STATE OF NEW HAMPSHIRE
SUPREME COURT

Case No. 2017-0714

TS&A Motors, LLC d/b/a Kia of Somersworth

v.

Kia Motors America, Inc.

Rule 7 Appeal

Brief for Appellee Kia Motors America, Inc.

Kevin M. Fitzgerald (N.H. Bar No. 806)
Nathan P. Warecki (N.H. Bar No. 20503)
NIXON PEABODY LLP
900 Elm Street, 14th Floor
Manchester, NH 03101
(603) 628-4000
(603) 628-4040
kfitzgerald@nixonpeabody.com

Catherine E. Stetson (pro hac vice)
Kirti Datla* (pro hac vice)
HOGAN LOVELLS US LLP
555 13th Street, NW
Washington, D.C. 20004
(202) 637-5600
(202) 637-5491
cate.stetson@hoganlovells.com

*Admitted only in Texas;
supervised by firm members

Counsel for Appellee Kia Motors America, Inc.

Attorney Stetson to Argue

TABLE OF CONTENTS

Page(s)

TABLE OF AUTHORITIES

Page(s)

Federal Cases

State Cases

Federal Statutes

State Statutes

Rules

Other Authorities

QUESTION PRESENTED

Whether the Superior Court correctly concluded that Kia had "good cause" to terminate Kia of Somersworth's franchise, where Kia first acquired knowledge of the breach for which it issued its termination notice – the dealership's failure to employ any personnel in its service and parts departments – well within the 180-day statutory look-back period.

STATEMENT OF FACTS

A. The Regulation of Motor Vehicle Manufacturers and Dealers in New Hampshire

The New Hampshire Dealership Act, RSA chapter 357-C (the "Dealership Act"), regulates the activities of motor vehicle manufacturers and dealers in the state. *See Roberts v. Gen. Motors Corp.*, 138 N.H. 532, 536 (1994). It "protect[s] automobile consumers" and governs "the relationships between automobile manufacturers and their dealers." *Id.* This case concerns a provision that sets forth how a manufacturer may end a franchise relationship with a dealer.

The termination provision, codified at RSA 357-C:7, I, contains four requirements that must be met for a manufacturer to terminate a franchise relationship. Those are: "(1) notice; (2) good faith; (3) good cause; and (4) either the [New Hampshire Motor Vehicle Industry] Board's determination of good cause or the dealer's acquiescence . . . either by its written consent or by its failure to protest . . . in a timely manner." *Strike Four, LLC v. Nissan N. Am., Inc.*, 164 N.H. 729, 737 (2013). The Act's definition of "good cause" for a termination, in turn, has four components. Good cause exists when (1) a dealer has "fail[ed] . . . to comply with a provision of the franchise," (2) where the provision is "reasonable," (3) where the provision is "of material significance to the franchise relationship," and (4) where "the manufacturer . . . first acquired actual or constructive knowledge" of the dealer's failure to comply "not more than 180 days prior to the date on which notification is given." RSA 357-C:7, II(a). The fourth requirement, related to timing, is commonly referred to as the "look-back" period.

If a dealer disagrees with a termination decision, it may file a protest with the Motor Vehicle Industry Board within 45 days of receiving notice of the termination. *See id.* 357-C:7, I(d)(1). The Board must then hold a hearing and rule on whether good cause exists. *See id.*

Under the current version of the statute, if a dealer files a protest, the franchise "remain[s] in full force and effect . . . prior to a final determination by the [B]oard and any appeal." *Id.*

B. Kia and Somersworth Enter Into a Franchise Agreement

In December of 2007, Kia Motors America, Inc. ("Kia") and TS & A Motors, LLC d/b/a Kia of Somersworth ("Somersworth") entered into a written franchise agreement (the "Dealer Agreement") authorizing Somersworth to operate a Kia dealership in accordance with the terms of the agreement. *See* Somersworth App'x at 19, ¶ 1. In subsequent years, Somersworth repeatedly failed to meet various requirements, either in the Dealer Agreement or in other documents issued by Kia, relating to the operation of the dealership. These various issues led to a stream of correspondence between Kia and Somersworth.

In early 2011, for example, Kia wrote to Somersworth about the dealership's compliance with "Warranty Bulletin 2007-14," which imposed requirements to ensure that "a fully-trained Kia technician performs warranty repairs and verifies that the customer concern has been remedied." *Id.* at 1 (Mar. 17, 2011 letter from Kia Regional Director Michael Tocci to Somersworth owner Said Yahyapour). The letter explained that Somersworth was "one of a small group of Kia dealers that . . . failed to meet the minimum technician training requirements for the last two consecutive years." *Id.* It offered information about how Somersworth could bring its technicians up to par, along with a warning that the deficiencies would affect "the payment of warranty repair claims until full dealer certification [wa]s achieved." *Id.* at 2.

