

No. 41356-6-II  
(Pierce County Superior Court No. 10 2 06803 7)

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IN THE COURT OF APPEALS  
OF THE STATE OF WASHINGTON  
DIVISION II

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TACOMA AUTO MALL INCORPORATED, a Washington corporation,

Appellant/Cross-Respondent,

v.

NISSAN NORTH AMERICA INC.,

Respondent/Cross-Appellant.

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**BRIEF OF APPELLANT**

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## I. INTRODUCTION

This case concerns an issue of first impression in Washington: whether a prospective purchaser in the sale of a franchise has standing to sue for a violation of Washington's New Motor Vehicle Dealers' Franchise Act (Chapter 46.96, RCW) ("Franchise Act"). Under the Franchise Act, a manufacturer is prohibited from unreasonably withholding consent from the sale of a franchise to a qualified buyer.

Here, Nissan North America Inc. ("Nissan") refused to approve the sale of a Nissan franchise to Tacoma Auto Mall Incorporated ("TAM"), even though TAM was a qualified buyer with a proven history of operating a successful and profitable motor vehicle dealership. Because Nissan unreasonably withheld consent, it violated the Franchise Act.

The trial court, however, held that TAM, as a prospective purchaser, lacked standing to pursue claims that were based upon the Franchise Act. As a result, the trial court granted Nissan's summary judgment motion to dismiss TAM's claim for violation of the Franchise Act. The trial court also dismissed TAM's claims for promissory estoppel and breach of contract, claims that are related to the standards established by the Franchise Act.

The trial court erred in dismissing TAM's claims because the court's ruling ignores the primary purposes behind the Franchise Act: to ameliorate the disparity in bargaining power between manufacturers and dealers and to facilitate the transfer of ownership of automobile franchises.

Because genuine issues of material fact exist as to whether Nissan unreasonably withheld its consent to the sale of the franchise, the Trial Court erred in dismissing TAM's claims for violation of the Franchise Act, promissory estoppel and breach of contract. TAM requests that this Court reverse the trial court and hold that, as a matter of law, TAM has standing to pursue claims based upon violations of Washington's Franchise Act.

## **II. ASSIGNMENTS OF ERROR**

1. The trial court erred when it held TAM lacked standing under the Franchise Act to sue for violations of the Act.

2. The trial court erred when it summarily dismissed TAM's claims for promissory estoppel and breach of contract.

## **III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

1. Whether the trial court erred when it held TAM lacked standing under the Franchise Act as a matter of law, even though Nissan unreasonably withheld its consent to the sale of the franchise to TAM, a qualified buyer whose interests are protected by the Franchise Act. (Assignment of Error #1)

2. Whether the trial court erred when it summarily dismissed, as a matter of law, TAM's claim for promissory estoppel, even though TAM complied with the procedures established by Nissan and the Franchise Act. (Assignment of Error #2)

3. Whether the trial court erred when it summarily dismissed, as a matter of law, TAM's claims for breach of contract, even though Nissan dealt directly with TAM and TAM complied with the procedures established by Nissan and the Franchise Act. (Assignment of Error #2)

#### **IV. STATEMENT OF THE CASE**

For several decades, TAM, previously incorporated as Tacoma Dodge, Inc. ("Tacoma Dodge"), ran a successful Dodge dealership as a franchisee of Chrysler Motors, Inc. ("Chrysler"). Clerk's Papers (CP) 211-12. Tacoma Dodge was consistently among the highest performing Dodge dealerships in Washington in number of vehicles sold, parts sold and overall profitability. CP 212-13. From 2004 to 2008, for example, Tacoma Dodge ranked in the top eight dealers (out of 60) in the state. CP 213. In April 2009, Tacoma Dodge ranked No. 1 in Western Washington and No. 2 in the entire state for sales of new Dodge vehicles. CP 213. Tacoma Dodge also had a stellar record for the sale of parts: in 2008, Chrysler ranked Tacoma Dodge No. 76 for the sale of parts among all Chrysler dealers in the United States. CP 214.

