation of Lost Profits
- Options for Avoiding Litigation
    - Alternative Dispute Resolution (ADR)
        - Mediation;
        - Arbitration;
        - Negotiation.
    - Drafting Considerations
        - Internal Dispute Resolution
        - Buyout Provisions
        - Notice Provisions

        - Deadlock Provisions
- Litigation
    - Strategies and practical considerations
    - Drafting Considerations:
        - Forum Selection Clause
        - Choice of Law Provision
        - Jury Waiver
        - Fee Shifting Provisions

265 N.J.Super. 47
Superior Court of New Jersey, Appellate Division.

Robert HORN and John G.
Seneca, Plaintiffs–Respondents,
v.
MAZDA MOTOR OF AMERICA, INC. and
W.D. Goetze, individually, jointly, severally,
or in the alternative, Defendants–Appellants.

Argued March 24, 1993.
|
Decided May 28, 1993.

Synopsis
Proposed transferees of automobile franchise brought suit after franchisor refused to approve transfer based on one transferee's responses on transfer application and subsequent determination that transferee had been indicted for narcotics offenses. The Superior Court, Chancery Division, Middlesex County, entered preliminary injunction in favor of transferees and thereafter entered final judgment declaring transferees to be entitled to be franchisees. Franchisor appealed. The Superior Court, Appellate Division, Brochin, J.A.D., held that: (1) negative response to question in application about pending proceedings was material misstatement regardless of transferee's intent and transferee thus lacked standing to challenge rejection under Franchise Practices Act, and (2) even if franchisee had standing, franchisor would be legally entitled to reject him as franchisee based on his indictment for narcotics offenses.

Ordered accordingly.

Procedural Posture(s): On Appeal; Motion for Preliminary Injunction.

West Headnotes (10)

[1] **Antitrust and Trade Regulation** Representations; disclosure obligations

If information submitted to franchisor is incomplete or inadequate to serve intended function of allowing franchisor to determine whether there are any material reasons relating to character, financial ability, or business experience of proposed transferee of franchise that would make proposed transferee unacceptable as franchisee, Franchise Practices Act implies that franchisor is entitled to ask for relevant, reasonably necessary additional information and that running of 60–day period within which franchisor must act on application is tolled until such information is supplied. N.J.S.A. 56:10–6.

1 Case that cites this headnote

[2] **Antitrust and Trade Regulation** Transfer, sale, and assignment

Although automobile franchisor was probably entitled to demand parts settlements accounts memo, floor plan agreement, and final form of assets purchase agreement before proposed transferees were accepted as franchisees, such documents would be material to acceptability of transferees under provision of Franchise Practices Act dealing with notice of transfer and franchisor's response to such notice only if documents were relevant to transferee's character, financial ability, and business experience; only in such circumstance would their omission toll running of 60–day period within which franchisor had to act on application. N.J.S.A. 56:10–6.

1 Case that cites this headnote

[3] **Antitrust and Trade Regulation** Transfer, sale, and assignment

Antitrust and Trade Regulation Private entities or individuals

For standing purposes under Franchise Practices Act and requirement that franchisor act on transfer application within 60 days or have it deemed approved, proposed transferee's negative response to question on application as to whether transferee was "a defendant in any lawsuit or legal processing" was material misstatement in light of four outstanding indictments against transferee, notwithstanding transferee's belief that question referred only to civil proceedings and subsequent statement that charges had been or were going to be dismissed;

interpreted reasonably rather than literally, "legal processing" had to be read to mean legal proceeding, and, even if "legal processing" was interpreted literally, criminal proceedings were clearly legal proceedings or lawsuit and subjected transferee to considerable legal processing in court and in police headquarters. N.J.S.A. 56:10–6.

[4] **Contracts** Questions for Jury

Interpretation of written document solely on basis of its own terms, without reference to extrinsic evidence, is question of law.

6 Cases that cite this headnote

[5] **Witnesses** Truth of direct testimony

After proposed transferee of automobile franchise testified at preliminary hearing that he answered "no" to question on transfer application about pending proceedings against him because he believed that question referred only to civil proceedings, and after franchisor discovered posthearing evidence that transferee had also answered "no" to similar but unambiguous question asked by another franchisor, franchisor should have been permitted to cross-examine transferee about his answer on other application and court should have reconsidered whether transferee's answer on application in question was willfully false rather than result of poorly phrased question.

[6] **Antitrust and Trade Regulation** Transfer, sale, and assignment

In context of application for transfer of automobile franchise, intent of proposed transferee in answering question about pending proceedings against him was irrelevant inasmuch as transferee's material misstatement (transferee answered in negative even though there were outstanding indictments against him) lulled franchisor into refraining into further investigation, and transferee's misleading application could not be deemed to have started running of 60–day period within which franchisor had to act or lose right to reject transferee. N.J.S.A. 56:10–6.

[7] **Antitrust and Trade Regulation** Representations; disclosure obligations

Even inadvertent misstatement of material fact to franchisor in notice of intent to transfer prevents notice from starting running of 60–day period whose expiration will result in transfer being deemed approved. N.J.S.A. 56:10–6.

[8] **Antitrust and Trade Regulation** Transfer, sale, and assignment

Under Franchise Practices Act, franchisor's rejection of proposed transferee must be grounded on material reasons relating to character, financial ability, or business experience of proposed transferee. N.J.S.A. 56:10–6.

1 Case that cites this headnote

[9] **Antitrust and Trade Regulation** Transfer, sale, and assignment

Even if proposed transferee had standing under Franchise Practices Act to challenge franchisor's rejection of transfer application, automobile franchisor could not be legally compelled to enter into franchise agreement with transferee; transferee had four outstanding narcotics indictments against him and, although indictments were not admissible as evidence of guilt, franchisor was legally entitled to decline to enter into business partnership with transferee who had been indicted for serious crimes. N.J.S.A. 56:10–1 to 56:10–15.

[10] **Antitrust and Trade Regulation** Transfer, sale, and assignment

Automobile franchisor would not be legally entitled to refuse to contract with proposed transferee solely because of his drug addiction. N.J.S.A. 10:5–4.1, 10:5–12, subd. *l*.

Attorneys and Law Firms

****550** ***50** Job Taylor, III, New York City, of the New York Bar, admitted pro hac vice, for appellants (Young, Rose, Imbriaco & Burke, attorneys; Mr. Burke, Parsippany, Job Taylor, III, Louise Zeitzew and Lance Suede, New York City, on the brief).

Stephen Bernstein, Warren, for respondents (Bivona, Cohen, Kunzman, Coley, Yospin, Bernstein & DiFranceso, attorneys; Stephen Bernstein, on the brief).

Before Judges HAVEY, STERN and BROCHIN.
The opinion of the court was delivered by

Opinion

BROCHIN, J.A.D.

Brunswick Chrysler–Plymouth, Inc. (d/b/a Brunswick Mazda) is an automobile dealership that sold both Chrysler and Mazda automobiles. On April 10, 1990, plaintiffs Robert Horn and John G. Seneca, who owned other automobile dealerships, entered into ***51** an agreement with the owner of Brunswick Mazda, Daniel A. Brady, to buy its assets.

In order to be able to continue selling Mazda automobiles, plaintiffs needed Mazda's approval for the transfer of its franchise from Mr. Brady to themselves. Mazda was informed of the proposed transfer on April 20, 1990. It furnished plaintiffs with its standard form of application for approval of the transfer. They completed the form and submitted it to Mazda on or shortly after April 30, 1990. The form requested, and plaintiffs submitted, biographical information, personal financial statements, a *pro forma* balance sheet for the new dealership, an operating forecast, details about its proposed location, and information about the sources of the funds to be invested.

Among the questions contained on the application form were the following:

> Are you now or have you been during the past seven (7) years ...:
>
> *A defendant in any law suit or legal processing* [*sic*]?
>
> Declared bankrupt or made an assignment for creditors?
>
> Convicted of or imprisoned for crime?
>
> ****551** Bonded for any reason? [Emphasis added.]

Plaintiffs answered "No" to each of these questions.

Between April 20 and August 7, 1990, while negotiating with Mr. Brady about various changes to their agreement, plaintiffs also talked to Mazda's representatives from time to time about the status of their pending application for Mazda's approval of the transfer of the franchise. They were told that the application was being processed, but that a floor plan agreement and a parts settlement accounts memo were needed and were still missing. A floor plan agreement is a lender's agreement to finance the dealership's purchase of its stock of automobiles. A parts account settlement letter is an undertaking specifying whether the old dealer or the new one will be responsible to Mazda for any amount which the dealership owed for its parts inventory at the time of the transfer.

***52** On August 7, 1990, Mazda received the parts account settlement letter and its representative called plaintiffs to tell them that their application was still incomplete because their floor plan agreement was still missing. On the afternoon of August 8, the Mazda representative responsible for granting or withholding approval of the transfer of the dealership to plaintiffs learned from Mazda's district sales manager that criminal charges were pending against Mr. Seneca for violating the narcotics laws. That same day, Mr. Seneca was asked about the matter. According to the trial court's findings, he replied truthfully, informing the Mazda representatives, in substance, that there were several criminal narcotics charges outstanding against him and that he was then on bail, but that the charges had been or were going to be dismissed.

Mazda's subsequent investigation disclosed that four indictments were outstanding against Mr. Seneca. They were a State grand jury indictment filed October 13, 1987, charging that on February 5, 1987, he possessed more than 8 ounces of cocaine containing at least 3.5 ounces of pure freebase, intending to distribute it, and that he possessed a .32 caliber automatic pistol without a permit; a Middlesex County indictment charging that on December 7, 1989, he possessed cocaine in an amount of less than half an ounce, intending to distribute it; and two Middlesex County indictments charging

that he possessed small amounts of cocaine on November 1, 1988, and on July 18, 1989.

On August 10, 1990, Mazda's regional manager wrote Mr. Brady:

> While your submission of a completed package of materials necessary to give Mazda sufficient notice to evaluate your proposal has been incomplete and our district manager has been working with you to complete your applications, a serious problem has recently come to our attention which requires us to inform you immediately that we cannot approve your buy/sell proposal at this time.
>
> We have just learned that one of the proposed buyers did not disclose, in his application to Mazda, relevant information requested concerning his background and the pendency of criminal charges against him. This information was obviously called for in the materials submitted to Mazda and in our discussions with him and its exclusion as well as the pendency of the serious charges in question, require that we reject your proposal and you are hereby so notified.

***53** Pursuant to an amendment to the asset purchase agreement between plaintiffs and Mr. Brady, the sale of the dealership closed on August 10, 1990 without Mazda's approval. The amendment required the purchase price to be held in escrow until approvals were obtained from both Mazda and Chrysler. No express provision of the amendment prescribed what would happen if either of those approvals could not be obtained.

Plaintiffs Horn and Seneca responded to Mazda's refusal to approve their transfer of its franchise by filing a verified complaint [1] and order to show cause on August ****552** 20, 1990. They sought "injunctive relief enjoining the defendant Mazda to approve the purchase agreement...." By way of preliminary relief, they asked for an injunction that would enable them to continue to operate the Mazda dealership during the pendency of the action. [2] Brady, the franchisee was not a party to the suit.

On September 13, 1990, the court heard testimony relevant to plaintiffs' application for a preliminary injunction. The attorney representing Mr. Seneca against the criminal charges testified, and the judge found, that those charges were about to be disposed of by Mr. Seneca's admission into the Pretrial Intervention Program. Mr. Seneca testified that when he answered "no" to the question on his application inquiring whether he had ever been a "defendant in any law suit or legal processing," he understood the question to be asking only about civil, not criminal, proceedings. ***54** The judge determined that that was a reasonable interpretation of the question and that Mr. Seneca's answer was not a misrepresentation.

There was some testimony that "for a long time" "it's been basically general knowledge in the East Brunswick area about Mr. Seneca." But the source of this testimony was Mazda's district service manager whose wife was employed by the dealership and who expected to lose her job if the franchise was transferred to plaintiffs. There was no other evidence and no finding of fact that Mr. Seneca suffered from any notoriety because of his criminal involvement with illegal drugs.

At the conclusion of the hearing, the court ruled that holding Mr. Seneca ineligible to become a Mazda franchisee because of his past cocaine use would be contrary to New Jersey's strong public policy in favor of rehabilitating recovering addicts. Since no evidence had been offered showing that Mr. Seneca was presently unfit to function as a car dealer, the judge concluded that there was a strong probability that he would prevail at final hearing and that if plaintiffs could not operate as a Mazda dealer in the interim, they would suffer irreparable injury. The court therefore entered an order "that plaintiffs shall immediately be granted the right to act as franchisees for the defendant, Mazda Motors of America, Inc. subject to any finding that plaintiffs have a problem that would directly affect their ability to operate the franchise as determined at the Final Hearing...." [3]

At the final hearing, which was conducted on May 20, 21 and 27, 1992, Mr. Seneca testified that he was a recovering drug addict. He said that he had started using cocaine in 1984 when someone offered it to him at a wake for his brother and sister-in-law who had been killed in an automobile accident the morning after his father died. He admitted that he continued using cocaine regularly ***55** and very frequently until October 19, 1989. He stated that he did not remember the quantity of cocaine he ingested, but he agreed with the judge that he "spent a lot and used a lot." Mr. Seneca testified that he last used cocaine on October 19, 1989, the day before his birthday [4].

Despite this substantial period of addiction, the record supports the trial judge's finding that Mr. Seneca has not used cocaine ****553** since October 19, 1989. The record also shows that during the pendency of this law suit,

his performance as a Mazda dealer has been no worse than satisfactory and, from Mazda's perspective, plaintiffs' operation of the dealership may have been an improvement over their predecessor's.

During the course of the final hearing, Mazda introduced into evidence plaintiffs' application to Chrysler Corporation for its approval of the transfer to them of Mr. Brady's Chrysler franchise. That application was filled out and submitted approximately a month after the Mazda application. The Chrysler application asked, unambiguously:

> Are you, or any business in which you were either a principal owner, officer of [sic] director, a party to any presently pending civil or criminal action or administrative proceeding?

Mr. Seneca answered the question, "No." When Mazda sought to cross-examine him about why he had not disclosed the pending criminal indictments to Chrysler, plaintiffs objected and the trial judge sustained their objection. In explanation of his ruling, he stated that he had decided at the close of the hearing on the preliminary injunction that Mazda's application was ambiguous and that Mr. Seneca had not misrepresented when he failed to disclose the indictments in response to the question asking him whether he was "a defendant in any law suit or legal processing." "I have already ruled finally on the application and his answers thereto," the judge said, "[a]nd the only thing that I am trying ***56** here today is whether or not his state as an addict in itself interferes with his ability to have a Mazda Agency." Later, the judge reiterated his ruling that Mr. Seneca had not filed a false application with Mazda because its application did not call for him to disclose his indictments.