Later that same year, Kia's District Parts and Service Manager visited the Somersworth dealership, only to find the parts and service departments "closed, with the doors locked and the lights off." *See id.* at 3 (Dec. 1, 2011 letter from Mr. Tocci to Mr. Yahyapour). Kia learned that Somersworth's "entire Kia service and parts staff" at that time was a single "service manager and a single technician, neither of whom is adequately trained," and that Somersworth had

temporarily closed the departments because the service manager had pneumonia. *Id.* This was unacceptable to Kia; a dealer's "ability to keep its service operation open for business cannot rest entirely on two individuals." *Id.* It accordingly informed Somersworth that "[t]he closure constitute[d] a breach" of the Dealer Agreement. *Id.* Its letter referenced a provision of the agreement that required Somersworth to remain open during "customary and lawful" business days and hours. *Id.* It also referred to a requirement to "employ and train sufficient personnel to fulfill its obligations and to conduct its operations in accordance with the Business and Operating Plan," which in turn required Somersworth to staff the dealership "with, among others, a service manager, a service advisor, a parts manager, an additional parts employee, and two technicians." *Id.* Kia acknowledged that Somersworth had subsequently "re-opened" the departments, but it warned Somersworth to "act immediately to properly staff its Kia operations and to ensure that its personnel meet [Kia's] training requirements." *Id.*

A few months later, Kia notified Somersworth of a new issue. In January of 2011, Somersworth had entered into an agreement "in connection with the distribution of [Kia's] hybrid vehicle," the Kia Optima Hybrid. *Id.* at 6 (Mar. 20, 2012 letter from Mr. Tocci to Mr. Yahyapour). That agreement contained a requirement that "at least two active technicians . . . successfully complete all service training, courses and certification tests . . . relating to the Kia Optima Hybrid." *Id.* But Somersworth had "failed to meet the minimum number of technicians required to participate in the Kia Optima Hybrid Program." *Id.* Kia gave Somersworth 90 days to cure its deficiency and explained that, if it did not, Kia could "suspend or terminate . . . participation in the Kia Optima Hybrid Program, including the allocation of hybrid vehicles." *Id.*

These infractions did not, however, mark the end of Somersworth's compliance issues.

C. Kia Terminates the Franchise After Learning That Somersworth's Parts and Service Departments Had Essentially No Employees.

On November 6, 2014, Kia gave Somersworth formal notice of its conclusion that, at that time, Somersworth was in breach of the Dealer Agreement. *See id.* at 7–13 (Nov. 6, 2014 letter from Regional Director Anthony Orlando to Mr. Yahyapour). The letter outlined four separate categories of breaches of the Agreement that it demanded Somersworth cure or make substantial progress towards curing within a specified period:

- *Sales.* Somersworth had "not provided minimally adequate sales performance." *Id.* at 7. Its "sales effectiveness rank[ed] in the bottom six percent (6%) of all dealers in the Region." *Id.* at 8. That was a breach of "its obligation to 'vigorously and aggressively sell and promote Kia Products,' under Article II(i) of the Dealer Agreement, and to 'vigorously and aggressively promote, solicit and make sales of Kia Products . . . as required by Article IX(B)(1)." *Id.*
- *Consumer Complaints.* Kia had received multiple customer complaints that Somersworth had "failed to pay off a vehicle that was traded in" for a new Kia, causing them "to receive late notices, and, in some instances, damaging their credit ratings." *Id.* The Dealer Agreement required Somersworth "to maintain good customer relations, satisfactorily resolve all consumer complaints, and refrain from any conduct which creates consumer dissatisfaction." *Id.*
- *Staffing & Training.* As of the previous week, Somersworth "had lost (either through dismissals or resignations) its service manager, parts manager, service consultant, and parts counterperson." *Id.* at 9. It thus "lack[ed] a minimally adequate service and parts staff and [was] not properly staffed." *Id.* It had also experienced "extreme turnover" of its staff and had "only three sales consultants registered at Kia University," two of whom worked only in the evening. *Id.* This was a violation of a requirement to "employ and train a sufficient number of competent personnel" and have those personnel "attend such training as [Kia] may . . . require." *Id.* (quoting Article IX(A)(4) of the Dealer Agreement).
- *Customer Satisfaction.* Somersworth's "sales and service satisfaction scores were below the Regional average," in violation of the requirement in Articles II(ii), IX(C)(1), and X to "maintain adequate levels of customer satisfaction." *Id.*

Kia established a cure period, during which Somersworth needed to "act promptly to cure its deficiencies": 60 days for the staffing and training breaches (until January 6, 2015) and a longer period for the other breaches (until June 1, 2015). *Id.* at 11. It asked Somersworth to provide an "action plan" for addressing all of the breaches by November 21, 2014. *Id.* at 13.

Kia sent Somersworth a notice terminating its Kia franchise on February 23, 2015. *See id.* at 17–18 (Feb. 23, 2015 letter from Mr. Orlando to Mr. Yahyapour). The letter explained that, far from being remedied in the interim, the staffing deficiencies described in the November 2014 "cure notice" had in fact grown worse. In January, over a month *after* the November 2014 notice, Somersworth's "only trained technician left," followed by its service manager, who "left in or about late January," and then by "the parts manager . . . [who] resigned on or about February 9." *Id.* at 17. Indeed, Kia's District Service and Parts Manager had not seen "a single technician or service or parts manager or employee at the Dealership" during a February 12 visit. *Id.* As a result, Somersworth was again "in breach of . . . Article IX(A)(4)," addressing staffing requirements. *Id.* at 18. Kia reserved the right to issue a separate notice of termination for the other breaches described in the November 6 letter. *Id.* The termination was to take effect 90 days from the date of Somersworth's receipt of the termination notice. *Id.* at 17.

