State of New Hampshire
Supreme Court

NO. 2017-0714

2018 TERM

JULY SESSION

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

v.

Kia Motors America, Inc.

RULE 7 APPEAL OF FINAL DECISION OF THE MERRIMACK COUNTY SUPERIOR COURT

BRIEF OF PROTESTANT/APPELLANT, KIA OF SOMERSWORTH

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QUESTION PRESENTED

I. Did the court err in interpreting the statutory 180-day waiver period for franchise termination, such that its start-day is determined by when the manufacturer arbitrarily deems the dealer has reached an intolerable level of infirmity, rather than by when the manufacturer had first knowledge of the breach, as the New Hampshire statute mandates?

Preserved: Application for Rehearing (May 26, 2017), *Appx.* at 22; Notice of Appeal of Administrative Order (July 19, 2017), *Appx.* at 29.

STATEMENT OF FACTS

I. Kia Motors America, Manufacturer, and Kia of Somersworth, Dealer

Kia Motors America, Inc. ("Kia"), based in New Jersey, California, and South Korea, manufactures Kia vehicles. Said ("Sammy") Yahyapour, president and owner of TS&A Motors LLC, doing business as Kia of Somersworth ("Somersworth"), in 2008 entered into a Dealer Agreement with Kia to operate a new-car dealership in Somersworth, New Hampshire. Along with New Hampshire's motor vehicle dealer statute, RSA 357-C, the parties' 50-page Dealer Agreement governs the relationship between Kia and Somersworth. *See* KIA DEALER SALES AND SERVICE AGREEMENT § IV.A.4, *Addendum* at 28.

A portion of the Dealer Agreement provides that Somersworth have on staff a minimum of six trained employees, two each in its sales, service, and parts departments:

> [Somersworth] shall employ and train a sufficient number of competent personnel of good character, including one or more persons who will function as sales manager, service manager and parts manager, sales persons, service technicians and parts personnel to fulfill all of [Somersworth's] responsibilities under this Agreement and as recommended by [Kia], and shall cause such personnel to attend such training schools as [Kia] may from time to time require at [Somersworth's] sole expense.

DEALER AGREEMENT § IV.A.4.

II. New Hampshire Motor Vehicle Dealer Bill of Rights

New Hampshire's motor vehicle dealer statute, RSA 357-C, regulates the relationship between dealers and manufacturers. *Roberts v. General Motors Corp.*, 138 N.H. 532, 536 (1994) ("[C]hapter 357-C is a comprehensive statute governing the relationships between automobile manufacturers and their dealers.").

The "statute is remedial," *Autofair 1477, L.P. v. Am. Honda Motor Co., Inc.*, 166 N.H. 599, 602 (2014), its "clear intent ... is to protect the investment and property interests of ... dealers," *Roberts v. General Motors*, 138 N.H. at 536, and its purpose is to level "[t]he disparity in bargaining power between automobile manufacturers and their dealers." *New Motor Vehicle Bd. of California v. Orrin W. Fox Co.*, 439 U.S. 96, 100 (1978); N.H. LAWS 1981, 477:1 ("The general court finds that ... it is necessary to regulate vehicle manufacturers ... and dealers of vehicles ... in order to prevent frauds, impositions, and other abuses and to protect and preserve the investments and properties of the citizens of this state."); *see also Westfield Centre Service Inc. v. Cities Service Oil Co.*, 432 A.2d 48, 53 (N.J. 1981) ("Though economic advantages to both parties exist in the franchise relationship, disparity in the bargaining power of the parties has led to some unconscionable provisions in the agreements."); Automobile Dealers' Fair Day in Court Act, 15 U.S.C. §§ 1222-1225 (1956) (providing federal cause of action for dealers against manufacturers for bad-faith termination).

The New Hampshire "'dealer bill of rights,' provide[s] certain protections for motor vehicle dealers from the actions of manufacturers." *STIHL, Inc. v. State*, 168 N.H. 332, 333 (2015). First enacted in 1981, it has several times been amended and expanded. *Deere & Co. v. State*, 168 N.H. 460, 467 (2015).

Among the statute's protections is that, before terminating a dealer franchise, a

manufacturer must give notice to the dealer, *Russ Thompson Motors, Inc. v. Chrysler Corp.*, 425 F. Supp. 1218 (D.N.H. 1977), and also to the New Hampshire Motor Vehicle Industry Board ("MVIB"), RSA 357-C:7, V(a), which the statute creates. RSA 357-C:12. The dealer may protest the termination, prompting the MVIB to hold a hearing. Termination is granted if the manufacturer can show adequate notice, good faith, and good cause, all of which the statute defines. RSA 357-C:7, I.

The definition of "good cause" includes a limitation on the look-back period during which the manufacturer can claim the dealer violated the franchise agreement:

> Notwithstanding the terms, provisions, or conditions of any agreement ..., good cause shall exist for the purposes of a termination ... 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 compliance on the part of the new motor vehicle dealer is reasonably possible; and that *the manufacturer ... first acquired actual or constructive knowledge of such failure not more than 180 days prior to the date on which notification is given.*

RSA 357-C:7, II(a), *Appx.* at 42 (emphasis added).

The final phrase of this statutory section provides that if the manufacturer does not take action within six months of first discovering a breach, the breach is waived. It prevents a manufacturer from terminating a dealer for otherwise material violations of the dealer agreement which are stale, cured, or waived by manufacturer inaction. *See e.g., Nassau Blvd. Shell Service Station, Inc. v. Shell Oil Co.*, 875 F.2d 359, 362 (2d Cir. 1989) ("statutory period for effecting terminations... was imposed to preclude a franchisor from basing termination ... upon old and long forgotten events. Without such a time limitation, franchisors could transform their knowledge of past incidents into credible threats of termination used to gain

unfair advantage in negotiations and disputes.") (quotations and citations omitted). The statute thus requires the manufacturer to decide within half a year whether a breach is material, likely to resolve, or worthy of action. *See e.g., Veracka v. Shell Oil Co.*, 655 F.2d 445, 449 (1st Cir. 1981) ("[R]equirement is well designed to force the franchisor to decide quickly whether such events as franchisee bankruptcy or misconduct justify nonrenewal.").

This case concerns the process – the amount of time between when Kia "first acquired actual or constructive knowledge" of a breach, and when it issued its notice of termination.

III. Kia's Continuing Knowledge of Somersworth's Staffing Breach

Beginning in 2011, Kia began calling attention to staffing and training issues at Somersworth.

A. First Notice, March 2011

In March 2011, Michael Tocci, Kia's then Regional Director, sent a letter to Somersworth. It alerted Somersworth that it "is one of a small group of Kia dealers that has failed to meet the minimum technician training requirements for the last two consecutive years (2009 and 2010)." LETTER FROM KIA TO SOMERSWORTH ("Re: Trained Technician - Non Compliance/Dealer Service Performance") (Mar. 17, 2011), *Appx.* at 1.

Kia warned that Somersworth's "failure to have trained technicians negatively impacts customer satisfaction and warranty expense." The letter cited internal performance metrics showing that customer dissatisfaction with service was "at an unacceptable level" during the previous 12-month period. Kia directed that Somersworth's "failure ... to meet minimum technician training requirements needs ... immediate attention and action." The letter cautioned that unless Somersworth "achieve[s] full training certification ... within the next 2 quarters," it will "have an impact on the payment of warranty repair claims." *Id.*

Kia offered assistance in scheduling training classes, and announced its representative would soon show up at Somersworth for a meeting "to document the corrective action plan you will implement to improve your dealership performance in the area of technician training." *Id.*

B. Second Notice, December 2011

Later that year, in December 2011, Tocci again wrote to Somersworth about its staffing problems, which it considered "an urgent issue that requires your immediate attention." LETTER FROM KIA TO SOMERSWORTH ("Re: Failure to Staff/Operate") (Dec. 1, 2011), *Appx.* at 3.

> On a visit to your dealership on the morning of November 22, ... our District Parts and Service Manager observed that your Kia parts and service departments were closed, with the doors locked and the lights off.... The closure constitutes a breach of your [Dealer Agreement] and reflects that Kia of Somersworth is failing to meet its staffing obligations.

Id. The letter noted the parties' Agreement "requires that [Somersworth] employ and train sufficient personnel to fulfill its obligations and to conduct its operations." *Id.*

Kia recited provisions of the Agreement, which it asserted Somersworth was violating, mandating a minimum of six employees "to staff your Kia operation," which it then enumerated: "a service manager, a service advisor, a parts manager, an additional parts employee, and two technicians." The letter alleged, however, "that your entire Kia service and parts staff currently consists of your service manager and a single technician, neither of whom is adequately trained." Pointing out that Somersworth's "ability to keep its service operation open for business cannot rest entirely on two individuals," Kia said "[t]his staffing arrangement is unacceptable." *Id.*

Kia gave Somersworth 10 days to "advise us, in a written response to this letter, how [Somersworth] intends to correct this problem." Finally, Kia warned that it "reserves all its rights and remedies concerning the foregoing." *Id.*

C. Third Notice, December 2011

Somersworth responded, but not to Kia's satisfaction. Toward the end of December 2011, Tocci sent a third letter to Somersworth reflecting on a recent meeting they had in Boston, saying "the timeline you provided for trained staff at your Kia store in your letter ... is not acceptable to Kia." LETTER FROM KIA TO SOMERSWORTH (Dec. 21, 2011), *Appx.* at 5. Kia cited figures showing deficient training at Somersworth, and again listed Somersworth's contractual staffing requirements.

