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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TABLE OF CONTENTS

TABLE OF AUTHORITIES. ii

QUESTION PRESENTED. 1

STATEMENT OF FACTS. 2
- I. Kia Motors America, Manufacturer, and Kia of Somersworth, Dealer. 2
- II. New Hampshire Motor Vehicle Dealer Bill of Rights. 3
- III. Kia's Continuing Knowledge of Somersworth's Staffing Breach. 6
  - A. First Notice, March 2011. 6
  - B. Second Notice, December 2011. 7
  - C. Third Notice, December 2011. 8
  - D. Fourth Notice, March 2012. 8
  - E. Fifth Notice, November 2014. 8
  - F. Sixth Notice, February 2015. 10

STATEMENT OF THE CASE. 11

SUMMARY OF ARGUMENT. 14

ARGUMENT. 15
- I. Statute Requires Notice of Termination Within Six Months from First Knowledge of Breach, but Kia Waived by Providing Untimely Notice. 15
  - A. "First" Means First. 15
  - B. Kia's Notice of Termination Was Issued Years After First Knowledge of Breach. 16
  - C. Kia Waived its Right to Terminate on Basis of Inadequate Staffing or Training. 18
- II. Legislative Control of Franchise Relationship Requires Reversal. 20
  - A. MVIB and Superior Court Added Words to the Statute That Are Not There. 20
  - B. Distinguishing Other Jurisdictions from New Hampshire. 22

CONCLUSION. 26

REQUEST FOR ORAL ARGUMENT. 27

CERTIFICATIONS. 27

ADDENDUM. 27
1. Kia Dealer Sales and Service Agreement § IV.A.4. 28
2. (MVIB) Decision and Order (May 10, 2017). 30
3. (MVIB) Order on Motion for Rehearing (June 20, 2017). 49
4. (Superior Court) Order (Nov. 15, 2017). 53

TABLE OF AUTHORITIES

United States Supreme Court Cases

Alexander Milburn Co. v. Davis-Bournonville Co.,
270 U.S. 390 (1926).. 16

New Motor Vehicle Board of California v. Orrin W. Fox Co.,
439 U.S. 96 (1978). 3

Federal Circuit Court Cases

Chevron U.S.A., Inc. v. Finn,
851 F.2d 1227 (9th Cir. 1988). 22

Geib v. Amoco Oil Co.,
29 F.3d 1050 (6th Cir. 1994).. . . . . 22, 24

Kia Motors America, Inc. v. Glassman Oldsmobile Saab Hyundai, Inc.,
706 F.3d 733 (6th Cir. 2013). 25

Nassau Blvd. Shell Service Station, Inc. v. Shell Oil Co.,
875 F.2d 359 (2d Cir. 1989).. . . . . 4, 22

Rao v. BP Products North America, Inc.,
589 F.3d 389 (7th Cir. 2009). 22

Texaco Refining & Marketing Inc. v. Davis,
45 F.3d 437 (9th Cir. 1994). 23

Veracka v. Shell Oil Co.,
655 F.2d 445 (1st Cir. 1981). 5

Wisser Co. v. Mobil Oil Corp.,
730 F.2d 54 (2d Cir. 1984).. . . . . 23, 24

Federal District & Bankruptcy Court Cases

Bob Tatone Ford, Inc. v. Ford Motor Co.,
140 F. Supp. 2d 817 (S.D. Ohio 2000). 25

California Petroleum Distributors Inc. v. Chevron U.S.A. Inc.,
589 F. Supp. 282 (E.D.N.Y. 1984). 23, 24

Crown Central Petroleum Corp. v. Waldman,
515 F. Supp. 477 (M.D. Pa. 1981). 21, 24, 26

Heller v. Gulf Oil Corp.,
1984 U.S. Dist. LEXIS 22972 (D. Mass. Oct. 5, 1984). 21, 24, 26