At the conclusion of the final hearing, the judge ruled that since Mazda had not shown that Mr. Seneca would be unable to function as an automobile dealer, it would not be permitted to refuse to accept plaintiffs as its franchisees. In accordance with this ruling, a final judgment was entered declaring that "said plaintiffs are entitled to be Mazda franchisees."

Mazda has appealed. It contends that plaintiffs were never "offered or granted" a franchise. *See* *N.J.S.A.* 56:10–3. From that premise, it argues that since a franchisee is "a person to whom a franchise has been offered or granted," plaintiffs did not become franchisees, and only a franchisee has standing to invoke the protection granted by the Act. *Tynan v. General Motors Corp., supra,* 248 *N.J.Super.* at 660–666, 591 A.2d 1024. Alternatively, Mazda contends that even if plaintiffs did become franchisees by operation of *N.J.S.A.* 56:10–6, they failed to carry their burden of showing that its rejection of them as transferees of the franchise was unreasonable, and it also asserts that the court committed serious procedural errors.

Plaintiffs assert that by force of *N.J.S.A.* 56:10–6, Mazda's approval of Mr. Brady's transfer of his franchise to them must be "deemed granted" because Mazda did not reject their application within sixty days after they had given it statutory notice of the proposed transfer. If that assertion is correct, upon expiration of the sixty-day period plaintiffs became, as a matter of law, "person[s] to whom a franchise is offered" and, therefore, "franchisees" within the definition of *N.J.S.A.* 56:10–3. If they were franchisees, they had standing to challenge Mazda's action as either a wrongful refusal to transfer under the standards of *N.J.S.A.* 56:10–6 or as the termination of a franchise without good cause within the meaning of *N.J.S.A.* 56:10–5. They contend that ***57** Mazda's refusal to accept them as franchisees would fail either challenge.

N.J.S.A. 56:10–6, states:

> It shall be a violation of this act for any franchisee to transfer, assign or sell a franchise or interest therein to another person unless the franchisee shall first notify the franchisor of such intention by written notice setting forth in the notice of intent the prospective transferee's name, address, statement of financial qualification and business experience during the previous 5 years. The franchisor shall within 60 days after receipt ****554** of such notice either approve in writing to the franchisee such sale to proposed transferee or by written notice advise the franchisee of the unacceptability of the proposed transferee setting forth material reasons relating to the character, financial ability or business

> experience of the proposed transferee. *If the franchisor does not reply within the specified 60 days, his approval is deemed granted.* No such transfer, assignment or sale hereunder shall be valid unless the transferee agrees in writing to comply with all the requirements of the franchise then in effect. [Emphasis added.]

Plaintiffs contend that Mazda was properly notified of the proposed transfer when they completed and submitted Mazda's standard form of application on or shortly after April 30, 1990. Therefore, they maintain, the 60–day period for rejecting them as franchisees had expired long before Mazda delivered its letter of rejection to Mr. Brady on August 10, 1990.

Mazda, on the other hand, asserts that the 60–day period did not begin to run until a fully completed application had been submitted. Plaintiffs concededly did not submit a copy of their parts settlement accounts memo until August 7, 1990. They never submitted a copy of their floor plan agreement. They could not have submitted a copy of the final form of their assets purchase agreement with Mr. Brady until after it was amended on August 3, 1990. Therefore, Mazda contends, plaintiffs' application was never completed and consequently the time within it which it was free to reject the transfer for reasons other than those permitted by the Franchise Practices Act had not expired on August 10.

[1] The franchisee's notice of intent to transfer, whose submission to the franchisor starts the running of the 60–day period, must set forth "the prospective transferee's name, address, statement of financial qualification and business experience during the ***58** previous 5 years." *N.J.S.A.* 56:10–6. That data, together with whatever other information the franchisor obtains by its own investigation, is intended to serve as the basis for the franchisor's decision whether there are any "material reasons relating to the character, financial ability or business experience" of the transferee that would make the proposed transferee unacceptable as a franchisee. *Ibid.* If the information which the franchisee submits to the franchisor is incomplete or inadequate for its intended function, the statutory scheme implies that the franchisor is entitled to ask for relevant, reasonably necessary additional information and that the running of the 60–day period is tolled until that information is supplied.

In the present case, the application form which plaintiffs submitted to Mazda on April 30, 1990, or shortly afterwards, was the first written statement to Mazda that Mr. Brady intended to transfer his franchise to plaintiffs. It indicated the proposed transferees' names, addresses, financial qualifications, and business experience within the previous five years. It therefore started the running of the period for rejecting the transfer if it provided all of the information material to the transferee's "character, financial ability [and] business experience" that was reasonably necessary for Mazda's decision, and if it did not contain a material misstatement.

[2] That brings us to the question of the significance of the documents that were not submitted with the application to transfer the franchise, *i.e.,* the parts settlements accounts memo, floor plan agreement, and final form of the assets purchase agreement. We agree that Mazda was probably entitled to demand those documents before plaintiffs were *accepted* as franchisees. But the statute makes a distinction between a franchisor's determining that proposed transferees are *acceptable* as franchisees and its *accepting* them in that capacity. According to the *N.J.S.A.* 56:10–6, no transfer, assignment or sale of a franchise "shall be valid unless the transferee agrees in writing to comply with all the requirements of the franchise then in effect." A duly executed ***59** parts settlement accounts memo, floor plan agreement, and assets purchase agreement may very well be reasonable requirements of a ****555** franchise agreement between an automobile manufacturer or distributor and one of its dealers. If so, a franchisor could reasonably refuse to execute a franchise agreement with its new dealer until those documents were submitted, whether or not they affected the prospective dealer's *acceptability.* They would be material to *acceptability* only if they were relevant to the transferee's "character, financial ability [and] business experience." Their omission would toll the running of the 60–day period only if their omission was material to acceptability.

In the present case, the trial judge was not asked to find, and we cannot tell from the record, whether the missing documents were reasonably necessary to enable Mazda to decide whether plaintiffs' "character, financial ability [and] business experience" made them acceptable franchisees. We therefore cannot determine whether the omission of those documents from the transfer application extended the time within which Mazda was entitled to approve or reject the

transfer of the franchise for reasons that would not suffice if plaintiffs were already franchisees.

[3] **[4]** That conclusion requires us to address the issue of whether there was any material misstatement in the transfer application. In our view, the question in Mazda's application form which asked whether Mr. Seneca was or had been a "defendant in any law suit or legal processing [*sic*]," clearly called for him to disclose the criminal indictments pending against him. If the phrase is interpreted reasonably, rather than literally, "legal processing" would be read to mean "legal proceeding." In other words, sensibly interpreted, the question asks whether Mr. Seneca was a party to a law suit or other legal proceeding. If the phrase "legal processing" is interpreted literally, it asks whether he has been subject to "legal processing" other than in a law suit. In either case, the accurate answer is, "yes." The criminal proceedings against Mr. Seneca were clearly legal proceedings or a law suit and they subjected him to considerable "legal processing" in ***60** court and in police headquarters. We conclude that his omission of any reference to the criminal proceedings pending against him constitutes a factual misrepresentation. [5]

Furthermore, the omission was material. The pendency of the four indictments for violation of the firearms and narcotics laws, two for possession of cocaine with intent to distribute it, was clearly relevant to Mazda's decision whether to accept plaintiffs as franchisees. Clearly, any reasonable automobile manufacturer or distributor in Mazda's situation would have wanted to know about the indictments in order to explore their implications, to conduct further investigations of Mr. Seneca, and to consider all of the relevant facts.

[5] Mr. Seneca's failure to reveal his criminal indictments in his answer to the unambiguously phrased question on the Chrysler application form which asked for the disclosure of that information is persuasive evidence that his answer on the ****556** Mazda application was wilfully false. The court reporter's exhibit marking ***61** on the Chrysler application suggests that Mazda's attorneys obtained it in discovery after the conclusion of the preliminary hearing. The trial court erred in refusing to permit Mazda to cross-examine Mr. Seneca about that answer on the Chrysler application and it also erred in declining to reconsider whether, in the light of the Chrysler application, Mr. Seneca's answer on the Mazda application was willfully false. If the intent with which Mr. Seneca misstated his involvement with the criminal law were material, we would remand the case to enable the parties to develop the relevant facts and for reconsideration of that issue by the trial judge.

[6] **[7]** However, a remand is unnecessary because Mr. Seneca's intent is immaterial. Plaintiffs' material misstatement lulled Mazda into refraining from further investigation. Even if the misstatement was unintentional, submission of the misleading application cannot justly be held to have had the effect of starting the running of the 60–day period whose expiration would constrain the franchisor's right to reject plaintiffs as transferees. We therefore hold that even an inadvertent misrepresentation of material fact to a franchisor in a notice of intent to transfer prevents the notice from starting the running of the 60–day period at whose lapse the proposed transfer will be deemed approved. *Cf. Teas v. Third National Bank & Trust Co.,* 125 *N.J.Eq.* 224, 228, 4 *A.*2d 64 (E & A 1939) (equitable fraud will toll the statute of limitations). Mazda's August 10, 1991 letter rejecting plaintiffs as transferees was therefore not untimely, and plaintiffs did not become franchisees within the definition of *N.J.S.A.* 56:10–3.

[8] We held in *Tynan v. General Motors Corp., supra,* 248 *N.J.Super.* 654, 591 *A.*2d 1024 that plaintiffs who are not franchisees do not have standing to invoke the protection of the New Jersey Franchise Practices Act. Whatever may have been his reasons, Mr. Brady, the former franchisee, chose not to join in this suit. Consequently, Mazda was not obliged to show that its reasons for refusing to enter into a franchise agreement with plaintiffs satisfied the requirement implicit in *N.J.S.A.* 56:10–6 ***62** that the rejection of a transferee must be grounded on "material reasons relating to the character, financial ability or business experience of the proposed transferee," and its failure to satisfy that requirement did not entitle plaintiffs to injunctive relief.

[9] Furthermore, we conclude that even if plaintiffs had standing, they could not legally compel Mazda to enter into a franchise agreement with them. Mazda's reasons for refusing to approve them as franchisees were the indictments pending against Mr. Seneca and what it perceived to be his dishonest concealment of them. We recognize that indictments are accusations and in a trial they may not be considered as proof of guilt. Nonetheless, we accept an indictment as justification for the issuance of a warrant for the arrest of an accused. An indictment results in his being incarcerated or held to bail. It authorizes the courts to subject an accused to an onerous process involving numerous court appearances and leading to a criminal trial. In other words, although indictments are

inadmissible as evidence of guilt, the criminal justice system recognizes that a very high proportion of persons indicted are ultimately convicted of a crime, and it behaves accordingly. A franchisor, operating in a commercial context, is legally entitled to act upon the same commonsense conclusion and to decline to enter into a business partnership with a prospective franchisee who has been indicted for serious crimes. [6]

[10] Moreover, although we have accepted for purposes of our decision the trial judge's finding that Mr. Seneca's concealment of the indictments was not intentional, Mazda was entitled to reach and to act upon a contrary conclusion when it decided not to enter into a franchise agreement with him. Additionally, if the indictments ****557** had been disclosed, they would have led Mazda to discovery of Mr. Seneca's frequent, heavy use of cocaine over a period of more than four years, ending less than one year before submission ***63** of his application to become a franchisee. His admission of that use also implies an admission of his continual violation of the criminal laws over that same period. Mazda was not legally entitled to refuse to contract with Mr. Seneca because of his addiction. *See* *N.J.S.A.* 10:5–12(*l*) (prohibiting discrimination in contracting); *N.J.S.A.* 10:5–4.1 (extending the protections of the Law Against Discrimination to handicapped persons); *Matter of Cahill,* 245 *N.J.Super.* 397, 585 *A.*2d 977 (App.Div.1991) (defining a drug addict as a handicapped person); *see also* *Estate of Behringer v. Princeton Med. Ctr.,* 249 *N.J.Super.* 597, 642–644, 592 *A.*2d 1251 (Law Div.1991) (surgeon handicapped by AIDS is protected by LAD). But it was entitled to act on the basis of Mr. Seneca's criminal indictments, perceived dishonesty, and implicit admission of serious crimes. They are all matters which it could reasonably conclude were material to his character and which, therefore, consistently with *N.J.S.A.* 56:10–6, entitled it to decide that Mr. Brady's transfer of the franchise to him and his partner was unacceptable.

The judgment appealed from is therefore reversed, the injunction is vacated, and a judgment of no cause for action is hereby entered in favor of defendants.

All Citations

265 N.J.Super. 47, 625 A.2d 548

Footnotes

1 The complaint named Mazda Motors of America, Inc. and W.D. Goetze as defendants. Mr. Goetze is the Mazda official who apparently had final responsibility for approving or rejecting plaintiffs' application to assume Mr. Brady's Mazda franchise. However, no relief was sought or granted against Mr. Goetze individually.

2 Plaintiffs' complaint refers both to the New Jersey Franchise Practices Act, *N.J.S.A.* 56:10–1 to –15, and to several common law causes of action as the basis for their claims. But in their trial before the Chancery Division and during the argument before our court, plaintiffs relied only on the Franchise Practices Act. Any common law causes of action were preempted by the Franchise Practices Act. *Tynan v. General Motors Corp.,* 248 *N.J.Super.* 654, 670, 591 *A.*2d 1024 (App.Div.1991), *modified on other grounds,* 127 *N.J.* 269, 604 *A.*2d 99 (1992).

3 We denied defendants' motion for leave to appeal from the preliminary injunction and denied their motion to reconsider. The Supreme Court also denied leave to appeal.

4 Mr. Seneca was not asked specifically about the indictment charging him with possession of less than half an ounce of cocaine with an intent to distribute it on December 7, 1989.