D. The Board and the Superior Court Reject Somersworth's Protest.

Over three years later, the termination has yet to take effect. Somersworth filed a protest on April 6, 2015. Kia stayed the termination pending the outcome of the protest and appeal.[1]

Somersworth began its protest by asking the Board to find that good cause to terminate did not exist because it was not "reasonably possible" for it to comply with the agreement's staffing requirements. *See* Somersworth Addendum at 31 (Board Order at 2). After discovery and a hearing, the Board disagreed. *See id.* at 30 (Board Order at 1). The Board found that compliance with the Dealer Agreement's staffing requirements was "reasonably possible." *Id.* at

[1] After Kia and Somersworth entered into the Dealer Agreement, RSA 357-C:7, I(d)(1) was amended to continue the stay of a termination that the filing of a protest triggers through the resolution of any appeals. *See* 2009 N.H. Laws, 20:10. After the Board ruled in Kia's favor, Kia continued to stay the effect of its termination notice but reserved its right to contest whether RSA 357-C:7, I(d)(1), as amended, applied retroactively to the Agreement.

43 (Board Order at 14). As it observed, Somersworth's "problems were unique among dealers in New Hampshire and in that region." *Id.* They did not result from labor market conditions, as Somersworth contended. *See id.* at 44–46 (Board Order at 15-17). Rather, they were attributable to "the poor and often hostile work environment at the dealership, its poor reputation in the community, and its failure to provide compensation, as promised, to its employees." *Id.* at 44 (Board Order at 15).

The Board also confirmed the facts Kia included in its termination letter. When Kia sent the cure letter, Somersworth did not have a service manager, a parts manager, a service consultant, *or* a parts counterperson, all positions required under the Dealer Agreement. *Id.* at 32–33 (Board Order at 3–4). On top of that, one of the dealer's two Kia-certified technicians left on November 21, 2014, and the other then left on January 5, 2015. *Id.* at 33 (Board Order at 3).

Based on these material breaches, the Board found good cause for the termination. The Dealer Agreement required Somersworth to employ at least six trained service and parts employees, and "[t]he record established a complete inability of Somersworth to hire and retain these individuals." *Id.* at 42 (Board Order at 13). The staffing requirements were reasonable and material: They were "vital to the proper operation of [a] dealership." *Id.* They ensured that Kia could maintain "good will . . . and its reputation in the community" through quality service and that the dealership could perform "warranty work." *Id.* Indeed, because Somersworth did not have "a single Kia certified technician on staff . . . [it] was unable to provide warranty service to Kia customers for a two-month period" before the termination letter. *Id.* at 43 (Board Order at 14). And Kia satisfied the look-back requirement because it sent the notice within 180 days of learning "that the staffing problems at Somersworth . . . had reached a critical level, that it had,

in essence, ceased to function as a dealership in parts and service." *Id.* All of this meant that "Kia more than proved that it had good cause to terminate." *Id.* at 47 (Board Order at 18).

Somersworth sought rehearing but did not contest any of the Board's findings. Instead it raised a new argument, based on the look-back period. It argued that Kia had not sent its termination letter within 180 days of learning of the staffing breach. *See id.* at 50 (Rehearing Order at 2). Somersworth claimed that Kia had forfeited the right to terminate because it knew of Somersworth's earlier deficiencies – but did not terminate based on *those* deficiencies. *See id.* Again, the Board disagreed. Kia's notice was timely "because of the continuing nature of the staffing problems." *Id.* Rather than terminate "at the first technical breach," Kia "expended tremendous effort in order to correct the breach and avoid a termination" and resorted to termination "[o]nly after these efforts had failed and the breach rose to a critical level." *Id.* The Board thus denied rehearing. *See id.* at 52 (Rehearing Order at 4).

Somersworth appealed the Board's decisions to the Superior Court, relying solely on its new claim that the termination notice came more than 180 days after the staffing breaches. *See id.* at 54 (Superior Court Order at 2) (noting that "[t]here appears to be no dispute that Somersworth was in violation of the staffing requirements . . . at the time the Cure Letter was issued"); *id.* at 57 (Superior Court Order at 5). The Superior Court agreed with "the approach taken by the Board." *Id.* at 60 (Superior Court Order at 8). Under the terms of RSA 357-C:7, II(a), it explained, "[e]ach day that . . . Somersworth was out of compliance with the Dealer Agreement's staffing requirements constituted a new violation of that agreement." *Id.* And the look-back period was also satisfied because Somersworth's breaches had "evolve[ed]" over time. *Id.* at 59 (Superior Court Order at 7). As the Board found, the staffing issues had worsened, rather than improved, during and after the cure period from November 2014 to February 2015.

The Superior Court explained that its reading of RSA 357-C:7, II(a) was more consistent with the Dealership Act's goal of protecting "dealers from oppressive conduct by manufacturers" than Somersworth's reading, which would require a manufacturer to issue a notice of termination at the first sign of *any* material breach, without giving the dealer "the opportunity and time to make reasonable efforts to remedy" it. *Id.* at 60 (Superior Court Order at 8). Consistent with its obligation not to interpret statutes "in a way which would lead to an absurd result," the Superior Court declined to adopt Somersworth's reading. *Id.* at 61 (Superior Court Order at 9). And so it affirmed.

Somersworth then filed this appeal, its fourth attempt to challenge the termination. In the meantime, the Dealership Agreement remains stayed, and Somersworth remains free to hold itself out as an authorized Kia dealership.