Kia directed Somersworth to submit a revised response by January 6, 2012, "that details your specific staffing solutions and an expedited timeline for training completion for all staff." *Id.*

D. Fourth Notice, March 2012

Three months later, in March 2012, Tocci sent Somersworth a short fourth letter, LETTER FROM KIA TO SOMERSWORTH ("Re: Cure Notice - Kia Optima Hybrid Program") (Mar. 20, 2012), *Appx.* at 6, regarding Kia's hybrid models:

> According to our records, ... Somersworth has failed to meet the minimum number of technicians required to participate in the ... [h]ybrid [p]rogram. This constitutes a breach of your dealership's obligation ... which states that at least two active technicians ... shall successfully complete all service training courses and certification tests.

Id.

E. Fifth Notice, November 2014

Anthony Orlando replaced Tocci as Kia's Regional Director, and in November 2014, sent a lengthy letter to Somersworth. It detailed four areas in which it said Somersworth was lacking: low sales, consumer complaints regarding trade-in loans, inadequate staffing and training, and customer dissatisfaction with service and parts – each concern backed by data

demonstrating under-performance. LETTER FROM KIA TO SOMERSWORTH ("Re: Dealer Improvement Initiative") (Nov. 6, 2014) at 1-5, *Appx.* at 7.

In the section on "Inadequate Staffing & Training," *id.* at 3, Kia quoted and cited the Dealer Agreement regarding the six-employee minimum, and Somersworth's obligation to ensure they are trained, competent, and of good character. Kia asserted "[t]he Dealership has failed to meet this obligation," and recounted a recent record of resignations and dismissals, with "[t]he result ... that [Somersworth] lacks a minimally adequate service and parts staff and is not properly staffed to conduct customary operations." *Id.*

The letter noted that Somersworth "has experienced extreme turnover in various positions over an extended period," and complained that the sales staff was inadequate and under-trained. Kia wrote that "[t]he foregoing staffing and training deficiencies (collectively, the "Staffing Breach") are unacceptable." *Id.*

Kia insisted Somersworth "act immediately to properly staff its Kia operations and to ensure that all its personnel meet our training requirements." As in the 2011 and 2012 series of letters, Kia required a written response: demanding each employee be identified by name, position, and the hours they work; an explanation how Somersworth "intends to correct the Staffing Breach"; and an "outline [of] your upcoming plans regarding marketing/advertising, facilities, [and] personnel." *Id.* at 3, 7. Kia established a "cure period" ending on January 6, 2015, *id.* at 5, two months hence, within which Somersworth "must have an adequate, fully trained staff in place for its sales, service and parts operations." *Id.* at 3.

After offering a incentive to help increase sales, the letter concluded with an ultimatum: "If [Somersworth] fails to cure, or make substantial progress towards curing, its deficiencies within the timeframes ..., [Kia] will have no choice but to consider all of its

remedies under the Dealer Agreement, including, but not limited to, the issuance of a notice of termination." *Id.* at 6.

F. Sixth Notice, February 2015

About a month after the cure deadline, in February 2015, in another letter from Anthony Orlando, Kia gave Somersworth notice of termination, LETTER FROM KIA TO SOMERSWORTH ("Re: Notice of Intention to Terminate Kia Dealer Sales and Service Agreement") (Feb. 23, 2015), *Appx.* at 17, citing and attaching a portion of the Dealer Agreement. KIA DEALER SALES AND SERVICE AGREEMENT § IV.A.4, *Addendum* at 28.

Kia also referenced its fifth letter, of November 2014, and reiterated that "[a]mong other deficiencies," Somersworth "lacked a minimally adequate service and parts staff and had no service manager, parts manager, service consultant or parts counter person." SIXTH LETTER (Feb. 23, 2015) at 1. Although Somersworth had made promises, the letter used recent evidence to suggest that "the staffing deficiency has grown even more severe since November," resulting in "critical staffing breaches." *Id.*

The termination was effective automatically, 90 days[1] from the notice.[2]

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[1]The 90-day period is a statutory minimum. RSA 357-C:7, V.

[2]The termination was statutorily in abeyance upon Somersworth filing a protest with the New Hampshire Motor Vehicle Industry Board. RSA 357-C:7, I(d)(1) ("When a protest is filed under this section, the franchise agreement shall remain in full force and effect and the franchisee shall retain all rights and remedies pursuant to the terms and conditions of such franchise agreement.").

STATEMENT OF THE CASE

The February 23, 2015 (sixth) letter was notice of termination. On April 6, 2015, Somersworth filed a protest at the New Hampshire Motor Vehicle Industry Board, which after discovery, held a two-day hearing in April 2017.

Kia and Somersworth stipulated that around the time of the fifth and sixth letters in November 2014 and February 2015, Somersworth had essentially none of the six required positions filled. STIPULATION OF MATERIAL FACTS (undated), *Appx.* at 19.

Although the full MVIB hearing record was not presented in the superior court and is thus not before this court, in its order the Board credited the testimony of Anthony Orlando, Kia's Eastern Regional Director who signed the fifth and sixth letters in November 2014 and February 2015. Orlando had testified that in 2014 and 2015 Somersworth had few or none of the six required positions filled, that there had been "extreme turnover" among employees, and that staffing and training was generally deficient. MVIB DECISION AND ORDER (May 10, 2017) at 9-11, *Addendum* at 30. The Board also credited the testimony of Kia's regional parts and service manager, who also testified about the dearth of trained staff, high employee turnover rates, and other problems at Somersworth. *Id.* at 11-13.

The Board rejected Somersworth's contention that employment conditions and other circumstances outside its control prevented it from employing a minimum trained staff as envisaged by the Dealer Agreement. The Board noted that under the statute:

> Good cause exists where a dealer fails to comply with a reasonable and material franchise provision, provided that compliance is reasonably possible and the dealer first acquired notice of the failure no more than 180 days before the termination notice.
> ...

> Kia sent the termination letter fewer than 180 days after it first obtained knowledge that the staffing problems at Somersworth and the Service and Parts Department had reached a critical level, that it had, in essence, ceased to function as a dealership in parts and service.

MVIB DECISION AND ORDER at 13-14, *Addendum* at 42-43. The Board thus approved the termination. *Id.* at 15-18.

Somersworth filed a motion for rehearing, asserting Kia waived the grounds for termination because it failed to terminate within 180 days of its first knowledge of Somersworth's staffing issues, APPLICATION FOR REHEARING (May 26, 2017), *Appx.* at 22, to which Kia objected. OBJECTION TO REHEARING (June 12, 2017), *Appx.* at 25. The Board denied rehearing, writing:

> The legal error alleged is that the Board mistakenly found that Kia sent the termination letter to Kia of Somersworth fewer than 180 days after it first obtained knowledge of staffing issues. The Board, finds, however, that the notice was proper because of the continuing nature of the staffing problems. It would be contrary to the intent of the dealer statute to require a manufacturer to initiate a termination action by sending a termination letter at the first technical breach of the dealer agreement. In this case, Kia expended tremendous effort in order to correct the breach and avoid a termination. Only after these efforts had failed and the breach rose to a critical level did Kia issue the letter, and because it did so within 180 days, it complied with the statute.

ORDER ON MOTION FOR REHEARING (June 20, 2017) at 2, *Addendum* at 49.

Appeals from the MVIB to the superior court, and to this court, are on issues of law only, with deference to factual findings. RSA 357-C:12, VII.[3] Review of legal issues is *de*

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[3]RSA 357-C:12, VII, provides, in part:

> Any party to the proceeding may appeal the final order, including all interlocutory orders or decisions, to the superior court within 30 days after the date the board rules on the application for reconsideration of the final order or

(continued...)

novo. *Strike Four, LLC v. Nissan North America, Inc.*, 164 N.H. 729, 735 (2013).

In July 2017, Somersworth appealed the MVIB's ruling, and both parties submitted memoranda differing on how the 180-day look-back period was commenced. BRIEF OF APPELLEE (Oct. 17, 2017) (omitted from appendix); MEMORANDUM OF LAW (Oct. 18, 2017) (omitted from appendix). In November 2017, the Merrimack County Superior Court *(Richard B. McNamara*, J.), held:

> The court is persuaded that the approach taken by the Board was proper. In the first place, the Board's interpretation of the notice requirement is consistent with the plain language of the statute. Each day that ... Somersworth was out of compliance with the Dealer Agreement's staffing requirements constituted a new violation of that agreement. If as Somersworth contends, a franchis[or] must terminate at the first sign of a breach, then manufacturers would be encouraged if not required, to terminate based on any serious breach within 180 days of its first occurrence without giving the franchisee the opportunity and time to make reasonable efforts to remedy a breach. Such a construction would be inconsistent with the purpose of RSA 357-C which is to protect dealers from oppressive conduct by manufacturers. Moreover, the fact that a dealer may be terminated if a breach has been ongoing does not vitiate the requirement that the manufacturer prove that it has good cause for termination. ... [I]t would be contrary to the intent of the dealer statute to require the manufacturer to initiate a termination action by sending a termination letter at the first technical breach of the dealer agreement.

ORDER (Nov. 15, 2017), *Addendum* at 53 (quotations and citation omitted, paragraphing altered). Somersworth appealed to this court.

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[3](...continued)

> decision. All findings of the board upon all questions of fact properly before the court shall be prima facie lawful and reasonable. The order or decision appealed from shall not be set aside or vacated except for errors of law. No additional evidence shall be heard or taken by the superior court on appeals from the board.