5 The trial court interpreted the question without considering any extrinsic evidence. The interpretation of a written document solely on the basis of its own terms, without reference to extrinsic evidence, is a question of law. *Spinelli v. Golda,* 6 *N.J.* 68, 79–80, 77 *A.*2d 233 (1950) (interpretation of contract which does not depend

on extrinsic evidence is matter of law for the court); *Davis v. The Equitable Life Assur. Soc.,* 90 *N.J.Super.* 328, 331, 217 *A.*2d 459 (App.Div.1966) (court, not jury, should have construed insurance policy); *Andreaggi v. Relis,* 171 *N.J.Super.* 203, 212, 408 *A.*2d 455 (Ch.Div.1979) (the construction of a written instrument, the terms of which are not in dispute, is a question of law). Consequently we are not required to give any special deference to the trial court's interpretation of the questions in Mazda's application form. *Cf. Amer. Photocopy Eq. Co. v. Ampto, Inc.,* 82 *N.J.Super.* 531, 542, 198 *A.*2d 469 (App.Div.), *certif. denied,* 42 *N.J.* 291, 200 *A.*2d 125, *cert. denied,* 379 *U.S.* 842, 85 *S.Ct.* 80, 13 *L.Ed.*2d 47 (1964) (appellate court may dispose of case on appeal when its decision turns on the interpretation of written documents whose meaning is not significantly affected by the credibility of witnesses). *See also* *Snyder Realty, Inc. v. BMW of North America,* 233 *N.J.Super.* 65, 69, 558 *A.*2d 28 (App.Div.), *certif. denied,* 117 *N.J.* 165, 564 *A.*2d 883 (1989) (appellate court may make its own findings when, accepting trial judge's credibility determinations, it is convinced that a mistake was made); *Pioneer National Title Insurance Co. v. Lucas,* 155 *N.J.Super.* 332, 338, 382 *A.*2d 933 (App.Div.), *aff'd o.b.,* 78 *N.J.* 320, 394 *A.*2d 360 (1978) (same).

6 We do not decide what if any effect there would be on Mazda's right to reject the transfer if it knew prior to the rejection that Seneca had been acquitted or admitted to PTI.

2023 WL 5200398
Only the Westlaw citation is currently available.
United States District Court, E.D. New York.

KINGS AUTOSHOW, INC., Plaintiff,
v.
MITSUBISHI MOTORS OF NORTH AMERICA, INC., Defendant.

22-CV-07328 (JMW)
|
Signed August 14, 2023

Attorneys and Law Firms

Milton Grunwald, Esq., Karl C. Seman, Esq., Grunwald & Seman, PC, 100 Garden City Plaza, Suite 203, Garden City, NY 11530, Attorneys for Plaintiff Kings Autoshow, Inc.

Patrick McCormick, Esq., David Howard Green, Esq., Campolo, Middleton & McCormick, LLP, 4175 Veterans Memorial Highway, Suite 400, Ronkonkoma, NY 11779, Attorneys for Plaintiff Kings Autoshow, Inc.

Brandon Bigelow, Esq., Dallin Wilson, Esq., Seyfarth Shaw LLP, 2 Seaport Lane, Suite 1200, Boston, MA 02210, Attorneys for Defendant Mitsubishi Motors of North America, Inc.

Jeremy Andrew Cohen, Esq., Seyfarth Shaw LLP, 620 Eighth Avenue, New York, NY 10018, Attorney for Defendant Mitsubishi Motors of North America, Inc.

OPINION AND ORDER

WICKS, Magistrate Judge:

***1** "*Where the words of a contract in writing are clear and unambiguous, its meaning is to be ascertained in accordance with its plainly expressed intent.*" [1]

Defendant, Mitsubishi Motors North America ("MMNA"), is a manufacturer comprised of 350 automobile dealers spanning the United States. One such dealer is Plaintiff Kings Autoshow, Inc. Automobile manufacturers and dealers, such as Mitsubishi, operate under an agreement governing the rights and obligations of the parties. Compliance with the terms of the agreement is critical for both, but as for the manufacturer, brand integrity, uniformity and consistency throughout the franchise system is essential. Language in parties' agreements should strive to be free of any ambiguity. Once in a contractual relationship, the parties are also prohibited from taking any steps that might frustrate the other party's performance under the agreement. Many such agreements, like the one in this case, have "due cause" clauses, providing franchisors with the right to terminate if the franchisee breaches under certain circumstances.

The Court is now faced with determining whether Plaintiff breached several material provisions of the agreement, giving rise to MMNA's right to terminate as a matter of law. In doing so, the Court must undertake a careful review of the specific provisions at issue. This leaves open the threshold question of whether the conduct complained of by MMNA is indeed prohibited by the agreement. In addition, the Court is to determine whether Defendant acted in bad faith and without due cause when it refused to consider Plaintiff's agreement to sell the dealership and instead suggested another proposed buyer. [2] Needless to say, the parties sharply dispute whether Plaintiff materially breached the agreement and whether Defendant acted in bad faith. [3]

Now, before the court is Defendant's Motion for Summary Judgment on all counts (DE 21-6), Plaintiff's opposition to Defendant's motion (DE 22-15), and Defendant's reply to Plaintiff's opposition to this motion (DE 21-3). Oral argument was heard on May 2, 2023. (DE 25.)

For the reasons that follow, Defendant's Motion for Summary Judgment is hereby **GRANTED.**

UNDISPUTED MATERIAL FACTS [4]

***2** Plaintiff Kings Autoshow, Inc., and Defendant MMNA executed an agreement on October 29, 2021, to continue for three years. [5] *See* (DE 21-5 at ¶¶ 1-2); *see also* § I of Dealer Sales and Service Agreement executed on October 29, 2021 (the "Agreement") (DE 22-3). The Agreement contained "Standard Provisions" which were incorporated by reference into the Agreement itself and contained language regarding termination. (*Id.*)

On June 28, 2022, Plaintiff entered a Consent Order in which it pled guilty to the New York City Department of Consumer and Worker Protection's ("DCWP") 13-count petition. (DE 21-5 at ¶¶ 4-6.) As a result, Plaintiff was obligated to pay over

$500,000 in civil penalties and $304,901.54 in restitution. (*Id.* at ¶ 7.) It was also prohibited from selling used cars from July 3, 2022 to July 9, 2022. (*Id.* at ¶ 8.)

On July 28, 2022, Defendant sent Plaintiff a Notice of Termination letter after learning through a public news article about Plaintiff's conduct. (*Id.* at ¶¶ 9, 11.) On September 12, 2022, Plaintiff sent a letter to Defendant expressing its dismay at the news that Defendant planned to terminate their Agreement and even offered alternatives to rectify the situation. (*Id.* at ¶ 12.) However, despite this letter, on September 19, 2022, Defendant sent a response to Plaintiff stating it still intended to terminate. (*Id.* at ¶ 13.) Plaintiff then sought to sell the dealership. (*Id.* at ¶ 14.)

On October 26, 2022, Plaintiff entered into an Asset Purchase Agreement ("APA") with an individual named Richard Osiashvili. (*Id.* at ¶ 15.) Plaintiff sent the APA to Defendant for its approval, but Defendant did not consider the APA. (*Id.* at ¶ 16.) After this, Plaintiff filed suit, which stayed the alleged termination. (DE 1-2 at ¶ 37); *see also* VEH. AND TRAF. § 463.2(e)(1) (stating that if a vehicle dealer receives a notice of termination and an action is brought within four months after the dealer receives notice, then the termination will be stayed until the final judgment is rendered).

PROCEDURAL HISTORY

On November 22, 2022, Plaintiff filed its complaint in the Supreme Court of New York, Nassau County. (DE 22-1.) Plaintiff sought review of Defendant's threatened termination under New York State Vehicle and Traffic Law ("VTL") section 469 whereby Defendant bears the burden of proof to demonstrate that due cause and good faith exist to pursue termination of the Agreement. *See* VEH. AND TRAF. § 463.2(e)(2). Plaintiff also alleges that Defendant coerced it into selling the dealership in violation of VTL section 466 and Article 17-a of the Franchised Motor Vehicle Dealer Act. Thus, Plaintiff concludes that Defendant lacks due cause in pursuing termination of the Agreement because there was no material breach and lacks good faith in both refusing to consider the APA and proposing Victory Mitsubishi as the suggested buyer. (DE 22-1 at 6.) This, it argues, amounts to an "unreasonable restriction[ ] on the franchised motor vehicle dealer relative to transfer, [or] sale ... of a franchise...." VEH. & TRAF. § 466; (DE 1-2 at ¶ 44.) Furthermore, Plaintiff argues that Defendant "maliciously and intentionally interfered" with its contractual relationship with the new buyer. (DE 1-2 at ¶ 55.) As part of its damages, Plaintiff seeks to have the termination declared null and void, continue business operations with Defendant as part of the Agreement, and award Plaintiff costs and fees. (DE 1-2 at 8.)

***3** On December 2, 2022, Defendant removed the action to this Court. (*Id.*) Defendant filed its Answer on December 19, 2022, stating that in its defense, it issued the Notice of Termination with due cause and in good faith only after it became aware of the DCWP's Consent Order with Plaintiff. (DE 10 at 14-15.) In addition, Defendant argues that Plaintiff's claims fail because it neither needed to consider nor approve the request to transfer since the Notice of Termination had already been issued. (*Id.* at 15.) Finally, Defendant counters that the incurable breaches of the Agreement gave it due cause to issue the Notice of Termination and this decision was made in good faith. (*Id.*)

The parties have exchanged Rule 26(a)(1) disclosures, served and responded to first interrogatories and document demands, and met and conferred regarding 30(b)(6) depositions. (DE 19.) On January 13, 2023, Defendant filed a pre-motion letter for the instant motion. (DE 20.) The Court set a briefing schedule and hearing on the motion and parties submitted their papers accordingly. (DE 21, 22.) Oral argument was heard on May 2, 2023. [6]

Defendant seeks summary judgment on the following grounds, claiming no issues of fact remain for trial: (1) Plaintiff materially and incurably breached the Agreement, giving Defendant due cause to terminate; (2) Defendant was not compelled to consider Plaintiff's request to approve the dealership transfer given that the Notice of Termination was already issued; and (3) Plaintiff's contractual interference claim is meritless. (DE 21 at 7-18.)

LEGAL STANDARD

Summary judgment must be granted when there is "no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). A genuine dispute of material fact exists "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). The initial burden is on the movant to demonstrate the absence of a genuine issue of material fact, which can be met by pointing

to a lack of evidence supporting the nonmovant's claim. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 325, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986); *Feingold v. New York*, 366 F.3d 138, 148 (2d Cir. 2004). Once the movant meets its initial burden, the nonmovant may defeat summary judgment only by adducing evidence of specific facts that raise a genuine issue for trial. Fed. R. Civ. P. 56(e); *Anderson*, 477 U.S. at 250, 106 S.Ct. 2505; *Davis v. New York*, 316 F.3d 93, 100 (2d Cir. 2002). "The Court is to believe the evidence of the non-movant and draw all justifiable inferences in her favor, but the non-movant must still do more than merely assert conclusions that are unsupported by arguments or facts." *Sosa v. New York City Dep't of Educ.*, 406 F. Supp. 3d 266, 268 (E.D.N.Y. 2019) (internal citations omitted). The role of the court at the summary judgment stage is not to *resolve* disputed issues of fact, but merely to undertake an analysis to identify whether triable issues of fact exist. That is, the court's function is "issue-finding," not "issue-resolution." *Carolina Cas. Ins. Co. v. Cap. Trucking Inc.*, 523 F. Supp.3d 661, 668 (S.D.N.Y. 2021) (citing *Gallo v. Prudential Residential Servs., Ltd. P'ship* 22 F.3d 1219, 1224 (2d. Cir. 1994)).

It is against this backdrop that the Court considers Defendant's motion for summary judgment.

DISCUSSION

A. Whether the Agreement Applies to Both New *and* Used Cars

The threshold issue presented is whether the Agreement applies to "used" car customers. Plaintiff argues that the Consent Order exclusively related to its used car business and that the Agreement only applies to new vehicle sales. (DE 22-15 at 6, 7.) Defendant opposes, stating that the Agreement applies to sales to all customers, new and used. (DE 21-3 at 3.)

***4** In interpreting contracts, the New York Court of Appeals has stated,

> This Court has held that " 'reasonable expectation and purpose of the ordinary business[person] when making an ordinary business contract' " serve as the guideposts to determine intent (*Album Realty Corp. v. American Home Assurance Co.*, 80 N.Y.2d 1008, 1010, 592 N.Y.S.2d 657, 607 N.E.2d 804 (quoting *Bird v. St. Paul Fire & Mar. Ins. Co.*, 224 N.Y. 47, 51, 120 N.E. 86)). Thus, the "tests to be applied * * * are common speech * * * and the reasonable expectation and purpose of the ordinary business[person]," in the factual context in which terms of art and understanding are used, often also keyed to the level of business sophistication and acumen of the particular parties (*Ace Wire & Cable Co., Inc. v. Aetna Casualty & Surety Co.,* 60 N.Y.2d at 398, 469 N.Y.S.2d 655, 457 N.E.2d 761; *see,* *Michaels v. City of Buffalo*, 85 N.Y.2d 754, 757, 628 N.Y.S.2d 253, 651 N.E.2d 1272; *Miller v. Continental Ins. Co.*, 40 N.Y.2d 675, 676, 389 N.Y.S.2d 565, 358 N.E.2d 258).
>
> *Uribe v. Merchants Bank of N.Y.*, 91 N.Y.2d 336, 670 N.Y.S.2d 393, 693 N.E.2d 740, 743 (N.Y. 1998).

That is, courts are obligated to examine the contract as a whole and interpret its parts with reference to the whole. *See* 11 SAMUEL WILLISTON & RICHARD A. LORD, A TREATISE ON THE LAW OF CONTRACTS § 32:5 (4th ed. 2012) (stating that contracts must "be read as a whole and every part will be read with reference to the whole"); *see also* *Postlewaite v. McGraw-Hill, Inc.*, 411 F.3d 63, 67 (2d Cir. 2005) ("Contracts must be read as a whole, and if possible, courts must interpret them to effect the general purpose of the contract."); *Bailey v. Fish & Neave*, 8 N.Y.3d 523, 837 N.Y.S.2d 600, 868 N.E.2d 956, 959 (N.Y. 2007) ("Agreements should be read as a whole to ensure that undue emphasis is not placed upon particular words and phrases.").

Simply offering differing interpretations of a contractual provision does not mean that the provision is ambiguous. In the summary judgment context, if the Court finds the existence of ambiguities, then an award of summary judgment is inappropriate. *See Dev. Specialists, Inc. v. Peabody Energy Corp. (In re Coudert Brothers)*, 487 B.R. 375, 390 (S.D.N.Y. 2013) ("Generally, summary judgment is appropriate in a contract dispute only where the contract's terms are unambiguous, whereas 'interpretation of ambiguous contract language is a question of fact to be resolved by the factfinder.' ") (citations omitted). The Court next turns to the parties' positions, which are polar opposite.

Plaintiff argues that the Agreement does not apply to its sale of used cars (DE 22-15 at 6), relying in particular on several key provisions in the Agreement itself that refer to the products as "new." (DE 22-15 at 6.) Specifically, Plaintiff contends

that the purpose of the Agreement—which is to "provide for the sale and servicing of *MMNA Products* in a manner that will best serve [all parties'] interests"—does not extend to used vehicles. (DE 22-3 at 1.) In fact, it points to 'MMNA Products' which it says only refers to new cars or trucks and new parts and accessories. (DE 22-15 at 7.); (DE 22-3 at 13.) Furthermore, posits Plaintiff, the Consent Order only addressed Plaintiff's used car sales and prohibited Plaintiff from selling used cars for only seven days. (DE 22-15 at 7.)