Marks v. Shell Oil Co.,
643 F. Supp. 1050 (E.D. Mich. 1986). 23, 24

In re Pereau,
40 B.R. 500 (Bankr. M.D. Fla. 1984). 23

Rhea & Judy Little Brentwood Service Inc. v. Shell Oil Co.,
697 F. Supp. 958 (M.D. Tenn. 1988).. . . . . 22, 23

Russ Thompson Motors, Inc. v. Chrysler Corp.,
425 F. Supp. 1218 (D.N.H. 1977). 4

Shell v. Ray Thomas Petroleum Co.,
642 F. Supp. 2d 493 (W.D.N.C. 2009). 22

Smoot v. Mobil Oil Corp.,
722 F. Supp. 849 (D. Mass. 1989). 23

Walters v. Chevron U.S.A., Inc.,
476 F. Supp. 353 (N.D. Ga. 1979). 23, 24

H.B. Automotive Group, Inc v. Kia Motors America,
2016 WL 4446333 (S.D.N.Y. Aug. 22, 2016).. 25

Lee Dodge, Inc. v. Kia Motors America, Inc.,
2011 WL 3859914 (D.N.J. Aug. 31, 2011).. 25

Maple Shade Motor Corp. v. Kia Motors America, Inc.,
2006 WL 2320705 (D.N.J. Aug. 8, 2006).. 25

The Maids International, Inc. v. Maids on Call, LLC,
2017 WL 4277146 (D. Neb. Sept. 25, 2017). 25

New Hampshire Cases

Autofair 1477, L.P. v. America Honda Motor Co., Inc.,
166 N.H. 599 (2014). 3

Belknap County v. Carroll County,
91 N.H. 36 (1940). 15, 16

D. M. Holden, Inc. v. Contractor's Crane Service, Inc.,
121 N.H. 831 (1981). 18

Deere & Co. v. State,
168 N.H. 460 (2015). 3

Maroun v. Deutsche Bank National Trust Co.,
167 N.H. 220 (2014). 18

Prime Financial Group, Inc. v. Masters,
141 N.H. 33 (1996). 18

Roberts v. General Motors Corp.,
138 N.H. 532 (1994). 3

STIHL, Inc. v. State,
168 N.H. 332 (2015). 3

Strike Four, LLC v. Nissan North America, Inc.,
164 N.H. 729 (2013). 13, 19, 20, 24

Other States' Cases

Colbath v. H.B. Stebbins Lumber Co.,
144 A. 1 (Me. 1929). 19

Edwards v. Kia Motors America, Inc.,
8 So. 3d 277 (Ala. 2008). 25

Shamrock Motors, Inc. v. Chrysler Corp.,
974 P.2d 1154 (Mont. 1999). 25

Smith's Sports Cycles, Inc. v. American Suzuki Motor Corp.,
82 So. 3d 682 (Ala. 2011). 24, 26

Westfield Centre Service Inc. v. Cities Service Oil Co.,
432 A.2d 48 (N.J. 1981). 3

Federal Statute

Automobile Dealers' Fair Day in Court Act, 15 U.S.C. §§ 1222-1225 (1956). 3

New Hampshire Statutes

N.H. LAWS 1981, 477:1. 3

RSA 357-C. 2, 3, 13, 19, 20

RSA 357-C:7, I. 4

RSA 357-C:7, I(d)(1). 10

RSA 357-C:7, II(a). 15

RSA 357-C:7, II(a). 4, 21

RSA 357-C:7, V.. 10

RSA 357-C:7, V(a).. 4

RSA 357-C:12. 4

RSA 357-C:12, VII. 12

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,
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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

1. Kia Dealer Sales and Service Agreement § IV.A.4. 28
2. (MVIB) Decision and Order (May 10, 2017). 30
3. (MVIB) Order on Motion for Rehearing (June 20, 2017). 49
4. (Superior Court) Order (Nov. 15, 2017). 53