SUMMARY OF ARGUMENT

Somersworth first presents the purpose of New Hampshire's dealer bill of rights, which is to protect car dealerships against exploitative practices by vehicle manufacturers. It recounts a years-long record of Kia acknowledging, in writing, Somersworth's staffing and training issues, showing Kia's toleration of any breach.

Somersworth then quotes the statute, which provides that in order to terminate a dealer, the manufacturer must issue a notice of termination within six months of knowing of a breach. Somersworth notes, however, that Kia's notice was as much six years late, and that therefore Kia waived termination on the grounds of inadequate staffing and training.

Somersworth points out that to justify a relaxed interpretation of the statute, the MVIB and the superior court added words to the statute that the legislature did not write, and shows that the New Hampshire Supreme Court has rejected such a loose approach. Accordingly, Somersworth requests this court reverse the superior court's indulgence of Kia's inaction, and vacate the dealership termination.

ARGUMENT

I. Statute Requires Notice of Termination Within Six Months from First Knowledge of Breach, but Kia Waived by Providing Untimely Notice

A. "First" Means First

The statute requires that, to terminate a dealer franchise agreement, the manufacturer must have "first acquired actual or constructive knowledge of such failure not more than 180 days prior to the date on which notification is given." RSA 357-C:7, II(a).

To determine adequacy of notice, the only consideration is when the manufacturer knew or should have known of the breach. The statute does not give the manufacturer discretion regarding the criticality of the breach, and does not provide that each day is a new violation. How critical the breach, or how extreme the conduct, are not relevant considerations.

While the legislature could have used such criteria to determine commencement of the notification period, it did not. Commencement of the notification period turns on the date the manufacturer "first acquired ... knowledge" of the breach, and nothing else.

The word "first," to measure commencement of a period of time, has its common meaning. In *Belknap County v. Carroll County*, 91 N.H. 36 (1940), the statute allocated pauper relief among counties, providing:

> The county which shall have relieved any county pauper within one year ... shall be liable to the county in which he may afterward be relieved, if he has not resided in the latter county above three months at the time of his *first relief*.

Id. at 36 (emphasis added). In that case, a pauper who received county relief from Carroll County, had moved to Belknap County. More than three months later, the pauper requested relief from Belknap County. Belknap County provided the relief, but notified Carroll County

that it considered the pauper a Carroll County case. This court disagreed, noting that:

> The "first relief" mentioned in the last clause of the statute ... means the first relief furnished by the county into which a pauper may remove. Hence, although the pauper ... last resided in Carroll County for the statutory period of not less than one year within the last five years preceding his removal to the County of Belknap, ... the fact that he resided in Belknap County for more than three months before receiving aid from that county operates to relieve the former county of the burden of his support and to cast that burden upon the latter one.

Id. (citations omitted).

Similarly, in *Alexander Milburn Co. v. Davis-Bournonville Co.*, 270 U.S. 390 (1926), the statute provided that patents be awarded to the "first inventor." Although Whitford filed his patent before Clifford, Clifford had already published plans for the machine. Denying Whitford the patent, the Supreme Court wrote: "Taking these words in their natural sense as they would be read by the common man, obviously one is not the first inventor if ... somebody else has made a complete and adequate description of the thing." *Id.* at 400.

Thus, the only question here is when Kia "*first* acquired actual or constructive knowledge" of Somersworth's breach.

B. Kia's Notice of Termination Was Issued Years After First Knowledge of Breach

Kia provided notice of termination on February 23, 2015. Calculating the date 180 days before that is August 27, 2014. If Kia, before August 27, 2014, discussed and described Somersworth's staffing breach, then it manifestly had knowledge of the breach more than 180 days before notice of termination.

The record discloses four letters, quoted and cited *supra*, from Kia to Somersworth, before August 27, 2014.

- The first, in March 2011, described Somersworth's "failure ... to meet minimum technician training requirements."
- The second, in December 2011, described Somersworth's staffing breach in detail, noting that Somersworth's "parts and service departments were closed, with the doors locked and the lights off," because Somersworth's "entire ... service and parts staff currently consists of your service manager and a single technician, neither of whom is adequately trained."
- The third, also in December 2011, reiterated the breach, observing that Somersworth's plans to cure were insufficient.
- The fourth, in March 2012, noted that Somersworth did not have any trained technicians to sell and maintain Kia hybrid cars.

These four letters, individually or collectively, constitute a complete description of Somersworth's breach, and therefore demonstrate knowledge.

The fifth and sixth letters, in November 2014 and February 2015 – which Kia claims are within 180 days from whenever it deemed the issue critical – do not correlate with when Kia "first acquired actual or constructive knowledge" of Somersworth's breach.

The initial four letters – comparing with the final two – consistently describe the same issues in the same language. The (first) March 2011 letter said Somersworth "failed to meet the minimum technician training requirements for the last two consecutive years." The (second) December 2011 letter chastised Somersworth for being closed during business hours due to insufficient staff. Likewise, the (fifth) November 2014 letter noted Somersworth's obligation to ensure a minimum of six trained staff, explained "[t]he Dealership has failed to meet this obligation," and lamented "[t]he ... staffing and training deficiencies ... are unacceptable."

Both the older and later letters hold out termination as a remedy. The (second) December 2011 letter said that Kia "reserves all its rights and remedies" concerning the breach. The (fifth) November 2014 letter made clear termination was imminent.

Kia conceded the long timeframe over which its knowledge extended. The (first) March 2011 letter asserted the problems dated from at least "2009 and 2010." The (fifth) November 2014 letter repeated that Somersworth's staffing issues had occurred "over an extended period." The two-and-a-half years between the initial four letters, and then the later fifth and six letters, coincides with when Michael Tocci left and Anthony Orlando became Kia's new Regional Director, which may explain the gap.

C. Kia Waived its Right to Terminate on Basis of Inadequate Staffing or Training

"The written terms of a contract may be waived orally or by implication," when "provisions of the contract had been disregarded by the parties." *D. M. Holden, Inc. v. Contractor's Crane Serv., Inc.*, 121 N.H. 831, 835 (1981) (quotation omitted); *see also Prime Financial Group, Inc. v. Masters*, 141 N.H. 33, 38 (1996). Statutory rights are equally waivable, unless the legislature says they are not. *Maroun v. Deutsche Bank Nat'l Trust Co.*, 167 N.H. 220, 227-28 (2014).

> Waiver ...is a voluntary or intentional relinquishment of a known right, [and] is essentially a matter of intention. It may be proved by express declaration or by acts and declarations manifesting an intent and purpose not to claim the supposed advantage, or by a course of acts and conduct, or by so neglecting and failing to act as to induce a belief that it was the intention and purpose to waive.
>
> Waiver is where one in possession of any right, whether conferred by law or by contract, and of full knowledge of the material facts, does or forbears the doing of something inconsistent with the existence of the right, or of his intention to rely upon it. Thereupon he is said to have waived it, and he is precluded from claiming anything by reason of it afterwards. And it may be added that under such circumstances, if the renunciation of the waiver would work to the injury or disadvantage of another who relied upon it, the party making the waiver is estopped to deny it.

Colbath v. H.B. Stebbins Lumber Co., 144 A. 1, 4-5 (Me. 1929) (quotations and citations omitted); *cf. Strike Four, LLC,* 164 N.H. at 745-46 (prospective waivers barred by statute).

By not seeking termination upon first knowledge of Somersworth's breach, which occurred years before its notice of termination, Kia waived its right, whether conferred by the Dealer Agreement or by RSA 357-C, to terminate on the grounds of inadequate staffing. This court should reverse.

II. Legislative Control of Franchise Relationship Requires Reversal

In *Strike Four,* the question was whether the statute applied to a settlement agreement between manufacturer and dealer. This court noted that while other courts allow relaxed interpretations, in New Hampshire, the court's role is to hew precisely to the legislature's language in construing New Hampshire's dealer bill of rights. *Strike Four*, 164 N.H. at 739-40. "When examining the language" of New Hampshire's motor vehicle dealer statute, RSA 357-C, this court will "ascribe the plain and ordinary meaning to the words used. We interpret legislative intent from the statute as written and will not consider what the legislature might have said or add language that the legislature did not see fit to include." *Strike Four,* 164 N.H. at 732.

A. MVIB and Superior Court Added Words to the Statute That Are Not There

To rule in favor of Kia, the MVIB and the superior court injected into the statute words that are not there. The MVIB wrote that "Kia sent the termination letter fewer than 180 days after it first obtained knowledge that the staffing problems ... had reached a *critical level*." MVIB DECISION AND ORDER (May 10, 2017) at 14 (emphasis added). In its order on rehearing, the MVIB repeated the error, writing that Kia attempted to aid Somersworth with its staffing issues, and "[o]nly after these efforts had failed and the breach rose to a *critical level*" did Kia begin to count 180 days before issuing its termination letter. ORDER ON MOTION FOR REHEARING (June 20, 2017) at 2 (emphasis added). The MVIB rehearing order compounded that error by holding that "notice was proper because of the *continuing nature* of the staffing problems." *Id.* (emphasis added). The superior court likewise suggested that when a "breach has been ongoing," the 180-day period is set aside. ORDER (Nov. 15, 2017) at 9, *Addendum* at 61.

Nothing in the statute suggests that a manufacturer has the discretion to begin the 180-day period from when it unilaterally determines that a breach has reached a "critical level." Nothing in the statute suggests that a "continuing" or "ongoing" breach excuses the 180-day period. The statute is plain that the 180-day period commences when the manufacturer "first acquired actual or constructive knowledge." RSA 357-C:7, II(a).