***5** Defendant argues that per the Agreement, Plaintiff's transactions would include used cars and Plaintiff would use the same name to sell both used and new cars. (DE 21-3 at 4.) Nowhere in the Agreement does it suggest that Plaintiff does not have the same obligations to both used and new car customers. (*Id.*) It would be *absurd*, Defendant asserts, for Plaintiff to think it could defraud used car customers, just because they are not covered in the Agreement. (*Id.* at 5.)

Contrary to Plaintiff's contentions, there are in fact several provisions in the Agreement in which the word "used" is referenced:

- Section 6, Dealership Premises: "**MMNA** has approved the following premises as the location of **Dealer's** MMNA sales and service operations (hereinafter referred to as the "*Dealership Premises*")" and lists the "*Used Vehicle Display and Sales Facilities*" with the address 5910 Church Ave, Brooklyn, New York 11203.

- Standard Provisions, § IV. Dealership Premises, subsection C: "If **Dealer** or any of **Dealer's** *Owners or Executive Managers* should have or should acquire, directly or indirectly, for themselves or for members of their respective families, any substantial interest in an enterprise the business of which is in any way connected with *new or used MMNA Products (hereinafter referred to as "Related Business")*, or any property which is being used or will be used in connection with new or used MMNA Products (hereinafter referred to as "Related Property"), or any beneficial interest in any Related Property, **Dealer** will...."

- Standard Provisions, § VIII. Servicing MMNA Vehicles, subsection A(6): "... In the event that the laws of the state in which **Dealer** is located require motor vehicle dealers or distributors to install in *new or used motor vehicles*, prior to the retail sale thereof, any safety devices or other equipment not installed or supplied as standard equipment by **MMNA**, then **Dealer**, prior to its sale of any MMNA Vehicles on which such installations are so required, shall properly install such equipment on such MMNA Vehicles. **Dealer** shall comply with all state and local laws pertaining to the installation requirements of any such equipment including, without limitation, the reporting of such installation. **MMNA** shall not be liable for any failure of **Dealer** or its employees to comply with such state and local laws."

- Standard Provisions, § General Provisions, subsection A: "**Dealer** shall defend and indemnify **MMNA** and any manufacturer of MMNA Products and hold each of them harmless from any and all liabilities that may be asserted or arise by reason or out of: (a) **Dealer's** failure or alleged failure to comply, in whole or in part, with any obligation assumed by **Dealer** pursuant to this Agreement; (b) **Dealer's** negligent or improper, or alleged negligent or improper, repairing or servicing of *new or used MMNA Vehicles* or equipment, *or such other motor vehicles or equipment as may be sold or serviced by **Dealer***; (c) **Dealer's** breach, or alleged breach, of any contract between **Dealer** and **Dealer's** customer; or (d) **Dealer's** misleading statement or misrepresentation, or alleged misleading statement or misrepresentation, either direct or through advertisement, to any customer of **Dealer**. This indemnification shall include all attorneys' fees, court costs and expenses incurred by **MMNA** and/or any manufacturer of *MMNA Products* in defending any claim or suit asserted as a 30 result of the foregoing."

(DE 22-3 (emphasis added).)

***6** At the heart of the parties' arguments are several key provisions of the Agreement. Standard Provisions section I pronounces that, "**Dealer** shall engage in no discourteous, deceptive, misleading or unethical practices and shall actively promote the sale of *MMNA Products.* **Dealer** shall give prompt, efficient and courteous service to all customers of *MMNA Products* whether or not those customers purchased *MMNA Products* from **Dealer**." (*Id.* at 13.) Section X of the Standard Provisions in the Agreement states that Defendant may terminate dealer by giving 30 days prior written notice to Plaintiff for any of the following reasons:

- Section X(B)(2)(a): "Failure of **Dealer** to obtain or maintain any license, or the suspension or revocation of any license, necessary for the conduct by *Dealer* of its business pursuant to *this Agreement*;" or

- Section X(B)(2)(g): "Impairment of the reputation or financial standing of **Dealer** or any of its management subsequent to the execution of *this Agreement*, or ascertainment by **MMNA** subsequent to the execution of *this Agreement* of any fact existing at or prior to the time of execution of *this Agreement* which tends to impair the reputation or financial standing of **Dealer** or any of its management and which would substantially impair the operation of the dealership;" or

- Section X(B)(2)(h): "Any submission by **Dealer** to **MMNA** of a false or fraudulent dealership application report, statement or claim for reimbursement, refund, credit, or financial information, or submission to a customer of a false or fraudulent report or statement of any kind, including but not limited to statements concerning pre-delivery preparation, testing, servicing, repair or maintenance;" or

- Section X(B)(2)(l): "Failure to **Dealer** to maintain good relations with its customers, including, but not limited, failure to notify **MMNA** of complaints by customers and repeated failure to properly resolve customer complaints as required under Section VIII.B.4. hereof...."

(*Id.* at 33-35.)

The above provisions undoubtedly apply to *both* used and new car customers. A plain reading of all of the provisions leads to no other conclusion. Plaintiff's proffered interpretation of stand-alone provisions without reading the Agreement as a whole is nothing short of an acrobatic attempt to avoid basic rules of contract interpretation.

Reading the Agreement as a whole as this Court is obligated to do, and without cherry-picking provisions, it is evident that the parties contemplated that the obligations and rights in the Agreement apply to *all* types of vehicle sales. For example, section I of the Standard Provisions explicitly states that parties are to refrain from engaging in "discourteous, deceptive, misleading or unethical practices" without limitation to new MMNA products. (*See id.* at 13.)

Further, Standard Provision section X(B)(2)(g), does not limit the impairment or financial standing to new car transactions. There is simply no limiting language, yet the Agreement in many provisions refers to "new" or "used" cars. *See supra.* Section X(B)(2)(h) provides for termination of "any" false or fraudulent report/statement can implicate *all* car transactions. Finally, section X(B)(2)(l) obligates Plaintiff to maintain good relations with *all* customers, again, with no limitation on new car customers only.

During oral argument there was a dispute as to whether the Agreement allows for Plaintiff to operate a separate business. (DE 25 at 30-37.) Defendant argued that there was no such provision, while Plaintiff contended that the Agreement contemplated a separate agreement if Plaintiff wished to engage in a separate business, here a used car business. Plaintiff argued that because parties never exchanged a separate agreement, the Agreement only concerns new cars. [7]

***7** However, Plaintiff's argument is nothing short of fallacious. The fact that there is no separate agreement means that the Agreement at issue governs *all* vehicle transactions —both used and new. Section IV(C), the provision upon which Plaintiff relies, simply does not apply. That provision discusses drafting a separate written instrument if Dealer, Dealer's owners, or executive managers wish to gain a substantial interest in a business enterprise bearing some relationship with MMNA Products. (DE 22-3 at 20.) Dealer admittedly held no substantial interest in any other company. The provision is for wholly new entities—not those operating under the same name but selling new versus used cars.

Because the relevant provisions of the Agreement are not ambiguous and can be read as applying to all customers, there is no question of fact as to whether the Agreement applied to used cars.

B. Whether the Notice of Termination was Issued with Due Cause

Because the Agreement applies here, the next step is to determine whether any questions of fact exist as to Plaintiff's alleged material breach, which would have provided Defendant with due cause to terminate the Agreement.

Plaintiff and Defendant entered into an Agreement under which Plaintiff would have the nonexclusive right to sell and service Mitsubishi cars and sell related parts, accessories, and options. (DE 22-3 at 1.) However, Defendant argues that Plaintiff materially breached several provisions of the executed Agreement.

"Under New York law, a party's performance under a contract is excused where the other party has substantially failed to perform its side of the bargain or, synonymously, where that

party has committed a material breach." *Belsito Commc'ns, Inc. v. Dell, Inc.*, No. 12-CV-6255, 2013 U.S. Dist. LEXIS 130598, 2013 WL 4860585, at *7 (S.D.N.Y. Sept. 12, 2013). Furthermore, "[m]aterial breach must be of a reasonable and necessary provision of a franchise if the breach is not cured in a reasonable time after written notice of the breach was received." *Giuffre Hyundai, Ltd. v. Hyundai Motor Am.*, No. 13-CV-0520, 2013 WL 1968371 at *4, 2013 U.S. Dist. LEXIS 67795 at *7 (E.D.N.Y. May 2, 2013). "Material breach is one that may cause the aggrieved party to revoke or terminate the agreement without giving them an opportunity to cure." *Id.* at *8.

According to New York's Vehicle and Traffic Law, the Notice of Termination from a franchisor must be issued with due cause and in good faith. N.Y. VEH. & TRAF. L. § 463(2)(e)(2). "In ... an action under [463(2)(e)(2)] the franchisor bears the burden of demonstrating both 'that due cause and good faith exist' and 'that all portions of [the] ... sales and service requirements for the protesting franchise[e] ... are reasonable.' " *Agar Truck Sales, Inc. v. Daimler Trucks N. Am., LLC*, No. 13-cv-5471 (NSR), 2014 WL 1318383 at *3, 2014 U.S. Dist. LEXIS 45429 at *10 (S.D.N.Y. Apr. 1, 2014). "To establish due cause, the franchisor must prove "a material breach by a new motor vehicle dealer of a reasonable and necessary provision of a franchise [and that] the breach [was] not cured within a reasonable time after written notice of the breach ha[d] been received from the manufacturer or distributor." *Maltbie's Garage Co. v. GM LLC*, No. 21-CV-581 (MAD) (TWD), 2021 WL 4972738, at *4, 2021 U.S. Dist. LEXIS 205914, at *10-11 (N.D.N.Y. Oct. 26, 2021).

As such, the Court looks to each of the provisions that Defendant has alleged that Plaintiff materially breached to determine whether a question of fact exists as to whether Defendant had due cause to issue the Notice of Termination. (DE 22-3 at 33-34.)

i. Engaging in Unfair and Deceptive Practices

Standard Provision § I: General Obligations states that the "[d]ealer shall engage in no discourteous, deceptive, misleading or unethical practices and shall actively promote the sale of *MMNA Products.* **Dealer** shall give prompt, efficient and courteous service to all customers of *MMNA Products* whether or not those customers purchased *MMNA Products* from **Dealer.**" (DE 22-3 at 13.)

***8** Here, it is undisputed that Plaintiff engaged in deceptive practices. In fact, it entered into a Consent Order with the DCWP defining literally thousands of deceptive acts to which it ultimately pled guilty to all. (*See* DE 22-5) (noting that Kings engaged in deceptive trade practices of at least 7,939 violations). Specifically, Plaintiff confessed that it falsely advertised vehicles, and that it engaged in deceptive business practices such as (1) misrepresenting vehicles' condition; (2) falsely stating that vehicles required repairs; and (3) failing to disclose legal names in receipts and bills of sale. (DE 22-4 at 56-66.) Because Plaintiff committed numerous deceptive acts and defrauded consumers, there is no material issue of fact that Plaintiff materially breached this provision if the provision is interpreted as applying to both used and new car customers.

This clause applies to a used car customer as well—a plain reading of this clause indicates that Plaintiff shall not engage in discourteous conduct relating *any* vehicle sale. (DE 22-3 at 13.) ("Dealer shall engage in no discourteous, deceptive, misleading or unethical practices....") Further, Plaintiff's use of the Mitsubishi name is for all customers that purchase Plaintiff's vehicles; the customers are likely unaware of the distinction between used and new cars. Indeed, this was conceded to at oral argument by Plaintiff's counsel. (DE 25 at 29) (Q: "But the point is that your client didn't use the same name to do both businesses and even though the misleading and deceptive practices were in connection with used sales, it was still the entity, the dealer, who's part of this Agreement that was guilty, found guilty, or pled guilty. It's the same entity, right? A: In – yes. Yes.") Thus, engaging in deceptive acts would globally apply to all customers and constitute a material breach of the Agreement.

ii. License Suspension

Section X(B)(2)(a) states that "[f]ailure of **Dealer** to obtain or maintain any license, or the suspension or revocation of any license, necessary for the conduct by **Dealer** of its business pursuant to *this Agreement* ..." (DE 22-3 at 33.)

Plaintiff argues that this license suspension was for used cars, and so they did not breach the Agreement. (DE 22-15 at 8.) Even if it did breach the Agreement, it was not a *material* breach, as it was only for a week and then cured, and Plaintiff was able to sell again thereafter. (*Id.* at 8-9.) Furthermore, Defendant did not learn of the license suspension until a week after the suspension was over. (*Id.* at 9.) Thus, as of the Notice

of Termination letter dated July 28, 2022, there was no breach. (*Id.*)

Here, notwithstanding Plaintiff's assertions, Plaintiff breached the Agreement in having its license suspended or revoked. The license suspension is not disputed. Rather, mitigating circumstances are offered to excuse the breach. After the June 28, 2022, Consent Order was executed and Plaintiff's license was suspended for one week, Plaintiff failed to notify Defendant pursuant to the Agreement. Instead, Defendant found out on its own, through a public news article, that Plaintiff committed numerous Consumer Protection Laws violations and was forced to pay thousands of dollars in civil penalties. For those reasons, Plaintiff breached the provision.

iii. Impairing the Reputation of Plaintiff and Management

Section X(B)(2)(g) provides that the "[i]mpairment of the reputation or financial standing of **Dealer** or any of its management subsequent to the execution of *this Agreement*, or ascertainment by **MMNA** subsequent to the execution of *this Agreement* of any fact existing at or prior to the time of execution of *this Agreement* which tends to impair the reputation or financial standing of **Dealer** or any of its management and which would substantially impair the operation of the dealership...." (DE 22-3 at 34) (emphasis added).

***9** Plaintiff argues that Defendant has not offered proof of this, *i.e.,* lost business opportunities. (DE 22-15 at 9-10.) Further, the public news article that Defendant cites does not show that its reputation or financial standing was impaired. (*Id.* at 10.) Defendant responds that it does not need to show its reputation was impaired by Plaintiff's fraud, but that Plaintiff's reputation was impaired when it pled guilty to the violations. (DE 21-3 at 5.)

Giuffre, a case upon which Defendant heavily relies, is factually similar and persuasive here. In *Giuffre*, the court granted defendant's motion for summary judgment and denied plaintiff's restoration of the dealership. *Giuffre Hyundai, Ltd.*, 2013 WL 1968371, at *1, 2013 U.S. Dist. LEXIS 67795, at *1. There, defendant terminated the dealership after discovering that plaintiff engaged in fraudulent and deceptive practices, such as strong-arming customers, preying on disadvantaged customers, and providing higher prices for cars at checkout, resulting in a $500,000 restitution payment. *Id.* at *1-2. The agreement contained provisions (1) requiring the dealer to treat customers fairly and "not engage in any deceptive or fraudulent practices" and (2) stating that a material and incurable breach occurred if there was a legal violation, including a "finding or adjudication ... that Plaintiff has engaged in misrepresentations or unfair deceptive trade practices." *Id.* at *2, 5.