SUMMARY OF ARGUMENT

Both parties to this appeal agree that three of the four "good cause" requirements for termination under the Dealership Act were satisfied by Kia's notice. Section IX(A)(4) of the Dealer Agreement required Somersworth to staff its parts and service departments with at least six employees: two Kia-certified technicians, one parts manager, one service manager, a parts staffer, and a service staffer. *See* Somersworth App'x at 3, 5. When Kia issued the termination notice, "Somersworth did not have a single one of those positions filled." Somersworth Addendum at 39 (Board Order at 10). Somersworth does not dispute that, as a result, it was in breach of a "reasonable," "material" provision of the Dealer Agreement, for which compliance was "reasonably possible." RSA 357-C:7, II(a).

The only issue is whether Kia satisfied the fourth requirement for good cause, the statutory look-back period. It did. Under RSA 357-C:7, II(a), a manufacturer may not terminate a franchise based on a failure to comply with a provision of a dealership agreement unless the manufacturer learned of "such failure" within 180 days of the termination notice. Kia terminated based on Somersworth's failure to fill any of the six required parts and service positions. That breach arose within the 180 days before Kia sent its termination notice.

Somersworth claims that because Kia knew of *other*, allegedly related, breaches by Somersworth more than 180 days before the notice, it could not terminate based on the dealership's failure to fill any of the required parts and service department personnel slots. Nothing in the Dealership Act supports that reading, which would lead to burdens on dealerships contrary to the Act's purpose – and to absurd results. The correct reading is both intuitive and faithful to the statutory text: The breach a manufacturer relies upon in its termination notice is the breach that triggers the 180-day look-back period, not any other breach (or breaches) about which a manufacturer may have known, or complained about, prior to the termination notice.

STANDARD OF REVIEW

This is an appeal from a decision of the Superior Court affirming an order of the Motor Vehicle Industry Board. The Board's findings "upon all questions of fact . . . [are] prima facie lawful and reasonable," and the Board's order "shall not be set aside or vacated except for errors of law." RSA 357-C:12, VII. This Court reviews the Superior Court's rulings on questions of law *de novo*. *See Accurate Transport, Inc. v. Town of Derry*, 168 N.H. 108 (2015).

ARGUMENT

I. THE BOARD AND SUPERIOR COURT CORRECTLY FOUND THAT KIA'S TERMINATION NOTICE WAS ISSUED WITHIN THE LOOK-BACK PERIOD.

A. Kia Learned of the Breach for Which It Terminated the Agreement Within 180 Days of the Termination Notice.

By its plain terms, RSA 357-C:7, II(a)'s look-back period runs backwards from the date of the termination notice to the date on which a manufacturer gained knowledge of the breach upon which the termination is based. *See Appeal of Town of Salem*, 168 N.H. 572, 577 (2016) (internal quotation marks omitted) ("We first look to the language of the statute itself, and, if possible, construe that language according to its plain and ordinary meaning."). The provision states that good cause to terminate "shall exist . . . when . . . [t]here is *a failure* by the . . . dealer to comply with a provision of the franchise" where the provision is "both reasonable and of material significance to the franchise relationship; provided that . . . compliance is reasonably possible" and where the manufacturer "first acquired . . . knowledge of *such failure* not more than 180 days prior to the date on which notification [of termination] is given." RSA 357-C:7, II(a) (emphasis added). The phrase "such failure" refers to the failure on which the termination was based. *See* Merriam-Webster's Collegiate Dictionary (11th ed. 2003) (defining "such" as "of the character, quality, or extent previously indicated or implied"). The good cause determination thus proceeds in two steps. The first asks whether the termination notice identified a qualifying

breach: a failure to comply with a reasonable, materially significant provision of the dealership agreement for which compliance was reasonably possible. The second asks whether the manufacturer first learned of *that qualifying breach* within the look-back period.

There is no dispute that Kia terminated the Dealer Agreement because of a qualifying breach: Somersworth's failure to have *any* parts and service employees on staff, even though the agreement required it to have six specific employees in those departments. *See* Somersworth Addendum at 42 (Board Order at 13). Somersworth was required to employ, at a minimum, a parts manager, a parts staffer, a service manager, a service employee, and two Kia-certified technicians. *See* Somersworth App'x at 5. As the termination notice explained, Kia terminated the franchise relationship after its District Service and Parts Manager visited the dealership on February 12, 2015 and "did not see a single technician *or* service *or* parts manager *or* employee." *Id.* at 17 (emphases added). This complete staffing failure occurred after Kia had notified Somersworth in early November 2014 that the dealer was already in breach of the agreement because it had only two parts and service employees, rather than the required six. *See id.* at 9, 17. And this complete staffing failure occurred more than a month after the end of the 60-day grace period Kia had given Somersworth to cure the breaches identified in its November 2014 notice. *See id.* at 17.

There is also no dispute that Kia learned of the complete staffing failure less than 180 days before it sent the termination notice. Kia sent the termination notice on February 23, 2015, marking August 27, 2014 as the start of the 180-day look-back period. Kia's November 6, 2014 cure letter states that Somersworth failed to have four of the six required parts and service positions filled "*as of last week* . . . through dismissals or resignations." *Id.* at 9 (emphasis added). Kia thus had knowledge of these staffing failures as of October 27, 2014, at the earliest,

119 days before it sent the termination notice. *Id.* at 9. Nothing in the Board's findings, or in the record, suggests that Kia knew about the vacancies – with four out of the six parts and service positions unfilled in November 2014 and all six unfilled in February 2015 – more than 180 days before it sent its termination notice.