That the manufacturer had continuing knowledge of the breach does not excuse tardy filing of termination. The purpose of the statute is to establish a process giving dealers some comfort that a manufacturer cannot arbitrarily yank their brand. A holding that continuing knowledge is sufficient to negate the 180-day clock, or that the 180-day clock can start anytime the manufacturer feels a breach has reached a "critical level," would allow a manufacturer to sit on any continuing violation until the manufacturer unilaterally decided its subjective tipping point was met. That would undermine the procedural predictability the provision is purposed to provide.

In *Heller v. Gulf Oil Corp.*, 1984 U.S. Dist. LEXIS 22972 (D. Mass. Oct. 5, 1984), *Appx.* at 31, for example, the franchisor had knowledge of the dealer's alleged credit card fraud and improper billing procedures, evidenced by a May 1983 letter raising the issue, but did not give notice of termination until March 1984, beyond the statutory deadline. The court appropriately held that although the franchisor "viewed these invalid payments as a pattern of misconduct" amounting to a breach, because it did not take prompt action, it "waived its right to terminate" the dealer on those grounds. *Id.* at 13-14; *see also Crown Central Petroleum Corp. v. Waldman*, 515 F. Supp. 477 (M.D. Pa. 1981) (during gasoline rationing, but in violation of dealer agreement, dealer refused to open on consecutive Sundays; notice of termination timely because counted from first Sunday closure).

B. Distinguishing Other Jurisdictions from New Hampshire

While there are numerous cases regarding terminations of dealers by franchisors in a variety of markets, most are easily distinguishable.

For example, while in Somersworth's case Kia plainly knew of a breach in 2009 or 2011, many cases involve a manufacturer only suspecting a breach early on, but not acquiring actual knowledge until later. *See e.g., Rao v. BP Products North America, Inc.*, 589 F.3d 389 (7th Cir. 2009) (dealer bribed manufacturer's manager, which dealer, acting as false informant, reported; court held manufacturer did not have knowledge of fraud, which was breach of franchise agreement, until dealer ceased cooperation with internal investigation, and not earlier when bribes were first reported); *Nassau Blvd. Shell Service Station, Inc. v. Shell Oil Co.*, 875 F.2d 359 (2d Cir. 1989) (where franchise agreement included "criminal misconduct" as cause for termination, and dealer was arrested for misusing credit cards, court held manufacturer did not have actual knowledge of breach until defendant admitted unlawful conduct); *Chevron U.S.A., Inc. v. Finn*, 851 F.2d 1227 (9th Cir. 1988) (parties had informal conversation regarding what dealer might do in violation of dealer agreement, which constituted less than actual or constructive notice); *Shell v. Ray Thomas Petroleum Co.*, 642 F. Supp. 2d 493 (W.D.N.C. 2009) (franchisor could not conclusively know of breach until confirmatory tests completed); *Rhea & Judy Little Brentwood Service Inc. v. Shell Oil Co.*, 697 F. Supp. 958 (M.D. Tenn. 1988) (franchisor did not know dealership would be razed for new highway until condemnation proceedings began).

Similarly, while in Somersworth's case there may have been a continuing violation, the violations were not discretely periodic, such that Kia could point to a date certain from which to commence counting the look-back period. *See e.g., Geib v. Amoco Oil Co.*, 29 F.3d 1050 (6th

Cir. 1994) (dealer repeatedly cheated manufacturer on prices by reporting inventory measurements early or late, depending upon whether daily price increased or decreased; although manufacturer had suspected conduct for long time, court held that because each misreport was a discrete new violation, counting was from latest occurrence); *Walters v. Chevron U.S.A., Inc.*, 476 F. Supp. 353, 357 (N.D. Ga. 1979) (statute indicates individual inspections constituted discrete violations).

Unlike New Hampshire's dealer bill of rights, some statutes or their legislative history exempt certain breaches from the look-back requirement. *See e.g., Wisser Co. v. Mobil Oil Corp.*, 730 F.2d 54, 59-60 (2d Cir. 1984) (legislative history showing "misbranding" breach exempt from look-back period); *Walters v. Chevron*, 476 F. Supp. at 357 (legislative history indicating individual occurrences of dirty bathrooms exempt from look-back period); *Marks v. Shell Oil Co.*, 643 F. Supp. 1050 (E.D. Mich. 1986), vacated on other grounds, 830 F.2d 68 (6th Cir. 1987) (non-renewal of franchise, as opposed to termination, statutorily exempt from look-back period).

Similarly, also unlike New Hampshire's law, in several cases the controlling statute imposes notice only when "reasonably practicable," allowing courts to consider the relative equities of the parties' situations, the "magnitude" of the violation, or the reasonableness of delayed termination. *See e.g., Texaco Refining & Marketing Inc. v. Davis*, 45 F.3d 437 (9th Cir. 1994); *In re Pereau*, 40 B.R. 500, 502 (Bankr. M.D. Fla. 1984); *Smoot v. Mobil Oil Corp.*, 722 F. Supp. 849, 854-55 (D. Mass. 1989); *California Petroleum Distributors Inc. v. Chevron U.S.A. Inc.*, 589 F. Supp. 282 (E.D.N.Y. 1984).

Cases such as *Rao, Nassau, Finn, Ray Thomas*, and *Rhea & Judy*, do not apply here because there is no uncertainty regarding whether Kia knew about Somersworth's breaches

before an August 2014 look-back period. *Geib* and *Walters* do not apply because Somersworth's breaches cannot be reduced to discrete daily or periodic occurrences. *Wisser*, *Walters,* and *Marks* do not apply because New Hampshire's statute discloses no ambiguity that would lead to an examination of legislative history, and there is no known legislative history that would soften the "first knowledge" requirement. Cases such as *Texaco Refining, Pereau, Smoot*, and *California Petroleum* do not apply because New Hampshire's notice provision does not contain a reasonableness component. But cases such as *Heller* and *Crown Central* are useful precedent here because the look-back period was lawfully calculated from first knowledge.

In an Alabama case, a local motorcycle shop for many years kept its premises messier and less organized than the parties' franchise agreement required. The sloppy shop argued that Suzuki terminated the agreement after long toleration of the problem. The court declined to follow the statute on policy grounds, saying that enforcing the law might reward a dealer's breach, encourage overly prompt terminations, or discourage providing periods for cure. *Smith's Sports Cycles, Inc. v. American Suzuki Motor Corp.*, 82 So. 3d 682, 688-89 (Ala. 2011).

While the concerns expressed by the Alabama court may resonate, such policy considerations are legislative. As noted in *Strike Four*, the New Hampshire Supreme Court cannot invent words the legislature did not write, in order to exonerate Kia's long toleration of Somersworth's staffing issues or Kia's dilatory notice of termination.

Moreover, the Alabama court's concerns are not warranted, as there are common and simple procedural workarounds. One is for the manufacturer to file for termination, and then stay the matter – in some cases for lengthy periods – to give the dealer time to cure. *See e.g.*, *Strike Four, LLC v. Nissan*, 164 N.H. at 732 (after notice of termination of dealership

franchise, MVIB issued stay of proceedings to allow for settlement negotiations); *Bob Tatone Ford, Inc. v. Ford Motor Co.*, 140 F. Supp. 2d 817, 827 (S.D. Ohio 2000) (decision-making body "delayed resolution of Tatone Ford's appeal for a period of more than two years, giving the dealer an opportunity to cure its deficiencies"); *Shamrock Motors, Inc. v. Chrysler Corp.*, 974 P.2d 1154, 1156 (Mont. 1999) (upon 1995 finding of good cause for termination, manufacturer "reinstituted the implementation of the 1994 termination proceeding"); *The Maids Int'l, Inc. v. Maids on Call, LLC*, 2017 WL 4277146 (D. Neb. Sept. 25, 2017) (parties agreed to stay termination to allow time to sell franchise business). There are other procedural workarounds: nothing prevents a manufacturer from retracting a termination if problems are cured, or from extending the (90-day minimum) effective date of a termination if problems are being cured. *Maple Shade Motor Corp. v. Kia Motors America, Inc.*, 2006 WL 2320705 (D.N.J. Aug. 8, 2006), *aff'd*, 260 F. App'x 517 (3d Cir. 2008), *Appx.* at 38 (manufacturer extended effective date of termination to provide Kia dealer time to sell dealership).

Finally, Kia is a sophisticated entity operating in all 50 states and internationally, charged with knowing the law regarding the rights of its dealers. *See e.g.*, *Kia Motors America, Inc. v. Glassman Oldsmobile Saab Hyundai, Inc.*, 706 F.3d 733 (6th Cir. 2013) (Michigan); *Edwards v. Kia Motors America, Inc.*, 8 So. 3d 277 (Ala. 2008) (Alabama); *H.B. Automotive Group, Inc v. Kia Motors America*, 2016 WL 4446333 (S.D.N.Y. Aug. 22, 2016) (New York); *Lee Dodge, Inc. v. Kia Motors America, Inc.*, 2011 WL 3859914 (D.N.J. Aug. 31, 2011) (New Jersey).

Because Kia could have filed for termination long before February 2015, and then stayed the matter at the MVIB to give Somersworth time to cure, application of the statute does not have the dire implications suggested by the Alabama court in *Smith's Sports*.

This court should follow its pledge to enforce choices made by the New Hampshire Legislature, acknowledge cases such as *Heller* and *Crown Central*, and enforce the statute as written.

CONCLUSION

New Hampshire's dealer bill of rights requires that the six-month look-back period for termination commence when the manufacturer has "first knowledge" of a breach. Because Kia had first knowledge in 2011, or even 2009, but its notice of termination was not issued until 2015, Kia waived the breach. This Court should thus reverse the superior court's decision, and vacate the dealership termination.