The plaintiff in *Giuffre* challenged the notice of termination and sought to reinstate its business, alleging that defendant did not give it an opportunity to cure, acted in bad faith in its termination, and restricted it from transferring its rights. *Id.* The court ultimately found that the deceptive acts constituted a material breach and thus an opportunity to cure was not necessary. *Id.* at *10. The Second Circuit affirmed the grant of summary judgment in defendant's favor, ruling that Hyundai need not continue its business relationship with the dealer. *Giuffre,* 756 F.3d at 210.

Here, Plaintiff is correct that the current Agreement has no provision allowing Defendant-franchisor to terminate the Agreement because it violated a law. However, the Agreement's provision sets a "lower standard" than that in *Guiffre*. The agreement in *Giuffre* only deemed conduct a material and incurable breach if there was a legal violation. *Giuffre Hyundai, Ltd.*, 2013 WL 1968371, at *2, 2013 U.S. Dist. LEXIS 67795, at *2,5. However, here *any* discourteous, deceptive, misleading, or unethical practice breaks Plaintiff's general obligation—it need not be a legal violation. (*See* DE 25 at 10, 44); (*see also* 22-3 at 13.) *Au fond*, Plaintiff admittedly engaged in thousands of deceptive business practices. (*See generally* DE 10-1.) Thus, like the Court stated in *Giuffre*, Defendant here should not be compelled to continue doing business with Plaintiff in the face of the breach.

iv. Submitting False or Fraudulent Reports to Customers

Section X(B)(2)(h) reads "[a]ny submission by **Dealer** to **MMNA** of a false or fraudulent dealership application report, statement or claim for reimbursement, refund, credit, or financial information, or submission to a customer of a false or fraudulent report or statement of any kind, including but not limited to statements concerning pre-delivery preparation, testing, servicing, repair or maintenance." (DE 22-3 at 34.)

Plaintiff argues that the buyers of used cars are not "customers" under the Agreement, so there is no breach. (DE 22-15 at 10.) It further states that a question of fact still applies to breach since, according to the Agreement, Defendant can terminate if Plaintiff submits to a customer a false or fraudulent report or statement. Here, however, all of the documents at issue relate to customer safety. (*See* DE 22-3 at 22; DE 22-15 at 10-11.) Defendant counters that Plaintiff conducted all business under the Brooklyn Mitsubishi name and its obligations under the Agreement applies to all transactions—new *and* used cars. (DE 21-3 at 6.)

***10** The Court finds Plaintiff's argument to be meritless. Plaintiff failed to let its customers know that certain cars were not in working condition. In the Second Amended Petition from the DCWP, the DCWP outlines at least four situations in which Plaintiff gave a false report to customers by misrepresenting defective vehicles as being "roadworthy." (DE 22-4 at 39-41.); (*id.* at 66) (noting that Brooklyn Mitsubishi violated the CPL by misrepresenting that the used vehicles it told to four customers were "roadworthy and by failing to disclose material defects about which it knew or should have known and which rendered those vehicles unfit for ordinary use"). And all of the business was conducted under the Brooklyn Mitsubishi name. Further, the language in section X(B)(2)(h) does not appear to limit the false or fraudulent reports or statements to safety alone because of the "including but not limited to" language. Therefore, there is no genuine issue of material fact that Plaintiff breached this provision.

v. Failing to Maintain "Good Relations" With Customers

Section X(B)(2)(l) provides that "[f]ailure to **Dealer** to maintain good relations with its customers, including, but not limited to, failure to notify **MMNA** of complaints by customers and repeated failure to properly resolve customer complaints as required under Section VIII.B.4. hereof...." (DE 22-3 at 34.)

Plaintiff argues that the term "good relations" is ambiguous in the Agreement as 'good' could mean ethical or satisfactory. (DE 22-15 at 11-12.) However, Defendant counters that the Agreement covers *all* customer relations—new and used car customers and "good relations" is not ambiguous. (DE 21-3 at 6-7.) Defendant asserts that the reason for termination of the Agreement was Plaintiff's repeated failure to properly resolve customer complaints and Plaintiff subsequently pled guilty to the violations. (*Id.*)

While the term "good relations" may be vague or ambiguous, the deceptive acts that Plaintiff engaged in related to its advertisements, warranty rights, financing terms, license applications, and misrepresentations about the roadworthiness of the vehicle were not. Such acts run counter to maintaining good relations with its customers. (*See* DE 22-5.) Thus, there is no genuine dispute of material fact that Plaintiff breached this provision.

C. Whether or Not the Breaches Were Incurable

Defendant argues that the breach of the Agreement was not curable. (DE 21-6 at 11-13.) Specifically, it asserts that Plaintiff here committed many acts of unfair and deceptive dealing and practices with customers, causing irreparable reputational harm to Mitsubishi. (*Id.*)

"When a breach involves deceptive conduct that goes to the essence of the contract and fundamentally destroys the parties' relationship, it may not be subject to cure." *Giuffre Hyundai*, 2013 WL 1968371, at *4, 2013 U.S. Dist. LEXIS 67795, at *9. "New York law permits a party to terminate an agreement immediately without notice and an opportunity to cure when 'the misfeasance is incurable and when the cure is unfeasible.' " *Id.* at *9-10.

In *Guiffre,* the court found that the action brought by the State Attorney General as well as the Supreme Court's findings constituted a "reputation poisoning" which gave defendant the ammunition it needed to terminate the agreement. 2013 WL 1968371, at *4, 2013 U.S. Dist. LEXIS 67795, at *11. And the court mentioned that if Hyundai had not terminated the agreement, the public's trust in Hyundai would be eroded. *Id.*

Section X(C) of the Standard Provisions incorporated into the present Agreement states that "Any notice of termination by **MMNA** shall inform **Dealer** of the grounds therefor, and any such notice may be withdrawn if during the applicable notice period **Dealer** cures to **MMNA's** satisfaction the condition or conditions upon which the notice is based." (*See* DE 22-3 at 35-36.)

Here, Plaintiff's contention that Defendant failed to provide it with an opportunity to cure is meritless because the breaches

and resulting reputational harm were "incurable."[8] The acts to which Plaintiff pled guilty to by definition cannot be cured. A promise not to do the same in the future is not a cure for a past default. Plaintiff engaged in deceptive acts, which is evident from its pleading guilty to numerous violations instead of protesting any of the DCWP's findings. (*See generally* DE 22-5); *Giuffre*, 756 F.3d at 211 (finding that dealer's failure to appeal the findings of deceptive conduct constituted "an adjudicated fact"). The very essence of this contract is to sell and service motor vehicles, which can only be done with good relations with customers. *See Giuffre*, 2013 WL 1968371, at *4, 2013 U.S. Dist. LEXIS 67795, at *11 (stating that public trust in the manufacturer is "essential for a successful vendor of automotive products"). Engaging in the thousands of violations could have caused permanent damage to both parties. All vehicle sales occurred under the "banner" of Mitsubishi, the very company name under which it pled guilty. (DE 25 at 54-55.) Thus, Plaintiff need not be given "a second chance" after a serious deviation from its obligations, such as this one, occurs. *Giuffre*, 2013 WL 1968371, at *5, 2013 U.S. Dist. LEXIS 67795, at *12.

***11** Further, Plaintiff's response to the Notice of Termination Letter in the September 12, 2022 letter is essentially an admission in that Plaintiff did not deny any of the alleged conduct nor did it state that it in fact did *not* breach the Agreement. (DE 22-7.) Rather than challenging Defendant's Notice of Termination, Plaintiff instead offered possible remedies to change Defendant's mind, including changing the name of the facility, relocating its showroom of new Mitsubishi products to another building, and re-marketing themselves, and entering a probationary period. (*Id.* at 2.) In effect, the letter, which sought to convince Defendant to reverse its determination, was a *mea culpa.*

Further, contrary to Plaintiff's argument that Defendant has not shown damages concerning reputational harm, it is intuitive that a report laying out thousands of violations committed upon car customers would be fatal to Plaintiff's reputation in the community. In fact, Defendant discovered these very violations through a public news article, which any one of Plaintiff's customers could have also done. And a prominent government figure, Mayor Eric Adams, outlined these acts in the article, which diminishes Plaintiff's credibility even further. The provisions in the Agreement, though applying to Plaintiff's reputation, largely exist to prevent sullying Mitsubishi brand altogether. But here, it is far too late for Plaintiff to provide any remedies to undo the harm.

D. Whether the Notice of Termination was Issued in Good Faith

Defendant's issuance of the Notice of Termination was not pretextual as Plaintiff contends. (DE 25 at 16-18.) Under the Automobile Dealers' Day in Court Act, a dealer can sue an automobile manufacturer engaged in commerce for failure to act in good faith in terminating the franchise. *See* 15 U.S.C. § 1222. To do this, a dealer must show, that the manufacturer coerced the dealer, and that the coercion was calculated to achieve a wrongful objective. *V.M. Paolozzi Imps., Inc. v. Am. Honda Motor Co.*, 2015 WL 7776926, at *8, 2015 U.S. Dist. LEXIS 161422, at *22 (N.D.N.Y. 2015).

Plaintiff points to *Bronx Auto Mall v. Am. Honda Motor Co.* 934 F. Supp. 596 (S.D.N.Y. 1996) to supports its proposition that Defendant's Notice of Termination was a pretext to coerce Plaintiff into selling to Victory Mitsubishi. (DE 22-15 at 4.) But that case is inapposite. There, the court found that defendant, as a pretext, issued the condition to renew by forcing plaintiff to make unreasonable and substantial renovations of the franchise in violation of VTL section 463(2)(c) such as "expanding and relocating the parts department, adding a dedicated lounge for Acura service customers, and renovating the restrooms." 934 F. Supp. at 609-10. They also used complaints about plaintiff's facilities "as a pretext to get rid of a dealer it did not want." *Id.* at 612. The Court found defendant's primary motives were to "reduce the overall number of dealers" and "eliminate a dealer who cut prices." *Id.* at 607.

Unlike *Bronx Auto Mall*, where the court found several concealed reasons for terminating the dealership, here, when asked by the Court here to provide supporting information for its pretext argument, Plaintiff repeatedly emphasized Defendant's urging to use Victory Mitsubishi as a buyer. (DE 25 at 19.) The Court further probed Plaintiff to point to evidence of pretext *before* the Notice of Termination was issued, but Plaintiff failed to do so and conceded he did not have any such information, but that further discovery could prove otherwise. (*Id.*) Unlike Plaintiff, Defendant was equipped with thousands of substantive, *non-pretextual* reasons to decline to renew as per the DCWP's petition. (*See generally* DE 22-4.) It thus had no obligation to consider any documents regarding the sale of dealership after the Notice of Termination was issued.

***12** Thus, the Court finds Plaintiff's argument to be without merit and that Defendant's issuance of the Notice of Termination was served in good faith. Defendant should not be required to continue doing business with an entity that admitted to defrauding its own customers. (DE 21-6 at 13-14.)

E. Whether Defendant Had to Consider the Asset Purchase Agreement and Engaged in Contractual Interference

Finally, because the Court has found that Plaintiff breached the Agreement, it need not reach the remaining contentions of whether Defendant had to consider the APA and whether Defendant engaged in contractual interference.

Plaintiff argues that there is evidence of bad faith here, that is, Defendant failed to consider the APA because it specifically wanted Plaintiff to sell the business to Victory Mitsubishi. (DE 22-15 at 13-14.) However, Defendant states that it had no obligation to consider the October 26, 2022 APA once it sent the July 28, 2022 Notice of Termination to Plaintiff after learning of the Consent Order. (DE 21-3 at 7-9.)

And Plaintiff argues that Defendant interfered with Plaintiff's contractual relationship with Osiashvili by refusing to consider the APA. (DE 22-15 at 15.) But Defendant states that Plaintiff and Osiashvili had not formed a binding contractual relationship with Osiashvili, especially since their relationship was conditioned on Defendant's approval of the APA. (DE 21-6 at 16-18.)

Indeed, during oral argument Plaintiff's counsel was asked whether the case ends if the termination was in fact proper. Counsel agreed, that if termination was proper then Plaintiff does not have the right to insist Defendant consent and approve the APA. (DE 25 at 14.)

Thus, because the termination is proper here, as explained above, it follows that that no dispute of material fact exists as to whether Defendant denied considering the APA and whether Defendant engaged in contractual interference.

CONCLUSION

For the reasons stated herein, Defendant's Motion for Summary Judgment is **GRANTED**.

All Citations

Slip Copy, 2023 WL 5200398

Footnotes

1 *M&G Polymers USA, LLC v. Tackett*, 574 U.S. 427, 435, 135 S.Ct. 926, 190 L.Ed.2d 809 (2015) (quoting 11 SAMUEL WILLISTON & RICHARD A. LORD, A TREATISE ON THE LAW OF CONTRACTS § 30:6 (4th ed. 2012)).

2 *Thyroff v. Nationwide Mut. Ins. Co.*, 460 F.3d 400, 407 (2d Cir. 2006) ("All contracts under New York law include" the covenant of good faith and fair dealing.).

3 The Court commends counsel on both sides for excellent paper submissions and presentations at oral argument.

4 Unless otherwise noted, a standalone citation to a party's Rule 56.1 statement throughout this Report and Recommendation means that the Court has deemed the underlying factual allegation undisputed. Any citation to a Rule 56.1 statement incorporates by reference the documents cited in it. Where relevant, however, the Court may cite directly to an underlying document. The Court has deemed true undisputed facts averred in a party's Rule 56.1 statement to which the opposing party cites no admissible evidence in rebuttal. *See Stewart v. Fashion Inst. of Tech.*, No. 18-cv-12297 (LJL), 2020 WL 6712267, at *8 (S.D.N.Y. Nov. 16, 2020) ("[P]ursuant to Local Civil Rule 56.1 [the movant's] statements are deemed to be admitted where [the non-

moving party] has failed to specifically controvert them with citations to the record.") (quoting *Knight v. N.Y.C. Hous. Auth.*, No. 03 Civ. 2746 (DAB), 2007 WL 313435, at *1 (S.D.N.Y. Feb. 2, 2007)); *Lumbermens Mut. Cas. Co. v. Dinow*, No. 06-CV-3881 (TCP), 2012 WL 4498827, at *2 n.2 (E.D.N.Y. Sept. 28, 2012) ("Local Rule 56.1 requires ... that disputed facts be specifically controverted by admissible evidence. Mere denial of an opposing party's statement or denial by general reference to an exhibit or affidavit does not specifically controvert anything."). Further, to the extent a party improperly interjects arguments and/or immaterial facts in response to facts asserted by the opposing party, and does not specifically controvert such facts, the Court disregards those statements. *See McFarlane v. Harry's Nurses Registry*, No. 17-CV-06350 (PKC) (PK), 2020 WL 1643781, at *1 n.1 (E.D.N.Y. Apr. 2, 2020) (quoting *Risco v. McHugh*, 868 F. Supp. 2d 75, 85 n.2 (S.D.N.Y. 2012)).