Somersworth homes in on the Board's description of the breach on which Kia based the termination as a "critical" one. *See* Br. at 21–22; Somersworth Addendum at 43 (Board Order at 14) (explaining that Kia sent the termination notice within 180 days of learning that Somersworth's "staffing problems . . . had reached a critical level"); *id.* at 50 (Rehearing Order at 2) (explaining that Kia sent the termination letter after "the breach rose to a critical level" and was not merely a "technical breach"). According to Somersworth, both the Board and the Superior Court impermissibly inserted the word "critical" into the statute and thereby calculated the look-back period based on the wrong date. But the term "critical" is simply a reasonable shorthand for describing the specific material breach upon which Kia based its termination notice and is entirely consistent with the plain-text reading of RSA 357-C:7, II(a). The breach that triggered the termination – the only breach relevant to the look-back period – was the last straw after a series of breaches of the Dealer Agreement. Kia terminated based on Somersworth's "critical," total-staffing-failure breach; the Board and the Superior Court properly calculated the 180-day look-back period from the issuance of the notice based on that breach.[2]

Nor is there anything suspect about Kia's decision to terminate upon a "critical" breach. Somersworth makes the remarkable claim that the Dealership Act "does not give the

[2] Perhaps Somersworth is implying that the use of the word "critical" must mean that the Board and Superior Court improperly ignored its earlier breaches in 2011 and 2012. As discussed *infra*, pp. 14–16, those earlier breaches were irrelevant because they either did not involve the Dealer Agreement, did not involve staffing, were cured before Kia sent its termination notice, or involved some combination of these circumstances.

manufacturer discretion regarding the criticality of the breach." Br. at 15. But that is plainly not so. The Act requires a manufacturer to identify a *material* breach – a breach of a provision that is "of material significance to the franchise relationship," RSA 357-C:7, II(a) – in order to terminate. It also requires a manufacturer to act in "good faith" when terminating, meaning it must act honestly and in accordance with normal commercial standards of fair dealing. *Id.* 357-C:7, I(b); *see also* Somersworth Addendum at 36 (Board Order at 7). Thus, the Act actually *requires*, it does not simply allow, a manufacturer to determine whether a breach is serious enough to justify termination. *See Strike Four*, 164 N.H. at 735 (Statutes should be interpreted "in the context of the overall statutory scheme and not in isolation.").

In sum, the Board correctly found that Kia sent the termination notice within the look-back period and therefore that good cause existed for the termination. Kia sent the termination notice "fewer than 180 days after it first obtained knowledge that [Somersworth's] staffing problems . . . had reached a critical level, that it had, in essence, ceased to function as a dealership in parts and service." Somersworth Addendum at 43 (Board Order at 14).

B. Somersworth's Claim That Kia Had Knowledge of the Breach More Than 180 Days Before the Termination Notice Rests on a Misreading of the Record.

Somersworth argues (Br. at 16–18) that Kia's termination notice was untimely in light of three letters to Somersworth in 2011 and 2012. It claims the "letters, individually or collectively, constitute a complete description of Somersworth's breach." Br. at 17. That is incorrect. The letters do not relate to the distinct breach on which Kia based its 2015 termination notice.

To begin with, two letters relate to breaches of *training* requirements. The March 2011 letter states that Somersworth "failed to meet the minimum technician *training* requirements for the last two consecutive years." *Supra* p. 3 (emphasis added). And the March 2012 letter states that Somersworth failed to ensure that "at least two active technicians . . . successfully complete

all service *training*, courses and certification tests . . . relating to the Kia Optima Hybrid." *Supra* p. 4 (emphasis added). Neither relates to the breach for which Kia issued the termination notice: a total failure to meet the minimum staffing requirement for the parts and service departments.

What is more, these two letters did not even allege that Somersworth's training failures were a breach of the *Dealer Agreement*. The March 2011 letter refers to requirements in a "Warranty Bulletin 2007-14." *Supra* p. 3. And the March 2012 letter refers to requirements in a January 2011 agreement "in connection with the distribution of" the Kia Optima Hybrid. *Supra* p. 3. In contrast, Kia's 2015 termination letter states that Somersworth's staffing failure was a violation of the staffing requirements in Article IX(A)(4) of the Dealer Agreement.

As for the one letter that did relate, in part, to staffing requirements, Somersworth later cured the staffing issue mentioned in the letter. In December 2011, after Somersworth's parts and service departments were closed because the only manager on staff was ill, Kia informed Somersworth that it needed to hire more employees for its parts and service staff and to ensure that all employees were properly trained. *See supra* pp. 3–4. Somersworth eventually did fill those positions, at least for a time. *See* Somersworth App'x at 19–21 (describing the departures from Somersworth's parts and service department that led to the termination as beginning in September 2014). It is no surprise then that Kia's termination notice does not mention the 2011 breach. *See id.* at 17–18. It was Somersworth's complete failure to staff its parts and service department in *2015*, not its deficiencies years earlier, that prompted Kia to notice termination of the Dealer Agreement.

All of this means that Somersworth is wrong to characterize its breach of the Dealer Agreement's staffing requirements as a homogenous, continuing breach of which Kia had knowledge years before it sent the termination notice. The correspondence Somersworth points

to involves either unrelated training requirements or long-cured violations of staffing requirements.

C. Even Knowledge of a "Continuing" Staffing Breach Would Not Make Kia's Termination Notice Untimely.

But even if Somersworth's breach of the staffing requirements could be characterized as "continuing" between 2011 and 2015 in light of these letters, Kia's termination notice would still have been timely. No one disputes that, at the time of the notice, Somersworth was in breach of the Dealer Agreement's staffing requirements. As other courts have recognized when interpreting materially identical statutory text, when a breach continues before and during a look-back period, each day a dealer is in breach is a new violation for which a manufacturer may terminate. *See Estate of Gordon-Couture v. Brown*, 152 N.H. 265, 273 (2005) (considering "similar statutes from other jurisdictions" as "guidance").