In addition, Tacoma Dodge always produced an above average profit, even in the troubled economy of recent years. For example, Tacoma Dodge had net earnings on new car sales in 2008 of \$1,704,249.00 (compared to a regional average of Dodge dealers of only \$680), and a net profit of almost a million dollars. CP 214.

### **1. TAM's Attempted Purchase of Puyallup Nissan**

In April 2009, Chrysler filed for bankruptcy protection. CP 9. In May 2009, Chrysler notified Tacoma Dodge that it was terminating its franchise. CP 215. As a result, Tacoma Dodge became interested in purchasing a different automobile dealership, and changed its name to Tacoma Auto Mall, Incorporated ("TAM"). CP 215.

The majority shareholder of TAM, Philip Schaefer, learned that Puyallup Nissan, Inc. ("Puyallup Nissan"), was for sale, and began negotiating to purchase it. CP 215. Because the public interest in Nissan vehicles was greater than for Dodge products, TAM anticipated earning a far greater profit selling Nissan vehicles than it had selling Dodge vehicles. CP 216.

TAM and Puyallup Nissan signed a Letter of Intent in October 2009, whereby TAM agreed to purchase all of the assets of Puyallup Nissan. CP 216. The following month, the two companies signed an Asset Purchase and Sale Agreement. CP 137-38, 216. Because it was necessary to have a Nissan franchise to operate a Nissan dealership, Nissan's approval was required. CP 126, 128, 216.

In February 2010, Nissan notified TAM and Puyallup Nissan it would not approve the sale based upon the scores TAM had received on the Dodge Dealer Scorecards when it was a Dodge dealer. CP 260-62. In this letter Nissan claimed the Dodge Dealer Scorecards showed "that performance declined significantly year over year...." CP 261.

Nissan, however, was wrong. What the Dodge Dealer Scorecards really showed was that for 2007, TAM (which was operating then as Tacoma Dodge) was ranked in the top 46% of all Dodge dealers in the United States. CP 217. The following year TAM increased its performance so that it was ranked in the top 29% of all Dodge dealers in the nation. In February 2009, the last month TAM operated as a Dodge dealership, the Dodge Dealer Scorecard ranked TAM among the top 23% of all Dodge dealers in the United States. CP 217.

Nevertheless, Nissan refused to approve the sale based solely upon TAM's Dodge Dealer Scorecard, even though TAM had been outperforming 77% of the Dodge dealerships in the United States. CP 217.

## **2. TAM Files Suit.**

On February 24, 2010, TAM filed suit against Nissan. CP 3-7. The Complaint alleged violation of the Franchise Act (Chapter 46.96, RCW), promissory estoppel, unlawful interference with business and contractual relationship, and breach of contract. CP 5-6. The Complaint requested damages, specific performance and a declaratory judgment requiring Nissan to consent to the sale of the franchise to TAM. CP 6-7.

Nissan subsequently moved for the summary dismissal of all claims by TAM. CP 18-42. On October 22, 2010, the Honorable Ronald Culpepper of the Pierce County Superior Court partially granted and partially denied Nissan's motion. CP 293-95. The court allowed TAM's claims for tortious interference and damages to go forward, but denied

TAM's claims based upon a violation of the Franchise Act (RCW 46.96), promissory estoppel and breach of contract. CP 294.

In addition, Judge Culpepper certified the order for immediate review by this Court, stating that "this Order involves a controlling question of law as to which there is substantial ground for a difference of opinion," and that "immediate review of the Order may materially advance the ultimate termination of the litigation." CP 294.

On October 28, 2010, TAM filed a Notice of Discretionary Review regarding the trial court's order on summary judgment dismissing TAM's claims based upon RCW 46.96, promissory estoppel and breach of contract. CP 296-300.

On November 5, 2010, Nissan filed a Notice of Discretionary Cross-Review, seeking review of the trial court's order allowing TAM's tortious interference and damages claims to proceed, and denying Nissan's argument that TAM's claims were preempted by RCW 46.96. CP 301-07.