5 The undersigned notes that page nine of the Sales and Service Agreement outlines the protocols to be followed if the dealers open a related business, such as to notify Defendant, but it is silent as to whether Dealers are prohibited from operating other businesses generally. (DE 22-3 at 8-9.)

6 *See generally* Transcript of oral argument, *Kings Autoshow, Inc. v. Mitsubishi Motors of North America, Inc.*, No. 22-cv-7328 (JMW) (E.D.N.Y. May 2, 2023) (DE 25).

7 To support its contention, Plaintiff turns to section IV(C), which discusses situations in which "Dealer or any of Dealer's Owners or Executive Managers ... acquire, directly or indirectly, for themselves or for members of their respective families, any substantial interest in an enterprise the business of which is in any way connected with new or used MMNA Products ... or any property which is being used or will be used in connection with new or used MMNA Products ... or any beneficial interest in any Related Property." (DE 22-3 at 20.)

8 Indeed, during Oral Argument, Plaintiff argued that the provision in *Giuffre* provided for "adjudicated misfeasance" rather than simple misconduct, which is what occurred here. Plaintiff argued that *Giuffre* focused on the adjudication, which could not be corrected, but in the instant case, Plaintiff's behavior could be remedied. (DE 25 at 45, 56-57.) The Court finds this argument meritless because the DCWP's Consent Order, a fully adjudicated matter, was premised on the very misconduct alleged here and resulted in reputational harm for the entire Mitsubishi brand.

260 Fed.Appx. 517
This case was not selected for publication in the Federal Reporter.
Not for Publication in West's Federal Reporter See Fed. Rule of Appellate Procedure 32.1 generally governing citation of judicial decisions issued on or after Jan. 1, 2007. See also Third Circuit LAR, App. I, IOP 5.7. (Find CTA3 App. I, IOP 5.7)
United States Court of Appeals,
Third Circuit.

MAPLE SHADE MOTOR CORPORATION d/b/a Maple Shade Kia of Turnersville, Appellant
v.
KIA MOTORS AMERICA, INC.

No. 06–3971.
|
Submitted Under Third Circuit L.A.R. 34.1(a) on Jan. 8, 2008.
|
Filed Jan. 11, 2008.

Synopsis

Background: Automobile franchisee sued franchisor, challenging, inter alia, the legality of the franchisor's termination of the franchise under the New Jersey Franchise Practices Act (NJFPA). The parties filed cross-motions for partial summary judgment. The United States District Court for the District of New Jersey, Joseph E. Irenas, J., 384 F.Supp.2d 770, granted summary judgment for franchisor. Franchisee appealed.

Holdings: The Court of Appeals, Aldisert, Circuit Judge, held that:

[1] franchisee's failure to build a separate showroom for franchisor's vehicles provided good cause for termination of the franchise under the NJFPA, and

[2] franchisor's rejection of proposed transfer of franchise did not contravene the NJFPA.

Affirmed.

Procedural Posture(s): On Appeal; Motion for Summary Judgment.

West Headnotes (3)

[1] Antitrust and Trade Regulation Duration, Termination, and Renewal

Automobile franchisee's failure to build separate showroom for franchisor's vehicles was material breach of the franchise agreement and thus provided "good cause" for termination of the franchise under New Jersey Franchise Practices Act (NJFPA). N.J.S.A. 56:10–1 et seq.

5 Cases that cite this headnote

[2] Antitrust and Trade Regulation Transfer, Sale, and Assignment

Automobile franchisor's rejection of franchisee's proposed transfer of the franchise free and clear of the notice of termination did not contravene New Jersey Franchise Practices Act (NJFPA), since franchisee only had an interest in a franchise agreement subject to a notice of termination. N.J.S.A. 56:10–1 et seq.

3 Cases that cite this headnote

[3] Antitrust and Trade Regulation Transfer, Sale, and Assignment

Automobile franchisor's rejection of franchisee's proposed transfer of the franchise did not contravene New Jersey Franchise Practices Act (NJFPA), where transferee did not agree to meet all of the requirements of the existing franchise agreement. N.J.S.A. 56:10–6.

3 Cases that cite this headnote

***517** Appeal from Orders Entered by the United States District Court for the District of New Jersey, Civil Action No. 04–cv–02224, District Judge: Honorable Joseph E. Irenas.

Attorneys and Law Firms

Marvin J. Brauth, Wilentz, Goldman & Spitzer, Woodbridge, NJ, for Appellant.

Jason P. Isralowitz, Hogan & Hartson, New York, NY, William H. Hyatt, Jr., Kirkpatrick & Lockhart Preston Gates Ellis, Newark, NJ, for Appellee.

Before: FISHER, HARDIMAN AND ALDISERT, Circuit Judges.

OPINION

ALDISERT, Circuit Judge.

****1** Because we write exclusively for the parties and the parties are familiar with ***518** the facts and proceedings below, we will not revisit them here.

I.

The District Court did not err in granting summary judgment in favor of Kia Motors America, Inc. ("KMA") with respect to KMA's good cause termination of its franchise agreement with Maple Shade Motor Corporation. The New Jersey Franchise Protection Act, N.J. STAT. ANN. §§ 56:10–1, *et seq.*, ("NJFPA") prohibits a franchisor from terminating a franchise agreement without giving proper notice to the franchisee and without good cause for the termination. *Id.* § 56:10–5. When evaluating the "good cause" requirement for the termination of a franchise agreement, courts have focused their inquiries on whether a franchisee has breached a material obligation of the franchise agreement. *See* *Gen. Motors Corp. v. New A.C. Chevrolet, Inc.*, 263 F.3d 296, 315–317 (3d Cir.2001). In addressing this materiality requirement, this Court has stated that "a breach is material if it 'will deprive the injured party of the benefit that is justifiably expected' under the contract." *Id.* at 315 (quoting 2 E. ALLEN FARNSWORTH, FARNSWORTH ON CONTRACTS § 8.16, at 497 (2d ed.1998)).

[1] Here, the Addendum to the franchise agreement signed by Maple Shade and KMA expressly stated that Maple Shade's obligation to build an exclusive Kia showroom was a material term of the parties' agreement. This statement indicates that KMA was justified in expecting Maple Shade to build the Kia showroom as it was integral to the parties' agreement. *See* *New A.C.*, 263 F.3d at 316. In addition, KMA's conduct following Maple Shade's failure to meet the deadline for construction of the showroom emphasizes the materiality of the provision. KMA repeatedly admonished Maple Shade for its failure to construct the showroom and encouraged Maple Shade to bring itself into compliance with the agreement.

Because Maple Shade failed to construct the showroom described in the Addendum, Maple Shade breached a material and reasonable term of the parties' agreement. Contrary to Maple Shade's argument, its existing facilities did not substantially comply with the terms of the Addendum as its existing facilities did not provide KMA with a benefit that it justifiably expected under the Addendum, an exclusive Kia showroom. By failing to construct the exclusive Kia showroom required by the Addendum, Maple Shade committed a material breach of the franchise agreement and gave rise to KMA's good cause termination of the franchise agreement.

Therefore, exercising plenary review, *Northview Motors, Inc. v. Chrysler Motors Corp.*, 227 F.3d 78, 87–88 (3d Cir.2000), we are satisfied that the District Court did not err in granting summary judgment in favor of KMA as no genuine issue of material fact existed concerning KMA's good cause termination of the franchise agreement.

II.

The District Court did not err in granting summary judgment in favor of KMA with respect to Maple Shade's claim that KMA improperly rejected its proposed transfer of the Kia franchise to Vallee & Bowe, Inc. The NJFPA describes circumstances for a franchisee's proper transfer of an existing franchise and a franchisor's proper rejection of a franchisee's proposed transfer. *See* N.J. STAT. ANN. § 56:10–6. In this case, KMA's rejection of the proposed transfer was proper.

****2** **[2]** According to the terms of the Consent Agreement executed at the outset of this litigation, Maple Shade had only an interest in a franchise agreement subject ***519** to a notice of termination. The Consent Agreement did not nullify the notice of termination; instead, it preserved the status quo without "modify[ing], increas[ing] or diminish[ing] any of the rights or obligations that either party would otherwise have

after the dealer's receipt of a notice of termination." App. 398A. The status quo at the time the Consent Agreement was entered into was that Maple Shade had no rights in the franchise transferable "free and clear" of the notice of termination. *See* Restatement (Second) of Contracts § 336 cmt. b. Because the District Court found that KMA had good cause to terminate the franchise agreement with Maple Shade and the Consent Agreement preserved the status quo as it existed after KMA issued the notice of termination, KMA's rejection of the proposed transfer "free and clear" did not contravene the NJFPA.

[3] In addition, the proposal for the transfer of the Kia franchise from Maple Shade to Vallee & Bowe anticipated Vallee & Bowe temporarily housing Kia vehicles in its Cadillac showroom until Vallee & Bowe could build a separate Kia showroom. When Maple Shade presented the transfer proposal to KMA, Vallee & Bowe was unable to provide any assurances that General Motors consented to the dualing of the Cadillac and Kia vehicles in Vallee & Bowe's Cadillac showroom. Therefore, Vallee & Bowe was unable to commit to providing any Kia dealership facilities, let alone the exclusive showroom required by the Addendum. Because Vallee & Bowe could not agree to meet all of the requirements of the existing franchise agreement, KMA's rejection of the proposed transfer was not prohibited by the NJFPA. *See* N.J. STAT. ANN. § 56:10–6.

Therefore, exercising plenary review, *Northview Motors,* 227 F.3d at 87–88, we are satisfied that the District Court did not err in granting summary judgment as Maple Shade's attempt to transfer the franchise "free and clear" of the notice of termination and Vallee & Bowe's inability to demonstrate that it could fulfill the requirements of the agreement were proper bases for KMA to reject the proposed transfer.

We have considered all of the contentions raised by the parties and conclude that no further discussion is necessary.

Accordingly, the judgment of the District Court will be affirmed.

All Citations

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excluded the Hyundai assets and reduced the purchase price by $350,000. (56.1 ¶¶ 12-15).

On December 8, 2020, Glick notified HMA via email that it was terminating the HMA franchise, stating "[h]aving not heard from you and given certain time constraints, [Glick] has had to make the difficult decision of terminating the Hyundai franchise effective close of business on December 9, 2020." (56.1 ¶ 9; Sullivan Decl., Ex.17).

This litigation followed.

STANDARD OF REVIEW

Pursuant to Federal Rule of Civil Procedure 56, a court "shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed R. Civ. P. 56(a). "A fact is 'material' if it 'might affect the outcome of the suit under the governing law,' and is genuinely in dispute 'if the evidence is such that a reasonable jury could return a verdict for the nonmoving party.' " *Liverpool v. Davis*, No. 17-CV-3875, 2020 WL 917294, at *4 (S.D.N.Y. Feb. 26, 2020) (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)).[3] " 'Factual disputes that are irrelevant or unnecessary' are not material and thus cannot preclude summary judgment." *Sood v. Rampersaud*, No. 12-CV-05486, 2013 WL 1681261, at *1 (S.D.N.Y. Apr. 17, 2013) (quoting *Anderson*, 477 U.S. at 248). "The question at summary judgment is whether a genuine dispute as to a *material* fact exists—not whether the parties have a dispute as to any fact." *Hernandez v. Comm'r of Baseball*, No. 22-343, 2023 WL 5217876, at *5 (2d Cir. Aug. 15, 2023); *McKinney v. City of Middletown*, 49 F.4th 730, 737 (2d Cir. 2022)).

The Court's duty, when determining whether summary judgment is appropriate, is "not to resolve disputed issues of fact but to assess whether there are any factual issues to be tried." *McKinney*, 49 F.4th at 738 (quoting *Wilson v. Nw. Mut. Ins. Co.*, 625 F.3d 54, 60 (2d Cir. 2010)). Indeed, the Court's function is not to determine the truth or weigh the evidence. The task is material issue spotting, not material issue determining. Therefore, "where there is an absence of sufficient proof as to one essential element of a claim, any factual disputes with respect to other elements of the claim are immaterial." *Bellotto v. Cty. of Orange*, 248 F. App'x 232, 234 (2d Cir. 2007) (quoting *Salahuddin v. Goord*, 467 F.3d 263, 281 (2d Cir. 2006)).

"It is the movant's burden to show that no genuine factual dispute exists." *Vermont Teddy Bear Co. v. 1-800 Beargram Co.*, 373 F.3d 241, 244 (2d Cir. 2004) (citing *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157 (1970)). The Court must "resolve all ambiguities and draw all reasonable inferences in the non-movant's favor." *Id.* (citing *Giannullo v. City of N.Y.*, 322 F.3d 139, 140 (2d Cir. 2003)). Once the movant has met its burden, the non-movant "must come forward with specific facts showing that there is a genuine issue for trial." *Liverpool*, 2020 WL 917294, at * 4 (quoting *Matsushita Elec. Indus. Co.* v. *Zenith Radio Corp.*, 475 U.S. 574, 586-87 (1986)). The non-movant cannot defeat a summary judgment motion by relying on "mere speculation or conjecture as to the true nature of the facts." *Id.* (quoting *Knight* v. *U.S. Fire Ins. Co.*, 804 F.2d 9, 12 (2d Cir. 1986)). However, if "there is any evidence from which a reasonable inference could be drawn in favor of the opposing party on the issue on which summary judgment is sought, summary judgment is improper." *Sood*, 2013 WL 1681261, at *2 (citing *Sec. Ins. Co. of Hartford v. Old Dominion Freight Line Inc.*, 391 F.3d 77, 83 (2d Cir. 2004)).

***3** Should there be no genuine issue of material fact, the movant must also establish its entitlement to judgment as a matter of law. *See Glover v. Austin*, 289 F. App'x 430, 431 (2d Cir. 2008) ("Summary judgment is appropriate if, but only if, there are no genuine issues of material fact supporting an essential element of the plaintiffs' claim for relief."); *Pimentel v. City of New York*, 74 F. App'x 146, 148 (2d Cir. 2003) (holding that because plaintiff "failed to raise an issue of material fact with respect to an essential element of her[ ] claim, the District Court properly granted summary judgment dismissing that claim"). Simply put, the movant must separately establish that the law favors the judgment sought.