In *Smith's Sports Cycles, Inc. v. American Suzuki Motor Corporation*, for example, the Alabama Supreme Court construed Alabama's materially identical dealership statute.[3] 82 So. 3d 682, 689 (Ala. 2011). Suzuki had terminated a dealership agreement after the dealer breached a provision requiring it to keep up the appearance of the dealership's premises. *See id.* at 685–687. The Suzuki dealer argued, much as Somersworth argues here, that the termination notice was untimely because earlier letters between the two showed that "Suzuki had notice of the appearance issues and the deteriorating condition of the dealership . . . more than 180 days before it gave . . . notice." *Id.* at 687. The Alabama Supreme Court disagreed. Suzuki had made

[3] "[G]ood cause shall exist . . . when . . . [t]here is a failure by the new motor vehicle dealer to comply with a provision of the franchise which provision is both reasonable and of material significance to the franchise relationship, provided that the manufacturer first acquired . . . knowledge of such failure not more than 180 days prior to the date on which notification is given by the manufacturer pursuant to the requirements of this section." Ala. Code § 8-20-5(b)(1).

good-faith efforts to work with the dealer to resolve the appearance issues, but the dealer chose not to cooperate and allowed the dealership's appearance to deteriorate, eventually leading to the termination notice. Because the problems were "evolving and continuous," they did not prevent Suzuki from terminating despite its knowledge of earlier problems. *Id.* at 689. "To hold otherwise would allow [a dealer] to continue to operate the dealership in a manner inconsistent with, and in violation of, the franchise agreement." *Id.*

Federal courts have interpreted the look-back provision of the Petroleum Marketing Practices Act, a federal statute that protects motor fuel franchisees against arbitrary franchise terminations, in the same way.[4] Take *Walters v. Chevron U. S. A., Inc.*, 476 F. Supp. 353 (N.D. Ga. 1979), *aff'd*, 615 F.2d 1135 (5th Cir. 1980). There, Chevron declined to renew a franchise after a franchisee failed to keep its premises clean and safe. Chevron had, "both within and without the 120-day [look-back] period," inspected the premises, found cleanliness issues, and attempted to correct them. *Id.* at 356–357. The franchisee argued that Chevron therefore had knowledge of the breach before the start of the look-back period. The court disagreed and held that "the better approach is to treat each instance when an inspection revealed noncompliance with the lease as a separate failure to comply," particularly where the "violations were not of a purely static nature." *Id.* at 357. That interpretation, it explained, aligned with the purpose of the look-back period: "to preclude a franchisor from basing termination or nonrenewal upon old and long-forgotten events." *Id.* (internal quotation marks omitted); *accord Geib v. Amoco Oil Co.*, 29 F.3d 1050, 1056 (6th Cir. 1994) ("Geib repeatedly breached the MMP, and each new breach

[4] The Petroleum Marketing Practices Act allows termination or nonrenewal for a "failure . . . to comply with any provision of the franchise, which provision is both reasonable and of material significance to the franchise relationship, if the franchisor first acquired . . . knowledge of such failure . . . not more than 120 days prior to the date on which notification. . . is given, if notification is given pursuant to [15 U.S.C. § 2804(a)]." 15 U.S.C. § 2802(b)(2)(A)(i).

provided Amoco with 120 days to terminate the franchise."). Or consider *Gruber v. Mobil Oil Corporation*, which reached the same result. 570 F. Supp. 1088 (E.D. Mich. 1983). There, a franchisee chose not to follow the franchise agreement's requirements for operating hours. In response to pressure from Mobil to comply, he " 'experimented' with maintaining the lease hours for short periods on three separate occasions, but each time went back to his own hours of operation." *Id.* at 1090. After Mobil declined to renew the agreement, he claimed that Mobil had knowledge of his breach before the look-back period. The court rejected that argument. It held that "[w]hen the alleged failure . . . is ongoing, occurring within and prior to the 120-day limitation, then the breaching event is not considered stale, but rather, viewed as a new ground for terminating the relationship each time the franchisee fails to comply." *Id.* at 1092.[5]

Somersworth's breaches are best thought of as a series of independent and ultimately worsening breaches, the last and most serious of which caused Kia to terminate the franchise. But if instead its deficiencies are viewed as one continuing violation, Kia's decision to terminate fits squarely within these courts' holdings. Somersworth's staffing failures were not static. Its parts and service department *shrunk* from two employees in November 2014, when Kia sent its cure letter, to zero employees in February 2015, when Kia sent its termination notice. When Kia sent the notice, Somersworth "had, in essence, ceased to function as a dealership in parts and service." Somersworth Addendum at 43 (Board Order at 14).[6] And Kia's termination was

---

[5] The sole, unpublished federal district court decision Somersworth cites (Br. at 21) does not undercut these cases. It did not discuss the statutory text or its purposes. It concluded that the look-back period had been violated where the franchisor had earlier knowledge of breaches *identical* to the ones for which it attempted to terminate. *See Heller v. Gulf Oil Corp.*, 1984 U.S. Dist. LEXIS 22972, *12 (D. Mass. Oct. 5, 1984). Here, Somersworth's total staffing failure was unique, and indeed worse, than any prior breach.