TAM and Nissan then jointly moved for an order staying trial pending resolution of their respective requests for discretionary review. CP 312-315. The trial court granted the motion on November 22, 2010. CP 314-15.

On February 1, 2011, this Court granted TAM's motion for discretionary review and Nissan's cross-motion for discretionary review.

## V. ARGUMENT

### A. Standard for Reviewing Summary Judgment Orders

An appellate court reviews de novo a summary judgment order and engages in the same inquiry as the trial court. *Allstate Ins. Co. v. Raynor*, 143 Wn.2d 469, 475, 21 P.3d 707 (2001). Summary judgment is appropriate if “the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” *Vallandigham v. Clover Park School Dist. No. 400*, 154 Wn.2d 16, 109 P.3d 805 (2005). To defeat summary judgment, the nonmoving party must come forward with specific, admissible evidence to sufficiently rebut the moving party’s contentions and support all necessary elements of the party’s claims. *White v. State*, 131 Wn.2d 1, 9, 929 P.2d 396 (1997). Argumentative assertions, unsupported speculation, suspicions, beliefs and conclusions, as well as inadmissible evidence that unresolved factual issues remain, are insufficient to meet this burden. *White*, 131 Wn.2d at 9; *Seven Gables Corp. v. MGM/UA Entertainment Co.*, 106 Wn.2d 1, 13, 721 P.2d 1 (1986). Where reasonable minds could reach only one conclusion based on the facts, summary judgment should be granted. *LaMon v. Butler*, 112 Wn.2d 193, 197, 770 P.2d 1027 (1989).

**B. Washington’s Franchise Act Protects Dealers and Prospective Purchasers.**

Historically, the vastly unequal power of the automobile manufacturers compared to individual dealers enabled the manufacturers to impose onerous restrictions on the dealers’ ability to manage their own businesses, as well as a plethora of other unfair practices. C.W. McMillian, *What Will It Take To Get You in a New Car Today?: A Proposal For a New Federal Automobile Dealer Act*, 45 Gonz. L. Rev. 67, 70 (2010) (“McMillian”). As the United States Supreme Court has stated, the disparity in power between automobile manufacturers and dealers prompted Congress and many states “to enact legislation to protect retail car dealers from perceived abusive and oppressive acts by the manufacturers.” *New Motor Vehicle Bd. of Cal. v. Orrin W. Fox Co.*, 439 U.S. 96, 100-01, 99 S. Ct. 403, 58 L. Ed. 2d 361 (1978).

These franchise acts cover not just termination and non-renewals, but practically the entire manufacturer-dealer relationship, including such diverse matters as reimbursements to dealers for warranty work, the allocation of new vehicles, allowing dealers to protest relocations and requiring “manufacturers to approve transfers.” McMillian at 73. As a result, “Virtually every aspect of the manufacturer-dealer relationship is now governed by statute.” McMillian at 68.

Washington’s Franchise Act is found at RCW chapter 46.96. In enacting this legislation, the Legislature addressed not only the disparity in bargaining power between manufacturers and dealers, but also the rights

of dealers to transfer ownership of their franchises without undue constraints:

The legislature further finds that there is a substantial disparity in bargaining power between automobile manufacturers and their dealers, and that in order to promote the public interest and the public welfare, and in the exercise of its police power, it is necessary to regulate the relationship between motor vehicle dealers and motor vehicle manufacturers, importers, distributors, and their representatives doing business in this state, not only for the protection of dealers but also for the benefit for the public in assuring the continued availability and servicing of automobiles sold to the public.

The legislature recognizes it is in the best interest for manufacturers and dealers of motor vehicles to conduct business with each other in a fair, efficient, and competitive manner. The legislature declares the public interest is best served by dealers being assured of the ability to manage their business enterprises under a contractual obligation with manufacturers where **dealers do not experience unreasonable interference and are assured of the ability to transfer ownership of their business without undue constraints.** It is the intent of the legislature to impose a regulatory scheme and to regulate competition in the motor vehicle industry to the extent necessary to balance fairness and efficiency. These actions will permit motor vehicle dealers to better serve consumers and allow dealers to devote their best competitive efforts and resources to the sale and services of the manufacturer's products to consumers.