REQUEST FOR ORAL ARGUMENT

Because the issue raised in this appeal is of concern to all automobile dealers in New Hampshire, and is a novel issue in this jurisdiction, this court should entertain oral argument.

Respectfully submitted,

Kia of Somersworth
By its Attorney,
Law Office of Joshua L. Gordon

Dated: July 3, 2018

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CERTIFICATIONS

I hereby certify that the decision being appealed is addended to this brief. I further certify that this brief contains no more than 6,566 words, exclusive of those portions which are exempted.

I further certify that on July 3, 2018, copies of the foregoing will be forwarded to Nathan Warecki, Esq.; and to Kirti Datla, Esq.

Dated: July 3, 2018

Joshua L. Gordon, Esq.

ADDENDUM

KIA DEALER SALES AND SERVICE AGREEMENT

such Addendum may be revised by COMPANY from time to time), in connection with the selling and servicing of Kia Products. DEALER agrees that it will promptly discontinue the display and use of any and all Kia Marks, and shall change the manner in which any Kia Marks are displayed and used, when and for any reason COMPANY requests that it do so. DEALER may use the Kia Marks only at the location(s) identified in Part I and for the purposes stated in this Agreement. DEALER agrees that none of the Kia Marks may be used as part of DEALER'S name or the name under which DEALER'S business is conducted without the prior written consent of COMPANY.

c. Discontinuance Of Use. Upon the termination of this Agreement for any reason, DEALER agrees that it shall immediately:

(i) Discontinue the use of the word "Kia" and the Kia Marks, or any semblance thereof, including without limitation the use of all stationery, telephone directory listings and other printed material referring in any way to the word "Kia" or bearing any of the Kia Marks;

(ii) Discontinue the use of the word "Kia" and the Kia Marks, or any semblance of the same, as part of DEALER'S business or corporate name, and file a change or discontinuance of such name with the appropriate authorities;

(iii) Remove and return to COMPANY all product signs bearing the word "Kia" or any of the Kia Marks;

(iv) Cease representing itself as an authorized Kia Dealer; and

(v) Refrain from any action, including without limitation any advertising, stating or implying that it is authorized to sell or distribute Kia Products. If DEALER fails to comply with any of the terms of this Paragraph, COMPANY shall have the right to enter upon DEALER'S premises and remove without liability all such product signs and identification bearing any of the Kia Marks. DEALER agrees that it shall reimburse COMPANY for any costs and expenses incurred in such removal, including without limitation reasonable attorneys' fees.

4. Personnel. DEALER shall employ and train a sufficient number of competent personnel of good character, including one or more persons who will function as sales manager, service manager and parts manager, sales persons, service technicians and parts personnel to fulfill all of DEALER'S responsibilities under this Agreement and as recommended by COMPANY, and shall cause such personnel to attend such training schools as COMPANY may from time to time require at DEALER'S sole expense.

5. Capital And Credit. DEALER shall maintain at all times and employ in connection with DEALER'S business and operations under this Agreement sufficient investment, working capital, net worth, lines of credit and retail finance plans as may be required to enable DEALER to fulfill all of DEALER'S responsibilities under this Agreement. In no event shall DEALER'S working capital be less than the amount specified by COMPANY. COMPANY shall have the right to increase the

Before the
N.H. MOTOR VEHICLE INDUSTRY BOARD
James H. Hayes Safety Building
33 Hazen Drive, Concord, N.H. 03305

In the Matter of:

TS & A Motors, LLC D/B/A Kia of Somersworth v. Kia Motors America, Inc.

(Termination Protest)

15-01

DECISION AND ORDER

By: Christopher Casko, Chair; David Allen; Lawrence Blaney; Cameron Eldred; Paula Hiuser, Board Members

Appearances: Kia: Carl Chiappa, Esq.; Ryan Ford, Esq.; Ellen Kennedy, Esq.

Kia of Somersworth: Mark Sullivan, Esq.

PROCEDURAL HISTORY

This is a termination protest that has been pending since filing on or about April 6, 2015 by TS & A Motors, LLC D/B/A Kia of Somersworth, hereafter Somersworth or Protestor, against Kia Motors America, INC., hereafter Kia or Respondent. The board held a hearing on discovery on or about April 4, 2016 and issued an order outlining the discovery obligations of each side. Thereafter, the parties completed discovery. The board held a final hearing on April 11 and 12, 2017.

BACKGROUND INFORMATION

Description of the Parties: Somersworth is a New Hampshire limited liability company. Kia is a corporation based in California.

Position of Kia of Somersworth: Due to an unprecedented tight labor market for automobile service workers in the Seacoast area, particularly Kia certified technicians, it was unable to hire the workers required under the dealer agreement. Therefore, it was not reasonably possible for it to comply with the staffing requirements of Kia, and there is insufficient evidence of statutory good cause for the termination.

Position of Kia: The dealer agreement required Somersworth to employ a minimum number of 6 key service and parts personnel. It failed to do so for a lengthy time. In fact, during the cure period, Somersworth failed to have employees in any of the required positions. Therefore, it has satisfied its legal obligations for termination of the franchise because it provided proper notice, and that the termination is being done in good faith and with sufficient evidence of good cause.

FINDINGS OF FACT

The parties have filed agreed upon Findings of Fact. The findings of fact were further supported by the witness testimony presented during the hearing.

Kia Motors America, Inc. and TS & A Motors, LLC, d/b/a Kia of Somersworth are parties to a dealer agreement which was fully executed on or about December 19, 2007. This dealer agreement governs the franchise relationship between Kia and Somersworth, except as modified by operation of New Hampshire Motor Vehicle Statutes. By letter dated November 6, 2014, (the cure letter), Kia provided notice of Somersworth's failure to employ a minimally adequate service and parts staff. The cure letter provided a cure period of not less than 60 days to cure the staffing breach. Kia, however, provided more than 100 days of cure period to allow Somersworth to cure the breach.

Kerri Guptil was Somersworth's Service Manager from October 7, 2013 until August 7, 2014. At the time Kia sent the cure letter, Somersworth did not have a Service Manager. Moreover, at the time that Kia sent the cure letter, Somersworth did not have a Service Advisor/Service Consultant or a Parts Counter person. These positions were

required by the Dealer Agreement. Not having sufficient staff violated the Dealer Agreement.

During the six month period before the cure letter, Somersworth had four different parts managers: Jamie Lyons, from May 11, 2014 to August 15, 2014. Casey Goldthwaite, from July 7, 2014 to October 10, 2014. Drew Connors, from September 23, 2014 to October 16, 2014 and, finally, Lynn Biegerl from October 14, 2014.

Somersworth had no Service Manager from August 27, 2014 until December 14, 2014. Mark Tavares was hired by Somersworth as its Service Manager on or about December 1, 2014, but left the dealership on or about January 23, 2015. His tenure as Service Manager was tumultuous. He experienced many deficiencies at the dealership, including a severe lack of staff. He finally quit after being required to shovel snow from the dealership parking lot after a blizzard.

On November 21, 2014, George Hatch, one of Somersworth's two certified Kia technicians retired. On or about January 5, 2015, Jamie Holland, Somersworth's remaining certified Kia technician stopped working for Somersworth. After Jamie Holland's departure, Somersworth did not have another certified Kia technician on staff until Ray Encarnacion started working on or about April 13, 2015.

On or about January 21, 2015, Kia sent a letter stating that Somersworth had not cured the staffing breach identified in the cure letter. Somersworth had no Kia certified technician for a period of January 6, 2015 until April 12, 2015. As a result, due to the lack of a Kia certified technician during this term from January 6, 2015 through April 12, 2015, Somersworth was unable to perform any warranty service work. Consequently, any customers requiring warranty work needed to be referred to other Kia dealerships. It is critical that a new car dealer be able to perform warranty work. Customers expect the dealership where they purchase a car to perform warranty work.

Somersworth had no Service Manager, as required by the Dealer Agreement, from January 23, 2015 until March 9, 2015, when Richard Brickley began working for Somersworth.

Somersworth had no Service Advisor/Service Consultant or a parts counter person for the period of September 1, 2014 through February 28, 2015, when Biegerl, Somersworth's Parts Manager stopped working for Somersworth on or about February 6, 2015. Somersworth did not fill the parts manager position until March 2, 2015, when Somersworth hired Brodie Reilly.

On or about February 23, 2015, 110 days after the cure letter, Kia sent a termination notice (termination letter)

pursuant to Article XII(c)(3)of Part II of the Dealer Agreement advising Somersworth that effective in 90 days after their receipt of the letter, the Dealer Agreement would terminate. At the time of the termination letter, Somersworth did not have a Service Manager, Service Advisor/Service Consultant, Parts Manager, Parts counter person, or Kia certified technician. Somersworth did not have a single position filled that the Dealer Agreement required in its Parts and Service Department.

DISCUSSION AND CONCLUSIONS

In order to terminate Somersworth's Kia franchise, Kia must prove, by a preponderance of the evidence, that it acted in good faith, that all notice requirements have been satisfied, and that there exists good cause for the termination. RSA 357-C:7, IV; Mvi 209.05(a)(1)-(3).