[6] Because of the distinct drops in staffing, Somersworth is also wrong to claim (Br. at 22) that its staffing breaches were not "periodic, such that Kia could point to a date certain from which to

consistent with the purpose of the Dealership Act's look-back period (Br. at 4): to prevent termination based on a breach that is "stale, cured, or waived by manufacturer inaction." Far from allowing the breach to grow stale, Kia took timely action when it learned of the staffing breach by giving Somersworth notice and time to cure. It sent the termination notice after Somersworth failed to cure the breach and, indeed, had allowed the staffing issues to worsen to the point that it had *none* of the required parts and service employees. Concluding that the look-back period prevented Kia from terminating when Somersworth had *zero* parts and service employees would reward Somersworth for its earlier staffing failures and punish Kia for its efforts to allow Somersworth to cure those earlier failures. Somersworth cannot reasonably claim that the look-back period was designed to work the absurdity of "protecting" a dealership in its situation.

II. THE SUPERIOR COURT CORRECTLY REJECTED SOMERSWORTH'S INTERPRETATION OF THE LOOK-BACK PROVISION.

Somersworth reads RSA 357-C:7, II(a)'s look-back period (Br. at 15–18) to require a manufacturer to terminate within 180 days of the first time it learns that a dealer has breached the dealership agreement. In other words, Somersworth reads the statute as creating a "one strike, and you're out" rule. If a manufacturer does not terminate the very first time it learns a dealer has breached the agreement, it cannot ever terminate based on a different breach that takes place on a later date. That reading is out of step with the statutory text, does not serve any of the purposes of the look-back requirement, and leads to – indeed ensures – absurd results.

---

commence counting the look-back period." The Dealer Agreement required Somersworth to have six specified positions filled at all times. Kia issued its cure notice when the number of employees dropped to two and its termination notice when the number fell to zero. Each of those failures was a new, identifiable, and material breach from which a look-back period could (and did) commence.

Somersworth focuses (Br. at 15–16) on the word "first" in the look-back provision, but ignores the word that "first" modifies. The look-back provision states that for a manufacturer to terminate based on a failure to comply with the dealership agreement, the manufacturer must have "first acquired . . . knowledge of such failure not more than 180 days prior to the date on which notification is given." RSA 357-C:7, II(a). The word "first" modifies "acquired," not "failure." Somersworth's interpretation requires rewriting the look-back provision to read: The manufacturer must have "~~first~~ acquired actual or constructive knowledge of [the first] ~~such~~ failure not more than 180 days prior to the date on which notification is given." This revision does not just rearrange the text; it drastically changes its meaning. By ignoring the word "such," it untethers the look-back period from the breach that led to the termination. Instead of asking when the manufacturer learned of the breach for which it terminated ("such failure"), the look-back period would ask when the manufacturer learned of *any* prior breach ("the first failure"). This Court is not in the business of rewriting statutes in this way. *See Strike Four*, 164 N.H. at 735 (This Court "will not . . . add language that the legislature did not see fit to include."); *Balke v. City of Manchester*, 150 N.H. 69, 73 (2003) ("[The Court] will not rewrite the statute; that is the province of the legislature.").

Somersworth's reading also does not serve – indeed it undermines – the purpose of the look-back requirement. *See Doggett v. Town of N. Hampton Zoning Bd. of Adjustment*, 138 N.H. 744, 746 (1994) ("We construe the statutes so as to effectuate their evident purpose." (internal quotation marks omitted)). As Somersworth acknowledges (Br. at 4), the purpose of the look-back requirement is to protect dealers by preventing a termination based on a stale, cured, or waived breach. But untethering the look-back period from the breach upon which a manufacturer issues a notice of termination does not serve that purpose. It ensures that a

manufacturer cannot terminate for a fresh, uncured breach in the present *simply because* of a stale, cured, or waived breach in the past. This case proves the point: Somersworth has never claimed that its complete staffing failure was stale, cured, or waived, or even that there is any unfairness in a termination based on that failure. It claims only that, under its (atextual) reading, Kia cannot terminate on the basis of that failure.

Worse still, Somersworth's interpretation would *harm* dealers. Take a dealer who, like Somersworth, did not comply with advertising requirements. Under Somersworth's reading, the manufacturer could terminate or it could work with the dealer to cure the breach. But if it chooses to work with the dealer, it forfeits the right to terminate based on *any* future breach by the dealer that occurs more than 180 days after the advertising breach because it will have had "knowledge" of a "first" breach before the look-back period. Somersworth's interpretation thus gives manufacturers every incentive to terminate as soon as it learns of a dealer's first breach of any kind. Somersworth provides no reason why a statute that it agrees was designed to help dealers should be read to *require harm* to dealers by incentivizing manufacturers to terminate franchise agreements rather than to work cooperatively with dealers.[7] *Cf. Gruber*, 570 F. Supp. at 1092 (rejecting an interpretation that encouraged "franchisors . . . to terminate all breaches . . . within 120 days of its first occurrence without giving the franchisee the opportunity and time to make reasonable efforts to remedy" it).

---

[7] Somersworth claims (Br. at 24–25) that the ability to seek a stay of a termination before the Board mitigates these harsh results. Leaving aside the administrative burdens that would result from requiring parties to seek a stay (or even multiple stays) in termination proceedings – and whether the Board would grant such stays – under Somersworth's reading a manufacturer would have no incentive to seek a stay to allow a dealer time to cure. That is because, as earlier noted, providing such an opportunity would forever foreclose a termination based on a subsequent, similar breach. The absurdity of this result is indisputable.