RCW 46.96.010 (emphasis added).

As discussed below, the act promotes freedom of contract and fair competition by limiting a manufacturer's ability to restrict the sale of a franchisee's business.

**1. The Washington Franchise Act Protects Prospective Purchasers.**

The Washington Franchise Act provides that a prospective buyer of a dealership is to be approved by the manufacturer as a franchisee if the prospective buyer is capable of being licensed as a new motor vehicle dealer in Washington:

Notwithstanding the terms of a franchise, a manufacturer shall not unreasonably withhold consent to the sale, transfer, or exchange of a franchise to a qualified buyer who meets the normal, reasonable, and uniformly applied standards established by the manufacturer for the appointment of a new dealer, or is capable of being licensed as a new motor vehicle dealer in the state of Washington....

RCW 46.96.200(1) (1994). The Washington Franchise Act adds that a manufacturer's refusal to approve a proposed buyer "is presumed to be unreasonable" when the proposed buyer is capable of being licensed as a new motor vehicle dealer:

(5) In determining whether the manufacturer unreasonably withheld its approval to the sale, transfer, or exchange, the manufacturer has the burden of proof that it acted reasonably. A manufacturer's refusal to accept or approve a proposed buyer who otherwise meets the normal, reasonable, and uniformly applied standards established by the manufacturer for the appointment of a new dealer, or who otherwise is capable of being licensed as a new motor vehicle dealer in the state of Washington, is presumed to be unreasonable.

RCW 46.96.200(5) (1994).<sup>1</sup> If a manufacturer rejects a prospective dealer, the act requires the manufacturer to “state the specific grounds for the refusal to approve the sale.” RCW 46.96.200(3).

In 2010, the legislature amended RCW 46.96.200 by deleting “unreasonably” from RCW 46.96.200(1). Thus, under the new act a manufacturer “shall not withhold consent to the sale . . . of a franchise to a qualified buyer . . . .” RCW 46.96.200(1) (2010). The amended statute, which became effective after TAM filed this lawsuit, expands the protections provided prospective purchasers and reinforces TAM’s contention that RCW 46.96.200 was intended to protect prospective purchasers.

Having operated a successful dealership for over 36 years, TAM was clearly capable of being licensed as a new motor vehicle dealer in Washington, as it had been licensed for over 36 years. Nissan, which was required by RCW 46.96.200(3) to state the grounds for refusing to approve the sale, could only muster a single reason: that TAM’s performance on the Dodge Dealer Scorecards showed that TAM’s “performance declined significantly year over year....” CP 261.

Nissan’s interpretation of TAM’s performance, however, was patently wrong. What the Dodge Dealer Scorecards really showed was that for 2007, TAM was ranked in the top 46% of all Dodge dealers in the

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<sup>1</sup> The 2010 amendments to RCW 46.96.200 deleted “unreasonably” from RCW 46.96.200(1). *See* RCW 46.96.200(1) (2010). As a result, the legislature also removed the examples of unreasonable conduct found in RCW 46.96.200(5) (1994). *See* RCW 46.96.200(5) (2010).

United States. CP 217. The following year TAM increased its performance so that it was ranked in the top 29% of all Dodge dealers in the nation. In February 2009, the last month TAM operated as a Dodge dealership, the Dodge Dealer Scorecard ranked TAM among the top 23% of all Dodge dealers in the United States. CP 217.

At the very least, genuine issues of material fact exist as to whether Nissan unreasonably withheld its consent to the sale of the franchise. Because genuine issues of material fact exist, the trial court erred in granting the summary judgment dismissal of TAM's claims based upon violations of the Franchise Act.

The trial court, however, granted summary judgment because it held that TAM lacked standing to sue under the Franchise Act.