Pursuant to New Hampshire Law, Kia is entitled to terminate Somersworth upon establishing that the notice requirements were timely satisfied and proving that the termination was done in good faith and with good cause. Under RSA 357-C:7, IV, the termination notice must be in writing, sent by certified mail or personally delivered to a dealer, and contain a statement of its intent to terminate the franchise. Moreover, the termination notice must contain a statement of the reasons for the termination

and the start date upon which termination takes effect. In this hearing, Kia has proven that it has done so by a preponderance of the evidence. Kia introduced as Exhibit A, its notice of intent to terminate Kia Dealer Sales and Service Agreement. This was sent by overnight and certified mail to Mr. Yahyapour, hereafter dealer, and dated February 23, 2015. It outlined in specific detail the nature of the breach and the basis of the termination. It was spelled out in clear and plain language. It gave all of the pertinent reasons for the termination in explicit detail. Consequently, the notice portion of the statute has been complied with.

Based on the witnesses presented by Kia, it has demonstrated good faith. Good faith is defined as honesty in fact and the observance of reasonable commercial standards of fair dealing in the trade. Prior to sending a cure letter and a termination letter, Kia management worked hard with the dealer to remedy the staffing deficiencies. In addition, Kia established that the dealer's inability to hire staff was due in large part to the working environment created at Somersworth. Moreover, former Somersworth employees, including Mr. Tavares, testified about a hostile and/or difficult working environment. Mr. Tavares testified that based upon poor credit, he was unable to

purchase any parts on demand as required to get timely service work done on vehicles. In the industry, it is customary for a dealer to have credit with parts suppliers in the area and parts are supplied on demand. In most instances, parts can be obtained the same day that repairs are being done on vehicles. At Somersworth, Mr. Tavares was unable to do so. In order to get a part to fix a vehicle, he would have to get a check or a credit card from dealer to prepay for the part in order to make the repair. Oftentimes, he was unable to do that. In fact, he testified as to an instance where Mr. Holland needed a particular tool and Somersworth did not have that tool. In order to get the repair done, the employees purchased the tool. Otherwise, without parts, a technician is unable to do any work. In addition, such an environment severely compromises a technician's ability to get work done and make money. A technician generally is only paid based on work done, not at an hourly rate.

The dealer caused this situation by not paying parts suppliers, which made him unable to obtain credit. This demonstrated the dealership's poor reputation in the community. This poor reputation frustrated its ability to get the parts needed to perform essential service work. The poor reputation also contributed to the dealer's

inability to attract and retain service staff as required by the Dealer Agreement.

Furthermore, Kia established that it notified dealer in writing many times of the inadequacy of its parts and service staffing, met with dealer to discuss its concerns over staffing, and gave him every benefit of the doubt with respect to his repeated promises to hire the appropriate number of staff members. Anthony Orlando, the former regional director of Kia's eastern region testified about his extensive efforts working with the dealer to try to improve its operation, particularly in the area of its Parts and Service Department staff. The number of employees required in the Dealer Agreement in the department was minimal for operating a new car dealership. During the entire time he worked with dealer, he noted a lack of Kia certified trained staff in this department. He verified that to do warranty work, there must be a Kia certified technician on staff to do the work. There were times when Somersworth did not have a single Kia certified technician. During his term working for Kia and overseeing Somersworth, Mr. Orlando noticed that staff were hired and left very quickly. The dealership had extreme turnover. This turnover was unlike anything that he had ever seen. Several witnesses testified that the rate of turnover was

unique and unlike anything that they had experienced in this industry. The witnesses who testified have many decades of experience in the industry and none had witnessed or been involved with a dealership that had such staffing problems or that was operated in the deficient manner of Somersworth.

By executing the Dealer Agreement, see Exhibit A at page 10 of the agreement, dealer agreed to employ and train a sufficient number of competent personnel of good character, including one or more persons who will function as Sales Manager, Service Manager, Parts Manager, Service Technicians, and parts personnel to fulfill all of his responsibilities under the agreement. The evidence demonstrated a complete lack of ability to employ those people or retain those people once hired. As a result, it breached the dealer agreement. The six key staff positions were listed as a Service Manager, a Service Advisor, a Parts Manager, a Parts person, and two certified Kia technicians. During its tenure as a dealer, as the evidence showed, Somersworth violated that provision on an almost constant basis. In fact, on the date of the termination notice, February 23, 2015, Somersworth did not have a single one of those positions filled. Kia demonstrated, through the evidence presented, that these

personnel are necessary in order to maintain its good will and reputation in the community by ensuring that customers have access to efficient, timely and quality service options. When a customer purchases a car, they expect to be able to get warranty work done at the dealership where they purchased the car. In the case of Somersworth, there were periods of months where customers would have been unable to have any warranty work done on their vehicles and would have been required to go elsewhere.

Also, the evidence demonstrated that there were many customer problems that were brought to Kia's attention at the dealership. Mr. Orlando testified that while staffing at a dealership may be difficult due to the long hours and weekend work requirements, he has never witnessed a dealership to have such a severe lack of staff like Somersworth and he has never participated in a termination based on lack of proper staff at a dealership in New Hampshire.

Also, Gary Airoldi, the District Parts and Service Manager, hereafter DPSM, who was responsible for Somersworth, detailed his extensive efforts to improve the staffing level at the dealership. He visited the dealership frequently and his practice was to visit each of the dealerships for which he was responsible as DPSM every

30 days to five weeks. He would spend four to six and a-half hours at each dealership. He would review all of the dealer's parts and service operations, including customer satisfaction, parts and inventory, and warranty review. He noticed many problems with Somersworth as he worked with them. The facility was older and not well maintained. It was vastly understaffed and had high turnover rates for employees. In the Kia computer system, he is able to see the employees at a dealership and when he reviewed Somersworth's computer staffing, he noticed extremely high turnover rates, unlike anything at any other dealership in New Hampshire.

Moreover, Mr. Airoldi witnessed a poor working environment at Somersworth. He was aware of dealer yelling at employees in front of other employees. He witnessed the dealer yelling at the Parts Manager. In addition, Somersworth had a poor reputation as a dealership, which made it more difficult to attract and retain quality employees. Also, the dealer had difficulty in obtaining parts, and therefore, technicians could not get work done and not make money based on their flat rate payment plans. Based on the hearing record, Kia established that this termination was based in good faith and was honest and

consistent with the observance of a reasonable commercial standard of fair dealing in the trade.

Also, Kia is required to demonstrate good cause for the termination. Good cause exists where a dealer fails to comply with a reasonable and material franchise provision, provided that compliance is reasonably possible and the dealer first acquired notice of the failure no more than 180 days before the termination notice. Under the terms of the Kia Dealer Agreement as contained in Exhibit A, which was supplemented by other specific agreements in the dealer's business plan which was incorporated into the agreement, required that the Service and Parts Department be staffed by at least six trained individuals. The record established a complete inability of Somersworth to hire and retain these individuals. Based on the testimony of Mr. Orlando and Mr. Airoldi, Kia proved that satisfying these minimal staffing requirements, particularly the requirement for having Kia certified technicians on staff is vital to the proper operation of an authorized new car dealership. As explained above, these personnel are necessary in order to ensure the good will of Kia and its reputation in the community by enabling customers to have efficient, timely and quality service done on their vehicles. In addition, this is critical and required for warranty work to be done,

an important part of the relationship between a manufacturer, a dealer, and its customers. Moreover, Somersworth had a legal obligation under the agreement to provide warranty and recall work to its customers. The record demonstrated that there were times when Somersworth was completely unable to maintain those requirements because there was not a single Kia certified technician on staff. Therefore, those customers had to be turned away. In fact, Somersworth was unable to provide warranty service to Kia customers for a two month period preceding the termination letter.

Kia sent the termination letter fewer than 180 days after it first obtained knowledge that the staffing problems at Somersworth and the Service and Parts Department had reached a critical level, that it had, in essence, ceased to function as a dealership in parts and service.

Moreover, Kia established, by more than sufficient evidence, that Somersworth failed to comply with the Service and Parts staffing requirement as articulated and agreed to in the Dealer Agreement. This was reasonably possible. Kia proved that Somersworth's staffing problems were unique among dealers in New Hampshire and in that region of the Seacoast. The testimony of witnesses with

personal knowledge and experience at Somersworth showed an inability of the dealer to attract and retain quality staff. There were times when they had no Service and Parts staff at all. This was due 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.

Furthermore, the expert testimony presented established that it was reasonably possible for Somersworth to hire the proper staff. While Brian Gottlob testified concerning difficulties of car dealerships finding qualified workers and that there was a shortage of workers, he did not analyze Somersworth specifically, or offer an opinion that based on its situation, it was not possible for Somersworth to hire the required service and parts staff outlined in the dealer agreement. Russell Thibeault of Applied Economic Research testified in rebuttal. He reviewed the reports relied upon by Mr. Gottlob: PolEcon Research, "Key Labor Market Trends in New Hampshire and Their Impact on the Supply of Automotive Service Technicians and Mechanics in the State; and Community College System of New Hampshire, (CCNH) "Labor Market Analysis of the Motor Vehicle Retail and Repair Industry in New Hampshire." Also, his work on this matter is

summarized in a report. See Exhibit CC. He supported that the CCNH report is not specific to the supply and demand for technicians in the Somersworth area or the experiences of Somersworth. Moreover, the PolEcon report is not specific to Somersworth either. While the report identifies reasons for a declining workforce in auto service technology, particularly in the Seacoast area, it did not address Somersworth's efforts to recruit, train and retain qualified service workers. Finally, Mr. Thibeault was of the opinion that there was an available pool of 1300 auto technicians within the Somersworth commuting area from which it could draw from to fill the 2 technician positions required by the Dealer Agreement.

Also, Mr. Varela, another witness with significant experience in the automotive industry, testified as to his poor experience working for a brief time at the Somersworth dealership. He left Florida in order to work for Somersworth based on promises made. Those promises were not fulfilled and like others before and after him, he left the dealership abruptly.