ANALYSIS

I. First Claim for Relief: Violation of the ADDCA

Plaintiff's First Claim for Relief asserts a violation of the ADDCA in connection with Defendant's allegedly

unreasonable refusal to consent to the proposed transfer to Gabrielli. (Compl. ¶¶ 43-51). The ADDCA provides in pertinent part that "[a]n automobile dealer may bring suit against any automobile manufacturer ... by reason of the failure of said automobile manufacturer ... to act in good faith in performing or complying with any of the terms or provisions of the franchise ...." 15 U.S.C. § 1222. The term "good faith" is statutorily defined as "the duty of each party to any franchise, and all officers, employees, or agents thereof to act in a fair and equitable manner toward each other so as to guarantee the one party freedom from coercion, intimidation, or threats of coercion or intimidation from the other party ...." 15 U.S.C. § 1222(e).

"Courts in the Second Circuit have noted that 'good faith' under the ADDCA 'has a narrow, restricted meaning.' " *Action Nissan, Inc. v. Nissan N. Am.*, 454 F. Supp. 2d 108, 118 (S.D.N.Y. 2006) (citing *Bronx Chrysler Plymouth, Inc. v. Chrysler Corp.*, 212 F. Supp. 2d 233, 245 (S.D.N.Y. 2002)). To assert a claim under the ADDCA, "[a] dealer must show[ ] that the manufacturer coerced the dealer, and that the coercion was calculated to achieve a wrongful objective." *Kings Autoshow, Inc. v. Mitsubishi Motors of N. Am., Inc.*, No. 22-CV-07328, 2023 WL 5200398, at *11 (E.D.N.Y. Aug. 14, 2023); *see also* *Empire Volkswagen Inc. v. World-Wide Volkswagen Corp.*, 814 F.2d 90, 95-96 (2d Cir. 1987) ("Failure to act in good faith under the [ADDCA] can be found only 'where there is evidence of a wrongful demand enforced by threats of coercion or intimidation.' "); *Lazar's Auto Sales, Inc. v. Chrysler Fin. Corp.*, 83 F. Supp. 2d 384, 388 (S.D.N.Y. 2000) ("summary judgment will be granted unless Plaintiff introduces some evidence that [defendant] made a *wrongful* demand and then *enforced it by threats or coercion or intimidation.*" (emphasis in original)). "A wrongful demand may be inferred 'from all the facts and circumstances' even in the absence of evidence that a formal, explicit demand was made." *Bronx Chrysler Plymouth, Inc.*, 212 F. Supp. 2d at 245 (citing *Marquis v. Chrysler Corp.*, 577 F.2d 624, 634 (9th Cir. 1978)). "Of course, lack of good faith does not mean simply unfairness or breach of a franchise agreement. If the manufacturer has an objectively valid reason for its actions, the plaintiff cannot prevail without evidence of an ulterior motive." *Action Nissan, Inc.*, 454 F. Supp. 2d at 118 (internal citations and quotations omitted).

Here, Plaintiff alleges that Defendant failed to act with "good faith" with respect to the provision of the Dealer Agreement requiring Defendant not to unreasonably withhold consent to change in ownership. (Pl. Br. at 13). Defendant contends that the claim fails because there is no evidence that Defendant made any wrongful demands that were enforced by threats of coercion or intimidation. (Def. Br. at 15). Plaintiff argues that "[t]he circumstances of this case, as well as HMA's course of conduct leading up to the March 19 Denial Letter, demonstrate that HMA coerced Glick by using a pretextual reason to reject the proposed sale and franchise transfer between Glick and Gabrielli." (Pl. Br. at 14). Plaintiff further contends that the "facts and circumstances" demonstrate that an issue of fact exists as to "whether HMA sought the wrongful demand of terminating Glick's franchise without complying with the requirements of New York State law." (*Id.* at 18-19). Specifically, Plaintiff asserts that Defendant used its authority over the proposed transfer as a means for circumventing the statutory requirements for terminating a franchise. (*Id.*).

***4** Even assuming *arguendo* that Defendant had the ulterior motive to terminate Plaintiff's franchise, Plaintiff does not offer evidence of any coercive conduct enforcing a wrongful demand made by Defendant. Plaintiff generally references the "circumstances of this case" and a "course of conduct leading up to the March 19 Denial Letter" (Pl. Br. at 14), but does not identify any specific conduct that was coercive. Nor does Plaintiff explain what Defendant was coercing Plaintiff to do. *C.f. Action Nissan, Inc.*, 454 F. Supp. 2d at 120 (denying summary judgment as to ADDCA claim where the franchisor's allegedly threatening or coercive behavior included repeated threats to terminate the franchise agreement unless the dealer relocated and frustration of the dealer's attempts to relocate through purposeful obfuscation and delay in approving both relocation sites and repairs to its existing facility). "[A] complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial. The moving party is 'entitled to a judgment as a matter of law' because the nonmoving party has failed to make a sufficient showing on an essential element of [its] case with respect to which [it] has the burden of proof." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). Plaintiff's failure to produce any evidence of coercive conduct or a wrongful demand constitutes a failure of proof and is insufficient to create a genuine dispute of material fact. *See Gray v. Toyota Motor Sales, U.S.A., Inc.*, 806 F. Supp. 2d 619, 627 (E.D.N.Y. 2011) (dismissing ADDCA claim based on defendant's refusal to consent to proposed franchise transfers where Plaintiff failed to allege that defendant engaged in coercive, intimidating,

or threatening conduct); *Gen. Motors Corp. v. Dealmaker, LLC*, No. 07-CV-00141, 2007 WL 2454208, at *5 (N.D.N.Y. Aug. 23, 2007) (dismissing ADDCA claim where "[e]ven assuming GM wanted to terminate Seaway's dealership, there is no allegation supporting a plausible claim of coercion or intimidation, or of threats of coercion or intimidation."). [4] Defendant is, accordingly, entitled to summary judgment dismissing the First Claim for Relief.

II. Third Claim for Relief: Breach of Contract

Plaintiff's Third Claim for Relief alleges that Defendant unreasonably withheld consent to the transfer in violation of Section 5 of the Dealer Agreement which provided that any change in ownership of the dealership "requires the prior written consent of HMA, which HMA shall not unreasonably withhold." (Compl. ¶¶ 58-65; 56.1 ¶ 2). Defendant argues this claim fails because (i) Defendant's denial based on Gabrielli's lack of car dealership experience was reasonable as a matter of law; and (ii) the evidence does not support that Defendant had an ulterior motive or that Defendant would have approved the transfer "but for" such ulterior motive. (Def. Br. at 8). The Court addresses each argument *seriatim*.

a. Reasonableness

Here it is undisputed that Romo Gabrielli, the proposed Dealer Principal of the dealership, did not have experience owning or operating a new car dealership at the time of the proposed transfer. (56.1 ¶ 8). Defendant refused the proposed transfer on the stated ground that Gabrielli did not meet its requirement of having experience owning and operating a new car dealership. (*Id*. ¶ 7). The Court finds that Defendant relied on a reasonable factor in refusing to consent to the proposed transfer. [5]

In assessing whether consent was unreasonably withheld pursuant to Section 5 of the Dealer Agreement, cases analyzing the analogous statutory requirement—N.Y. Veh. & Traf. Law § 463(2)(k) which makes it unlawful to "unreasonably withhold consent" to a transfer—are instructive. *See i.e. Gray*, 806 F. Supp. 2d at 623-24 (granting motion to dismiss breach of contract claim where plaintiff alleged franchisor unreasonably withheld consent to transfer based on customer satisfaction scores). Specifically, Defendant relies on the "reasonableness" standard articulated in *In re Van Ness Auto Plaza, Inc.*, which held that withholding consent is reasonable "if it is supported by substantial evidence showing that the proposed assignee is materially deficient with respect to one or more appropriate, performance-related criteria." 120 B.R. 545, 549 (Bankr. N.D. Cal. 1990)*; see also Pacesetter Motors, Inc. v. Nissan Motor Corp. in U.S.A.*, 913 F. Supp. 174, 179 (W.D.N.Y. 1996) (finding that the location of the dealership is an "appropriate, performance-related criteria" that supported Nissan's refusal to consent to the proposed sale) (applying California law). The *Van Ness* court identified "the extent of prior experience of the proposed dealer" as one of several factors relevant to assessing the likelihood of success or performance under the franchise. *In re Van Ness Auto Plaza, Inc.,* 120 B.R. at 547. [6]

***5** Further, at least one court in this Circuit found the consideration of a prospective dealer's prior experience to be reasonable. *See Ford Motor Co. v. W. Seneca Ford, Inc.*, No. 91-CV-00784, 1996 WL 685723, at *6 (W.D.N.Y. Nov. 21, 1996), *as amended* (Jan. 30, 1997) (finding rejection of a proposed dealership sale reasonable where one of the proposed buyers did not have any retail sales experience and the other proposed buyer had low customer satisfaction ratings at the dealership he managed); *see also Bevilacque v. Ford Motor Co.*, 605 N.Y.S.2d 356, 358 (App. Div. 1993) (finding it was reasonable to withhold consent to a franchise sale where the prospective purchaser had "limited experience" in automotive industry). Accordingly, the Court finds that the extent of a prospective dealer's prior experience operating the type of dealership that is the subject of the transfer is an appropriate consideration related to performance.

Moreover, the specific circumstances of this case do not render prior car dealership experience an unreasonable consideration. Plaintiff essentially argues that it was unreasonable to consider Gabrielli's lack of car dealership experience given that Mr. Gabrielli had experience selling trucks [7] and believed this experience would allow him to successfully sell cars. (Pl. Br. at 22). While Mr. Gabrielli may be correct that his experience operating a heavy-duty truck dealership is transferable to the operation of a car dealership, this fact does not make it unreasonable for Defendant to require car dealership experience. Indeed, "a reviewing court should not substitute its judgment for that of the manufacturer/distributor, but only look for a substantial basis for its determination." *Pacesetter Motors, Inc.*, 913 F. Supp. at 179 (citing *In re Van Ness Auto Plaza, Inc.*, 120 B.R. at 546). The advantages of a proposed dealer of a car dealership having prior experience operating a car dealership

are obvious, and the Court is not persuaded that it was unreasonable under Section 5 of the Dealer Agreement for Defendant to withhold consent on that basis. [8]

b. Pretext Theory

Plaintiff contends that even if Defendant's denial was reasonable as a matter of law, an issue of fact exists as to whether Gabrielli's lack of new car dealership experience was the "*true reason*" for the denial, and the fact that its justification was pretextual "nullifies its facial 'reasonableness.' " [9] (Pl. Br. at 21-28) (emphasis in original). Defendant responds that "(1) there is insufficient evidence to support, and ample evidence to contradict, the pretext theory; and (2) in any event, there is no evidence that HMA would have approved Gabrielli 'but for' an alleged desire to close the point." (Def. Br at 20). Accordingly, the Court considers whether Defendant's stated basis for denying the transfer–lack of car dealership experience–was merely pretext for Defendant's ulterior motive—to dissolve the primary market area that encompassed Plaintiff's dealership in Monticello.

***6** Plaintiff first points to market studies performed by Defendant in the days leading up to the March 19 Denial Letter as evidence of its ulterior motive. (Pl. Br. at 7, 25; Sullivan Decl., Ex. 7 "Kato Tr.," Part 6 at 122:1-11; *id.*, Exs. 23-24). Specifically, Plaintiff highlights that one such study, the market action analysis, included a proposed scenario after dissolving Plaintiff's dealership. (Sullivan Decl., Ex. 23 at HMA_002632). Defendant explains that this proposed scenario stems from a cross-sell analysis which was conducted at the direction of one of its employees, Dave O'Brien, who thought that Plaintiff might voluntarily terminate its franchise if the transfer was rejected and wanted to determine whether Plaintiff's dealership would need to be replaced. (Def. Br. at 20-21; Reply at 9-10). Mark Kato, a Senior Group Manager for Defendant, wrote in a March 11, 2020 email that "Dave O'Brian advised that if we deny the buy/sell he thinks the dealer may [voluntarily terminate] the point." (Sullivan Decl., Ex. 23 at HMA_002607; *id.*, Ex. 9 "Grafton Tr.," Part 5 at 106:21-25). The result of the cross-sell analysis was a recommendation that if Plaintiff voluntarily terminated its Monticello dealership, the point should be dissolved because other Hyundai dealers were adequately covering the area. (Sullivan Decl., Ex. 23 at HMA_002608). Defendant's explanation for this cross-sell analysis is supported by its employees' testimony. (Def. Br. at 20-21; Pl. Br. at 7; Sullivan Decl., Ex. 23 at HMA_002607; *id.*, Ex. 5 "O'Brien Tr.," Part 5 at 102:12-103:4, 105:10-16; Kato Tr., Part 5 at 117:8-11).

Relatedly, Plaintiff argues that the fact that Defendant's studies evaluated its performance is evidence of an ulterior motive because a franchise seller's performance is irrelevant to determining whether to approve a proposed transfer. (Pl. Br. at 7, 25; Sullivan Decl., Ex. 24 at HMA_00068-69). Defendant responds that Plaintiff's performance is standard background information included in a market action analysis (Reply at 10; Kato Tr., Part 5 at 107:3-25; Grafton Tr., Part 5 at 99:2-21; Sullivan Decl., Ex. 11 "Broussard Tr.," Part 6 at 120:8-18), as well as necessary information for a cross-sell analysis which measures the exchange of sales between various primary market areas. (Grafton Tr., Part 5 at 106:16-18). Ultimately, the fact that these market studies and evaluations were conducted in the days leading up to the transfer denial is at least some evidence of Defendant's purported ulterior motive, even if not evidence that Defendant acted on that ulterior motive.

Next, Plaintiff argues that the lack of any "written set of policies or guidelines" supporting the reason for Defendant's denial is evidence of an ulterior motive. (Pl. Br. at 8). Specifically, the ownership interest guide at the time did not include the requirement of having experience "owning and operating new car dealerships." (*Id*. at 8-9, 25; Sullivan Decl., Ex. 36). Plaintiff also takes issue with the varying terminology Defendant has used to describe the requisite experience (i.e. "car", "automobile," "motor vehicle," and "passenger vehicle" dealership experience). (Pl. Br. at 9-10, 26). Defendant contends that Plaintiff's argument regarding terminology is pure semantics, that it had no statutory or contractual obligation to have a written policy, and that its employees' testimony shows that Defendant considered prior experience operating dealerships that sell the types of vehicles that Hyundai sells. (Reply at 8; Sullivan Decl., Ex. 8, "Hyland Tr.," Part 2 at 36:18-21, 37:12-38:7; Grafton Tr., Part 2 at 43:8-15; Kato Tr., Part 6 at 136:4-10; O'Brien Tr., Part 5 at 94:4-15; Broussard Tr., Part 4 at 77:5-78:17). Although a written policy statement was not required, the Court takes note of the fact that the experience requirement was not memorialized in writing and that the new version of the ownership interest guide, issued mere months after the denial, included new language when describing dealers' requirements: "demonstrated experience owning and operating other successful *new motor vehicle franchises* ...." (Pl. Br. at 10; Sullivan Decl., Ex. 37) (emphasis in original).