**2. TAM Has Standing To Pursue Claims Based Upon Violations of the Franchise Act.**

Standing is a constitutional doctrine designed to assure that the plaintiff has a direct stake in the controversy to be decided. *United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669, 687, 93 S. Ct. 2405, 2415, 37 L.Ed.2d 254 (1973). Thus, a party has standing when it has a personal stake in the outcome of the case. *Gustafson v. Gustafson*, 47 Wn. App. 272, 276, 734 P.2d 949 (1987). A party has standing to complain about the violation of a statute if the interest it seeks to protect is "within the zone of interests to be protected" by the statute, and the complainant suffered an injury in fact, economic or

otherwise. *Nelson v. Appleway Chevrolet, Inc.*, 160 Wn.2d 173, 186, 157 P.3d 847 (2007).

In *Nelson*, for example, a customer brought a class action against a car dealer, alleging that it improperly added its business and occupation (“B&O”) tax to the sales price of its cars. *Id.* at 178. RCW 82.04.500 provides that B&O taxes are not intended to be paid by customers, but are intended to be a business overhead expense. The dealer argued that the customer, Nelson, was not within the zone of interests protected by RCW 82.04.500 because it was a tax on the business, but the court logically observed that it was the customer who had paid the tax for the business. *Nelson* at 186. The court rejected the argument that Nelson suffered no injury because he would have paid the tax anyway, and held that the customer had standing to object to a violation of the statute. *Id.*

Here, a primary purpose behind the Franchise Act is to facilitate the transfer of a franchise without “undue constraints.” RCW 46.96.010. Consistent with that purpose, RCW 46.96.200 protects the interests of prospective buyers by its express terms. Qualified buyers must be approved, and if consent is withheld, the dealer must provide notice to the prospective buyer of the specific reasons for withholding consent. These protections inure directly to the benefit of a prospective buyer, and the buyer suffers a direct injury from a violation.

Because TAM was a qualified buyer, it was within the zone of interests to be protected by the Franchise Act. Nissan’s unreasonable

failure to consent to the sale violated the act and damaged TAM. Under Washington law, TAM has standing to pursue its statutory claim.

**3. TAM Was Not Required To Pursue the Administrative Remedies Found in the Act.**

In its summary judgment motion, Nissan primarily argued that TAM lacked standing because the Act only offers an administrative remedy to a selling dealer. CP 28-31. In the same motion, Nissan then inconsistently argued that TAM's action is precluded because neither TAM nor Puyallup Nissan pursued the administrative remedy provided by the Franchise Act. CP 31-32. Neither argument withstands scrutiny.

While the Franchise Act provides a streamlined administrative remedy to dealers frustrated by a manufacturer's refusal to allow a sale of their dealerships, the existence of this remedy to the selling dealer does not immunize a manufacturer from a suit filed by a prospective purchaser. Nothing in the Franchise Act precludes a purchasing dealer from seeking redress from the courts when it is unreasonably refused a franchise by a manufacturer.

First, the existence of a statutory remedy does not mean that the legislature intended the remedy to be exclusive. *Potter v. Washington State Patrol*, 165 Wn.2d 67, 85, 196 P.3d 691 (2008). Nor will a court lightly find that an injured party is without a remedy. "If a remedy provided by a statute is exclusive, the statute implicitly abrogates all common law remedies within the scope of the statute." *Id.* at 79. Before making such a finding, the court must first examine the statute for an

express statement declaring it to be an exclusive remedy for the injury at issue. *Id.* at 80. In the absence of such a provision, the court examines the language and statutory provisions to determine whether the legislature intended a statutory remedy to be exclusive. *Id.* at 80 (citing *Wilmot v. Kaiser Aluminum & Chem. Corp.*, 118 Wn.2d 46, 54, 821 P.2d 18 (1991)). If the latter does not clearly establish the exclusivity of a remedy, the court may look to other manifestations of intent to make it exclusive, such as the comprehensiveness of the remedy provided by the statute, the purpose of the statute, and the origin of the statutory right. *Id.* at 84 (citing *Wilmot*, at 61-65).

Here, none of these factors supports Nissan's argument. The Franchise Act contains no express statement that the administrative remedy available to selling dealers is exclusive, nor is there any other indication that the legislature so intended. To the contrary, the legislature gave every indication that it intended to protect both purchasing dealers and selling dealers, and to promote their freedom of contract. And it clearly contemplated resolution of disputes by means other than the streamlined administrative proceeding available to the selling dealer.