In addition, through the testimony of Mark Tavares, a Service Manager for Somersworth who also had a very brief tenure at the dealership which ended badly demonstrated that the dealer's staffing problems were unrelated to a

challenging labor market. He also has a significant amount of experience in the industry and has worked for 37 years as both a Service Technician and Service Manager. He described his experience of being required to become Kia certified as a Service Manager within 30 days when the process would normally take one year. Such was unreasonable and did not contribute to a positive relationship between dealer and employee. He also established that the facility was outdated.

Moreover, Mr. Tavares testified about Jamie Holland's experience at the dealership and his poor working relationship with Parts Manager, Lynn Biegerl. Also, Mr. Tavares was asked to call Kia dealerships and try to solicit employees from those dealerships to come work at Somersworth. This is not an accepted practice and he refused to do it. He also has never seen such high turnover of staff at any dealership where he has worked. He verified Kia's position and testimony that it is not a manufacturer's responsibility to attract and hire staff, although dealer requested that at times. In fact, Mr. Tavares testified that it would not be ethical for a manufacturer to assist a dealer in hiring its staff. This is plain because for a manufacturer to do that, it would be unfairly competing with its other dealers by assisting one

dealer in a way that it was not assisting others. Moreover, it is clearly a dealership responsibility to attract, hire, and retain the appropriate staff as required in the Dealer Agreement.

Mr. Tavares's poor work experience was exemplified by the manner in which he left, as described above. After he quit, he sent an e-mail to Mr. Airoldi informing him that he quit because he was suspicious that warranty claims may get submitted in his name under his number on the Kia computer system. Dealer's wife had the ability to sign into any employee's account and because he had been asked to submit faulty warranty claims before, he was worried about fraud happening in his name after he left.

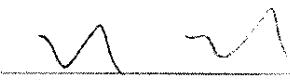
Based on all of the evidence presented, Kia more than proved that it had good cause to terminate Somersworth and that it acted in good faith.

Based on the manifest weight of the evidence presented, the Board rules that Kia has sustained its burden of proof.

THEREFORE, IT IS ORDERED that the termination protest is DENIED. A FINDING IN FAVOR OF KIA IS ENTERED.

IT IS FURTHER ORDERED that Kia shall provide Somersworth with the payment required under RSA 357-C:7, VI within 90 days from the date of this order.

By Order of the Board



Christopher Casko, Esq., Chair

Dated: May 10, 2017

Before the
N.H. MOTOR VEHICLE INDUSTRY BOARD
James H. Hayes Safety Building
33 Hazen Drive, Concord, N.H. 03305

In the Matter of:

TS & A Motors, LLC D/B/A Kia of Somersworth v. Kia Motors America, Inc.

(Termination Protest)

15-01

ORDER ON MOTION FOR REHEARING/REOPEN THE BOARD'S MAY 10, 2017 ORDER

Now before the Board are: 1. APPLICATION FOR REHEARING FOR RECONSIDERATION AND REOPENING Pursuant to RSA 357-C:12(VII), Mvi 208.13, 208.14, and Mvi 208.15, and 2. TS & A Motors, LLC d/b/a Kia of Somersworth v. Kia Motors America, Inc., Case No. 15-01-MVIB (objection of Kia).

DISCUSSION

On or about May 10, 2017, the Board issued a final order in the above-captioned matter. This followed a final hearing held on or about April 10-11, 2017. Kia of Somersworth filed a motion for rehearing and reconsideration of the order dated May 26, 2017. Kia filed an objection to the motion dated June 12, 2017, a filing date agreed to by the parties after Kia of Somersworth filed its motion.

The standard of review for a motion for rehearing is governed by Mvi 208.15 and RSA 357-C:12-VII. The burden in such motion is on the Petitioner, Kia of Somersworth, to establish that the Board's decision was unlawful or unreasonable.

The legal error alleged is that the Board mistakenly found that Kia sent the termination letter to Kia of Somersworth fewer than 180 days after it first obtained knowledge of staffing issues. The Board, finds, however, that the notice was proper because of the continuing nature of the staffing problems. It would be contrary to the intent of the dealer statute to require a manufacturer to initiate a termination action by sending a termination letter at the first technical breach of the dealer agreement. In this case, Kia expended tremendous effort in order to correct the breach and avoid a termination. Only after these efforts had failed and the breach rose to a critical level did Kia issue the letter, and because it did so within 180 days, it complied with the statute. Consequently, Kia of Somersworth has failed to satisfy the burden of proof for rehearing.

Moreover, the standard of review for a motion to reopen a case decided other than by default, is whether Kia of Somersworth alleges the existence of newly discovered

evidence which due diligence would not have discovered before the hearing, or where there is material error, omission, misconstruction of applicable statutes or rules or misrepresentation of applicable precedents. Mvi 208.13(c)(1) and (2). The new evidence alleged consists of impeachment materials which would contradict Kia witnesses Anthony Orlando and Daniel Varela. The Board finds that this is not newly discovered evidence which due diligence would not have discovered before the hearing. As Kia noted in the objection, the parties engaged in lengthy discovery, and Kia of Somersworth could have deposed both of these witnesses but chose not to do so. Therefore, this is not new evidence.

Furthermore, the Board finds the arguments presented in Kia's objection persuasive and for all of those reasons as well as those articulated above, Kia of Somersworth has not sustained its burden of proof.

Therefore, based on the above-mentioned analysis and after careful consideration of the motion for rehearing and the objection thereto, the Board finds that the Petitioner has failed to demonstrate that the Board's May 10, 2017 order is unreasonable or unlawful, or should be reopened.

THEREFORE, IT IS ORDERED that the motion for rehearing/reopen filed by Kia of Somersworth is respectfully DENIED.

By Order of the Board,

Christopher Casko, Esq., Chair

Dated: June 20, 2017

The State of New Hampshire

MERRIMACK, SS SUPERIOR COURT

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

v.

Kia Motors America, LLC

No. 2017-CV-00364

ORDER

The Plaintiff, TS&A Motors, Inc., d/b/a Kia of Somersworth ("Somersworth") appeals an administrative order of the New Hampshire Motor Vehicle Industry Board (the "Board") which issued an order (the "Board Order") denying Somersworth's termination protest against a notice of termination issued by Kia Motors America, Inc. (" Kia"). For the reasons stated in this Order, the Board's Order is AFFIRMED.

I

The facts are drawn from the order issued by the Board. Somersworth and Kia entered into a Dealer Sales and Service Agreement ("Dealer Agreement") on or about December 19, 2007. Board Order, p. 1. The Dealer Agreement governs the franchise relationship between Kia and Somersworth, except as modified by operation of New Hampshire law. Board Order, p. 3. The Dealer Agreement required Somersworth to maintain certain staffing levels at the dealership. Board Order, p. 3. By letter dated November 6, 2014 Kia provided Somersworth notice of its failure to employ a minimally adequate service and parts staff (the "Cure Letter"). Board Order, p. 3. Kia's Cure Letter provided a cure period of not less than 60 days to cure the staffing breach. The Board

found, however, that Kia provided more than 100 days of cure period to allow Somersworth to cure the breach.

The parties stipulated to many of the facts before the Board. There appears to be no dispute that Somersworth was in violation of the staffing requirements of the Dealer Agreement at the time the Cure Letter was issued. At the time the Cure Letter was sent, Somersworth did not have a Service Manager, a Service Advisor/Service Consultant or a Parts Counter Person. Board Order, p. 3. These positions were required by the Dealer Agreement, and not having a sufficient staff violated the Agreement. Board Order, p. 4, 10. Somersworth had no Service Manager from August 27, 2014 until December 2014. A new Service Manager was hired on December 1, 2014 but he left the dealership on or about January 23, 2015. Board Order, p. 4. It had no Service Manager from January 23, 2015 until March 9, 2015. It had no Service Advisor/Service Consultant or Parts Counter Person from September 1, 2014 through February 28, 2015. On or about November 21, 2014, one of two of Somersworth's two certified Kia service technicians retired. Board Order, p. 4. Somersworth's remaining certified Kia technician stopped working for Somersworth on Jan. 5, 2015. Board Order, p. 4. Somersworth did not have another certified Kia technician on staff until April 13, 2015. Board Order, p. 4. While there was no certified Kia technician on staff, Somersworth could not perform warranty work for its customers. Board Order, p. 5.

On or about February 23, 2015, 110 days after the Cure Letter Kia sent a termination letter pursuant to article XII (c) (3) of Part II of the Dealer Agreement, advising Somersworth that effective 90 days from receipt of the letter, the Dealer Agreement would terminate. Board Order, p. 6. At the time of the termination letter

Somersworth did not have a Service Manager, Service Advisor/Service Consultant, Parts Manager, Parts Counter Person or Kia certified technician. Board Order, p. 6. The Board found that at that time the termination letter was sent, Somersworth did not have a single position filled that the Dealer Agreement required in its parts and service department. Board Order, p. 6. The Dealer Agreement provided that this failure constituted grounds for termination.

The Board recognized that the agreement was subject to the provisions of RSA 357-C: 7, IV which requires that in order to terminate a franchise a manufacturer must prove, by a preponderance of the evidence, that it acted in good faith, that all notice requirements have been satisfied and that there exists good cause for the termination. Board Order, p. 6. The Board found that based upon the evidence presented, Kia had demonstrated good faith. Board Order, p. 7. It found that Kia had demonstrated that Somersworth had violated the Dealer Agreement by failing to employ adequate personnel. Board Order, p. 10. It found that, based upon the evidence provided Kia "more than proved that it had good cause to terminate Somersworth and that it acted in good faith". Board order,p.18.