As this case demonstrates, Somersworth's interpretation also produces absurd results. *See Doggett*, 138 N.H. at 746 ("We construe the statutes so as to . . . avoid an interpretation that would lead to an absurd or unjust result." (internal quotation marks omitted)). It rewards dealers like Somersworth who repeatedly violate a dealership agreement. *Cf. Gruber*, 570 F. Supp. at 1092 (rejecting an interpretation under which "a franchisee's carelessness or willful breach will be rewarded"). And it penalizes manufacturers like Kia for their forbearance. The Board and the Superior Court correctly declined to adopt this interpretation.

III. SOMERSWORTH'S WAIVER ARGUMENT IS NEW AND THUS FORFEITED.

Somersworth claims (Br. at 18–19) that Kia waived its right to terminate, "whether conferred by the Dealer Agreement or by RSA 357-C," under general waiver principles. To the extent this argument is distinct from an argument that Kia did not comply with the look-back requirement, it is new and forfeited. Somersworth has never argued that Kia somehow relinquished its right to terminate under the Dealer Agreement, even if it retained it under the Dealership Act. It cannot do so now. *See Quirk v. Town of New Boston*, 140 N.H. 124, 128 (1995) ("[T]his court will not consider on appeal issues or arguments not raised below.").

CONCLUSION

For these reasons, this Court should affirm.

REQUEST FOR ORAL ARGUMENT BEFORE A 3JX PANEL

Pursuant to New Hampshire Supreme Court Rule 12-D(1)(b), Kia renews its request for this Court to set this mandatory appeal for oral argument before a 3JX panel.

This appeal is suitable for argument before a 3JX panel because it involves a single "claim[] of error in the application of settled law." N.H. Sup. Ct. R. 12-D(5)(a). As Kia explained in its initial request, and as the briefing confirms, this appeal involves a single question of statutory interpretation: whether the look-back period in RSA 357-C:7, II(a) runs from the date a manufacturer learned of the breach for which it issued a termination notice or from the first date it learned of any breach. Resolving this issue requires only the straightforward application of the "well-settled principles of statutory construction" set out in this Court's opinions, *Coco v. Jaskunas*, 159 N.H. 515, 518 (2009).

Although the Court did not initially set this case for argument before a 3JX panel, the parties' briefs comply with the requirements for 3JX cases. Both Somersworth's opening brief and Somersworth's response brief are less than 35 pages, exclusive of tables and addenda. N.H. Sup. Ct. R. 12-D(6)(a). The briefs' brevity confirms the straightforward nature of this appeal.

Finally, an expedited appeal before the 3JX panel is in the interests of justice. Kia issued its notice of termination in early 2015 and stayed its effect in line with RSA 357-C:7, I(d)(1), for the duration of Somersworth's protest and appeals. This means that, Kia's name and reputation continue to be tied to Somersworth's, to Kia's detriment. *See, e.g.*, Stetson Letter to the Court dated Feb. 27, 2018 at 2 (citing Consent Order, *In re TS & A Motors LLC (d/b/a Stratham Mitsubishi and d/b/a Kia of Somersworth) & Said Yahyapour*, No. 16-130 (N.H. Banking Dep't May 22, 2017), *available at* https://www.nh.gov/banking/orders/enforcement/ documents/16-130-co-20170522.pdf) (imposing, with the consent of Somersworth's principal, Mr. Said Yahyapour, sanctions on Somersworth for "at least" 19 violations of RSA chapter 361-A, which

mandates payment by a motor vehicle dealer of any existing consumer retail installment within 21 days of a trade-in of a vehicle to such dealer). Expedited resolution of this mandatory appeal would reduce the risk of further reputational harm to Kia without prejudicing Somersworth's right to appellate review.

Attorney Stétson will argue for Kia Motors America, Inc.

August 2, 2018

Respectfully submitted,

Kevin M. Fitzgerald (N.H. Bar No. 806)
Nathan P. Warecki (N.H. Bar No. 20503)
NIXON PEABODY LLP
900 Elm Street
Manchester, NH 03101
(603) 628-4000
(603) 628-4040
kfitzgerald@nixonpeabody.com

Respectfully submitted,

Catherine E. Stetson (pro hac vice)
Kirti Datla* (pro hac vice)
HOGAN LOVELLS US LLP
555 13th St. NW
Washington, D.C. 20004
(202) 637-5600
(202) 637-5491
cate.stetson@hoganlovells.com

*Admitted only in Texas;
supervised by firm members

Counsel for Appellee Kia Motors America, Inc.

CERTIFICATIONS

I certify that on August 2, 2018, two copies of the foregoing were forwarded to Joshua L. Gordon, Esq.

Kevin M. Fitzgerald (N.H. Bar No. 806)
Nathan P. Warecki (N.H. Bar No. 20503)
NIXON PEABODY LLP
900 Elm Street, 14th Floor
Manchester, NH 03101
(603) 628-4000
(603) 628-4040
kfitzgerald@nixonpeabody.com

Catherine E. Stetson (pro hac vice)
Kirti Datla* (pro hac vice)
HOGAN LOVELLS US LLP
555 13th Street, NW
Washington, D.C. 20004
(202) 637-5600
(202) 637-5491
cate.stetson@hoganlovells.com

*Admitted only in Texas;
supervised by firm members

Counsel for Appellee Kia Motors America, Inc.