Finally, Defendant points out that the steps it took after the denial are inconsistent with its purported ulterior motive of closing the Monticello location. (Def. Br. at 21-22). Defendant renewed Plaintiff's Dealer Agreement effective May 5, 2020. (Sullivan Decl., Ex. 26, "O'Brien Decl." ¶ 2). In October 2020, Plaintiff proposed relocating its franchise to a nearby location in Monticello and Defendant conditionally approved the relocation (although Plaintiff ultimately decided to terminate the franchise in December 2020). (Sullivan Decl., Ex. 2 "Glick Tr." at 168:7-13; *id.*, Ex. 29; Kato Tr., Part 6 at 138:4-11; O'Brien Tr., Part 6 at 118-6:20, 119:12-18). While this conduct is certainly relevant to the factual question at hand, it does not necessarily preclude a finding that Defendant sought to advance an ulterior motive when denying the transfer. Based on this record, an issue of fact remains as to whether Defendant's basis for denying the transfer was pretext for its ulterior motive of closing the Monticello location.

***7** Defendant contends that, assuming *arguendo* that there is sufficient evidence of an ulterior motive, there is no evidence that Defendant would have approved Gabrielli if not for its alleged desire to close the Monticello location. [10] (Def. Br. at 24). Defendant supports this proposition with employee testimony that Gabrielli's lack of experience was the sole basis for withholding consent and that the cross-sell analysis was not a factor in that decision. (*Id*. at 22). Plaintiff responds that an issue of fact exists as to whether Defendant would have approved the transfer but for its ulterior motive to dissolve the Monticello location. (Pl. Br. at 24, 28). The Court agrees with Plaintiff. Even considering the employee testimony, the documentary evidence shows that (i) Defendant considered the voluntary termination of Plaintiff's franchise as a possible outcome of denying the proposed transfer and (ii) Defendant's employee recommended that, if that termination came to fruition, Defendant should dissolve the Monticello dealership. The Court cannot determine on this record whether the recommendation to dissolve the Monticello dealership motivated, in whole or in part, Defendant to deny the transfer.

Accordingly, a genuine issue of material fact remains as to Defendant's basis for withholding consent to the transfer. The Court, therefore, cannot determine whether Defendant's withholding of consent was unreasonable under Section 5 of the Dealer Agreement. Defendant's motion is denied as to the Third Claim for Relief.

III. Second Claim for Relief: Violation of Section 466 of the Dealer Act

The Dealer Act provides that, "[i]t shall be unlawful for any franchisor, notwithstanding the terms of any franchise contract ... [t]o unreasonably withhold consent to the sale or transfer of an interest, in whole or in part, to any other person or party by any franchised motor vehicle dealer or any partner or stockholder of any franchised motor vehicle dealer." N.Y. Veh. & Traf. Law § 463(2)(k). The Dealer Act further provides that "[i]t shall be unlawful for a franchisor directly or indirectly to impose unreasonable restrictions on the franchised motor vehicle dealer relative to transfer, sale, right to renew or termination of a franchise, discipline, noncompetition covenants, site-control (whether by sublease, collateral pledge of lease or otherwise), right of first refusal to purchase, option to purchase, compliance with subjective standards and assertion of legal or equitable rights with respect to its franchise or dealership." N.Y. Veh. & Traf. Law § 466(1).

Plaintiff's Second Claim for Relief alleges that "Defendant unreasonably restricted Plaintiff's ability to transfer the Dealership assets to Gabrielli" in violation of Section 466 of the Dealer Act. (Compl. ¶ 55). Defendant argues that Plaintiff's allegations are more properly made under Section 463(2)(k) of the Dealer Act, but, are barred by the applicable 120-day statute of limitations. (Def. Br. at 26-29). Defendant further argues that permitting Plaintiff to use Section 466 to "evade" Section 463(2)(k)'s statute of limitations violates well-established principles of statutory construction. (*Id*.). Although Plaintiff's Second Claim for Relief may be better housed as a violation of Section 463(2)(k), the Court considers Plaintiff's claim as asserted—a violation of Section 466—which is not precluded on limitations grounds. [11] (Pl. Br. at 19-20).

***8** "By the language of [N.Y. Veh. & Traf. L. § 466(1)], the New York Legislature prohibits a franchisor from 'directly or indirectly impos[ing] unreasonable restrictions on the franchised motor vehicle dealer relative to transfer ... of a franchise.' " *CMS Volkswagen Holdings, LLC v. Volkswagen Grp. of Am., Inc.*, 25 F. Supp. 3d 432, 443 (S.D.N.Y. 2014), *vacated and remanded on other grounds*, 669 F. App'x 602 (2d Cir. 2016); *Gray*, 806 F. Supp. 2d at 626–27 ("[T]he harm sought to be remedied by [Section 466] is 'unreasonable restrictions' on a dealer's right to, among other things, transfer, sell or renew its franchise."); *see also Smith Cairns Subaru, Inc. v. Subaru Distrib. Corp.*, 981

N.Y.S.2d 638 (Sup. Ct. 2013). "[T]his section does not refer to a franchisor 'withholding' consent...." *CMS Volkswagen Holdings, LLC*, 25 F. Supp. 3d at 443. Accordingly, the question is not whether Defendant's decision to withhold consent to the transfer was unreasonable, but whether Defendant's requirement that proposed transferees have prior car dealership experience constitutes an unreasonable restriction on Plaintiff's ability to transfer its franchise. The Court finds that it was not.

Plaintiff contends that Defendant acted unreasonably under Section 466 by basing its denial on the lack of new car dealership experience. (Pl. Br. at 21-22). But Plaintiff fails to explain how Defendant's imposition of the prior car dealership experience requirement unreasonably restricted its ability to transfer. (Def. Br. at 28-29). As discussed in detail *supra*, it was not unreasonable for Defendant to consider a prospective dealer's prior car dealership experience. *See i.e. Gray*, 806 F. Supp. 2d at 627 (dismissing Section 466 claim). Moreover, Plaintiff's pretext theory is premised on Defendant allegedly having ulterior motivations for withholding consent to the transfer and is not applicable to this statutory claim. Accordingly, the Court finds that summary judgment is warranted as to the Second Claim for Relief.

IV. Computation of Damages

Defendant seeks, in the alternative, an order that Plaintiff's compensatory damages are limited to $350,000. (Def. Br. at 29). Pursuant to Federal Rule of Civil Procedure 56(g), "[i]f the court does not grant all the relief requested by the motion, it may enter an order stating any material fact—including an item of damages or other relief—that is not genuinely in dispute and treating the fact as established in the case." "The decision of the Court to enter an order limiting relief under Rule 56(g) 'is a matter of discretion.' " *D'Iorio v. Winebow, Inc.*, 68 F. Supp. 3d 334, 356 (E.D.N.Y. 2014).

Here, it is undisputed that the only category of damages Plaintiff is seeking is the lost sale price of the dealership (except for attorneys' fees, costs, disbursements, and interest). (56.1 ¶ 10). Plaintiff and Gabrielli executed the "Third Amendment" to the ASA on July 27, 2020 which excluded the Hyundai assets. (*Id*. ¶¶ 12-13). Plaintiff admits that "the amount that the price of the operating assets were reduced as a result of the removal of the Hyundai franchise was $350,000." (*Id*. ¶ 15). Plaintiff offers an alternate calculation of $550,000 based on the value allocated in the prior version of ASA. (*Id*. ¶ 16; Pl. Br. at 29). Plaintiff also argues that it had another buyer willing to purchase the franchise for $450,000. (Pl. Br. at 29). The Court agrees with Defendant that Plaintiff's compensatory damages are limited to the undisputed amount that it lost in the sale to Gabrielli. [12] (Reply at 13). Accordingly, the Court grants Defendant's application to limit Plaintiff's entitlement to compensatory damages for the lost sale price to $350,000.

CONCLUSION

***9** For the foregoing reasons, Defendant's motion for summary judgment is GRANTED as to Plaintiff's First and Second Claims for Relief and DENIED as to Plaintiff's Third Claim for Relief. Additionally, Plaintiff's entitlement to damages for the lost sale price, subject to its ability to prove such damages at trial, is limited to $350,000.

The parties are directed to meet and confer and comply with Rules 6(A) and 6(B) of the Court's Individual Practices (rev. March 19, 2024) by filing the documents required therein, which include a joint pretrial order, proposed joint *voir dire* questions, joint requests to charge, joint verdict form, and any motions *in limine*, on or before October 1, 2024.

A pretrial conference has been scheduled for December 4, 2024 at 2:30 p.m. to be held in Courtroom 520 of the White Plains courthouse.

The Clerk of Court is respectfully requested to terminate the pending motion sequence (Doc. 45).

SO ORDERED.

Dated: White Plains, New York

August 28, 2024

All Citations

Slip Copy, 2024 WL 3992387

Footnotes

1 Citations to the documents referenced herein correspond to the pagination generated by ECF.

2 Defendant filed two versions of its Rule 56.1 Statement. (Docs. 55-56). The Court refers herein to the later-filed document (Doc. 56) which is titled "[Corrected] Defendant's Rule 56.1 Statement and Plaintiff's Responses Thereto."

3 Unless otherwise indicated, case quotations omit all internal citations, quotation marks, footnotes, and alterations.

4 *See also* *Fray Chevrolet Sales, Inc. v. Gen. Motors Corp.*, 536 F.2d 683, 685 (6th Cir. 1976) ("In the absence of coercion, intimidation, or threats thereof, there can be no recovery through the day-in-court statute, even if the manufacturer otherwise acted in 'bad faith' as that term is normally used.")(internal quotations and citations omitted); *Mathew Enter., Inc. v. FCA US, LLC*, No. 16-CV-03551, 2016 WL 6778534, at *6 (N.D. Cal. Nov. 16, 2016), *aff'd*, 751 F. App'x 983 (9th Cir. 2018).

5 Plaintiff argues that "reasonableness" is a "fact intensive question" that cannot be determined on summary judgment. (Pl. Br. at 22). But the case Plaintiff relies on, *Maltbie's Garage Co., Inc. v. Gen. Motors LLC*, is inapplicable given that the court held that it was "unable to make this [reasonableness] determination at the *motion to dismiss stage*." No. 21-CV-00581, 2021 WL 4972738, at *5 (N.D.N.Y. Oct. 26, 2021) (emphasis added).

6 At least two courts in this Circuit have relied on *Van Ness* to support the proposition that a prospective dealer's poor "customer satisfaction" score is a reasonable basis on which to turn down a candidate. *See i.e.* *Gray*, 806 F. Supp. 2d at 623; *H.B. Auto. Grp., Inc v. Kia Motors Am.*, No. 13-CV-04441, 2016 WL 4446333, at *5 (S.D.N.Y. Aug. 22, 2016) ("Customer satisfaction scores are valid grounds on which to refuse a transfer proposal.").

7 While there is no dispute that Gabrielli did not have prior experience operating a new *car* dealership, Plaintiff points out that Gabrielli had experience operating at least six other motor vehicle dealerships. (Pl. Br. at 22; Sullivan Decl., Ex. 4 ("R. Gabrielli Tr.") at 62:10-12)). Specifically, Mr. Gabrielli referred to himself as a "new truck dealer[ ]" as opposed to a "new car dealer[ ]." (*Id*. at 46:5-8). He testified that he did not have any experience selling new cars other than company vehicles, nor any experience selling SUVs other than to commercial clients. (*Id*. at 48:24-49:4, 57:9-15). He further testified that at some point he had been selling pick-up trucks, including "possibly" the Ford F-150. (*Id*. at 57:16-58:2, 23:8-13). He also testified that his Bridgehaven Ford dealership does business in truck sales and that it does not sell "minivans or other consumer vehicles." (*Id*. at 22:20-23:25). Accordingly, the evidence is clear that Mr. Gabrielli had experience selling trucks to commercial clients and not selling cars to the general public. (Reply at 7-8).

8 Plaintiff also argues that Defendant's denial was unreasonable because another automaker, General Motors, "took no issue with Gabrielli's purported lack of experience." (Pl. Br. at 22) (citing R. Gabrielli Tr. at 12, 32:3-5). Without further context, this unsupported assertion about General Motor's determination is not persuasive evidence that Defendant's determination was unreasonable in this case.

9 Courts have considered similar pretext theories in the context of withholding consent to a franchise sale or transfer. *See i.e.* *Gray*, 806 F. Supp. 2d at 627 (finding that "Plaintiffs' suggestion that Defendant's reliance on CSI ratings was merely a pretext for refusing consent" was insufficiently pled); *see* *In re Van Ness Auto Plaza, Inc.*, 120 B.R. at 550 ("The reasons stated by Porsche for withholding consent were not pretexts to mask other reasons for withholding consent.").

10 Defendant asserts that where, as here, a statute prohibits actions based on proscribed motives and the defendant's action was based on mixed motives, plaintiff must establish that defendant would not have made the same decision "but for" the unlawful conduct. (Def. Br. at 24-26 (citing *Comcast Corp. v. Nat'l Ass'n of Afr. Am.-Owned Media*, 589 U.S. 327, 332 (2020))). Defendant further contends that New York courts interpret statutes to be consistent with common-law rules unless the statute provides otherwise. (*Id*. (citing *Transit Comm'n v. Long Island R.R. Co.*, 235 N.Y. 345, 354-55 (1930)).

11 Other Courts in this Circuit have considered a franchisor's refusal to consent to transfer of a franchise as violations of both Sections 463(2)(k) and 466. *See H.B. Auto. Grp., Inc.*, 2016 WL 4446333, at *5; *see also Gray* 806 F. Supp. 2d at 627.

12 *See V.S. Int'l, S.A. v. Boyden World Corp.*, 862 F. Supp. 1188, 1197 (S.D.N.Y. 1994) ("In assessing damages, it is axiomatic that a party injured by a breach of contract must be placed in the same economic position in which he would have been, had the contract been fully performed ... [A] plaintiff must prove the existence of damages with certainty in order to recover for breach of contract ... New York law does not countenance damage awards based on [s]peculation or conjecture.") (internal quotations omitted).

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