II

An automobile dealer sales and service agreement is important to both the dealer and manufacturer. By the terms of a typical sales and service agreement, the dealer is allowed to hold itself out as related to the manufacturer and use the manufacturer's trademark, which has great value to the manufacturer. Misuse of the trademark can cause significant harm to the manufacturer. On the other hand, for a dealer to obtain a franchise, he or she must usually expend significant effort and make a substantial capital investment. Breach of the franchise agreement by the manufacturer can result in loss of the dealer's

business and, consequently, loss of his or her investment.

In virtually all cases, the financial resources of the manufacturer dwarf the resources of the dealer. RSA 357-C, the so-called Dealer Bill of Rights, was enacted to protect retail automobile dealers from the perceived abusive and oppressive acts by manufacturers. Deere & Company v. State of New Hampshire, 168 N.H. 460, 467 (2015). The statute is designed to level the playing field between manufacturers, who have the ability to render a dealer's business worthless by unfair exercise of the authority granted them under a franchise agreement. Cognate statutes have been enacted in many jurisdictions. See generally Roberts v. General Motors Corporation, 138 N.H. 532, 537-38 (1994); New Motor Vehicle Bd. of Cal. v. Orrin W. Fox Co., 439 U.S. 96, 101 (1978). As first enacted in 1981, RSA 357-C provided motor vehicles with a number of procedural protections, which were expanded over time to include creation of a Motor Vehicle Industry Board to enforce the statute. Stihl v. State of New Hampshire, 168 N.H. 332, 333 (2015).

Under RSA 357-C: 7, a manufacturer may not terminate a dealer unless (a) the manufacturer has complied with all the notice provisions of RSA 357-C -7 (V); (b) the manufacturer has acted in good faith; (c) the manufacturer has good cause for termination; and (d) the dealer consents to the termination, failed to file a timely protest of the termination with the Board, or the Board finds at the hearing that good cause exists for termination and an appeal is no longer pending. The burden is on the manufacturer at all times to satisfy these requirements RSA 357-C: 7 (IV). A finding of good cause is not a subjective determination. Rather, under RSA 357-C: 7 (II):

> II. Notwithstanding the terms, provisions, or conditions of any agreement or franchise or the terms or provisions of any waiver, good cause shall exist for the

purposes of the termination, cancellation, nonrenewal or noncontinuance when:

> (a) there 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 of the franchise relationship; provided that compliance on the part of the new motor vehicle dealer is reasonably possible; and that the manufacturer, distributor or branch or division thereof first acquired actual or constructive knowledge of such failure not more than 180 days prior to the date on which notification is given pursuant to paragraph V.

RSA 357-C: 7, II (a).

Somersworth does not challenge the factual findings relating to its violation of the dealer agreement. It argues instead that the Board made two errors of law:

> First, the Board improperly measured the 180 days' notice period from the date upon which Kia unilaterally determined that the breach had reached a "critical level" as opposed to the date upon which Kia "first acquired knowledge" of the alleged brief which contradicts the plain language set forth in the act. Second, upon reconsideration, the Board improperly justified this error by carving out an exception to the "180 days' notice" requirement when there is an alleged continuing violation.

Pltf.'s Memo, p. 5.

III

Kia first argues that Somersworth's argument is waived because it was not presented until Somersworth filed a Motion for Reconsideration. However, New Hampshire courts generally take the position that an issue raised in a Motion to Reconsider is preserved for appellate review as long as the trial court had full opportunity to correct its error. Mortgage Specialists, Inc. v. Davey, 153 N.H. 764, 786 (2006). The Court will therefore consider the merits of the appeal.

The Board recognized that by its terms, RSA 357-C: 7 requires that a termination letter be sent to the dealer within 180 days after the manufacturer first obtained knowledge of staffing issues. However, it stated:

> The legal error alleged is that the Board mistakenly found that Kia sent the termination letter to Kia of Somersworth fewer than 180 days after it first obtained

knowledge of staffing issues. The Board, finds however, that the notice was proper because of the continuing nature of the staffing problems. It would be contrary to the intent of the dealer statute to require a manufacturer to initiate a termination action by sending a termination letter at the first technical breach of the dealer agreement. In this case, Kia expended tremendous effort in order to correct the breach and avoid a termination. Only after these efforts had failed, and the breach rose to a critical level did Kia issue the letter and because it did so within 180 days if complied with the statute.

Order on Motion to Reconsider, p. 2.

The Board relied upon Smith's Motor Cycles, Inc. v. American Suzuki Motor Corporation, 82 So. 3rd 682 (Ala. Sup. 2011) which interpreted the cognate Alabama Dealer Act, which contained the same 180 day notice requirement. In that case, the dealer was found to be in breach of the sales and service agreement because the facility was not in compliance with the dealer sales and service agreement. The evidence in that case established that the problems with the dealership "began to occur a number of years before Suzuki gave notice of its intent to terminate the franchise agreement" and that these problems were brought to the dealer's attention on different occasions by Suzuki's representatives who apparently tried to work with the dealer to correct the problems. Smith's Motor Cycles, Inc. v. American Suzuki Motor Corporation, 82 So. 3rd at 689. The trial court had held that the 180 day requirement was not applicable because the deficiencies under the agreement were both "continuing and evolving". Id. at 688. In affirming, the Alabama Supreme Court noted that to prevent Suzuki from terminating because it had knowledge of problems 180 days before giving actual notice, would allow the dealer to continue to operate the dealership in a manner inconsistent with an violation of the franchise agreement. Id.

The Alabama court relied upon several federal cases interpreting similar notice provisions under the federal Petroleum Marketing Practices Act, ("PMPA") 15 U.S.C. §

2801 et seq. Under the PMPA, termination of a franchise is not permissible under a statute if the franchise or first acquired actual or constructive knowledge of the failure not more than 120 days prior to the date upon notification of termination or nonrenewal is given. In Walters v. Chevron USA, Inc., 476 F. Supp. 353 (N. D. Ga. 1979), the evidence showed that from 1974 through the spring of 1979 when the termination notice was given, there were repeated instances in which the service station premises were found to be an unsatisfactory condition, and in violation of the franchise agreement. The court noted that the evidence had disclosed consistent efforts by Chevron to have the problems corrected including attempts made within the 120 days immediately preceding the date of the notice of non-renewal. Walters v. Chevron USA, Inc., 476 F. Supp.at 357. The court noted that the legislative history of the PMPA noted that the time limitations were imposed to preclude a franchise or from basing termination or nonrenewal upon "old and long forgotten events" and reasoned that the better approach is to treat each instance when an inspection revealed noncompliance with the lease as a separate failure to comply. Id.

A similar result was reached in Gruber v. Mobil Oil Corporation, 570 F. Supp. 1088 (E. D. Mich.1983) in which the court cited the legislative purpose of the statute and stated "when the alleged failure to conform with the lease is ongoing, occurring within an 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.

Neither party has cited any case other than Smith's Motor Cycles which interprets the timeliness provision of cognate dealer statutes. Somersworth attempts to distinguish Smith Motor Cycles by arguing that the breach in this case was not "evolving". but this

argument is inconsistent with the Board's finding were noncompliant during the entire 180 day period.

While not disputing the analogy to cases decided under the PMPA, Somersworth argues that the Court should reject Walters and Gruber and follow Heller v. Gulf Oil Corporation, 1984 US Dist. LEXIS 22972 (D.Mass. 1984). But Heller is not apposite. In the first place, the court in that case only addressed one if the four termination notices issued by the distributor and upheld termination. Second, the notice the court found untimely related to credit card charges against Gulf and the dealer's failure to pay Gulf pay gasoline- conduct which affected only the distributor and not the public. Third, and perhaps most importantly, unlike the instant case while Gulf claimed that the dealer had engaged in a pattern of improper conduct, it did not engage continuous conduct which violated the agreement. Id. at *13-14.

The Court is persuaded that the approach taken by the Board was proper. In the first place, the Board's interpretation of the notice requirement is consistent with the plain language statute of the statute. Each day that the Somersworth was out of compliance with the Dealer Agreement's staffing requirements constituted a new violation of that agreement. If as Somersworth contends, a franchise or must terminate at the first sign of a breach, then manufacturers would be encouraged if not required, to terminate based on any serious breach within 180 days of its first occurrence without giving the franchisee the opportunity and time to make reasonable efforts to remedy a breach. Gruber, 570 F. Supp. at 1092. Such a construction would be inconsistent with the purpose of RSA 357-C which is to protect dealers from oppressive conduct by manufacturers. Strike 4, LLC v. Nissan North America, Inc., 164 N.H. at 739. Moreover, the fact that a dealer may be terminated if

a breach has been ongoing does not vitiate the requirement that the manufacturer prove that it has good cause for termination. RSA 357-C: 7.

When interpreting a statute, a court must give effect to the legislative purpose and avoid interpreting the statute in a way which would lead to an absurd result. Boivard v. Department of Administrative Services, 166 N.H. 755, 763 (2014). The Board's interpretation is consistent with the legislative purpose of dealer protection. The Board noted "it would be contrary to the intent of the dealer statute to require the manufacturer to initiate a termination action by sending a termination letter at the first technical breach of the dealer agreement". Order on Motion to Reconsider, p. 2. The Court agrees.

It follows that the Board's Order must be AFFIRMED.

SO ORDERED

11/15/17
DATE

Richard B. McNamara,
Presiding Justice

RBM/