For example, the Franchise Act requires that venue for a "lawsuit" arising under the Franchise Act "or otherwise" between a manufacturer and "one or more motor vehicle dealers" lies in Washington:

Notwithstanding the provisions of a franchise agreement or other provision of law to the contrary, the venue for **a cause of action, claim, lawsuit**, administrative hearing or proceeding, arbitration, or mediation, whether

**arising under this chapter or otherwise**, in which the parties or litigants are a manufacturer or distributor and **one or more motor vehicle dealers**, is the state of Washington. It is the public policy of this state that venue provided for in this section may not be modified or waived in any contract or other agreement, and any provision contained in a franchise agreement that requires arbitration or litigation to be conducted outside the state of Washington is void and unenforceable. . . .

RCW 46.96.240 (emphasis added). That this venue provision addresses lawsuits or administrative hearings arising under the Franchise Act “or otherwise” establishes that the legislature did not intend for the administrative procedures in the Act to be the exclusive remedies. Moreover, the reference in RCW 46.96.240 to a manufacturer and “one or more motor vehicle dealers” indicates that the legislature did not intend to limit the lawsuit to a single, selling dealer.

In addition, there are many reasons that the legislature may elect, as a matter of public policy, to provide expedited remedial procedures to one group that it does not provide to another. For example, the Washington Law Against Discrimination recognizes a general right to be free of discharge due to sex discrimination, but provides no remedy for the same. *Roberts v. Dudley*, 140 Wn.2d 58, 68, 993 P.2d 901 (2000) (discussing the statutory remedies for discrimination available from employers with at least eight employees). Where a statute provides a clear statement of public policy without specifying a remedy for a particular group, it is incumbent on the court to devise the appropriate remedy. *Id.* at

72 (citing *Thompson v. St. Regis Paper Co.*, 102 Wn.2d 219, 232, 685 P.2d 1081 (1984)).

Here, too, the legislature has enunciated a rule that manufacturers may not prevent a qualified purchasing dealer from obtaining a franchise when purchasing an automobile dealership from a willing seller. The Act does not state that applicants may not obtain damages for a violation of that rule. The Franchise Act places no limitations on the damages a purchasing dealer may seek once a manufacturer unreasonably refuses to grant it a franchise. That the Washington Franchise Act provides an expedited remedy for the selling dealer and does not grant the same expedited remedy to the purchasing dealer means simply that the purchasing dealer must pursue its remedies in court. As the Washington Supreme Court has explained, the mere existence of a particular remedy does not make it exclusive. *Potter*, 165 Wn.2d at 85.

Decisions from other jurisdictions that have addressed this issue under different franchise acts have reached mixed results. *Cf. e.g., Big Apple BMW, Inc. v. BMW of N. Am., Inc.*, 974 F.2d 1358, 1382-83 (3rd Cir. 1992), *cert. den.* 507 U.S. 912 (1993) (conferring standing on a prospective franchisee); *Fladeboe v. American Isuzu Motors Inc.*, 150 Cal. App.4th 42, 55, 58 Cal. Rptr.3d 225, 235 (Cal. App. 4 Dist. 2007) (holding prospective purchaser of franchise had standing to challenge denial of request to transfer); *Don Rose Oil Co., Inc. v. Lindsley*, 160 Cal. App.3d 752, 759-60, 206 Cal. Rptr. 670 (Cal. App.5 Dist., 1984); *with Roberts v. General Motors Corp.*, 643 A.2d 956, 958-59 (N.H. 1994) (no standing

for prospective buyer under New Hampshire law); *Statewide Rent-A-Car, Inc. v. Subaru of America*, 704 F. Supp. 183, 186 (D. Mont. 1988) (no standing for prospective buyer under Montana law).

The reasoning applied by the *Don Rose* court underscores the inherent flaws in Nissan's standing argument. In *Don Rose*, the trial court had held that the purchaser of a franchise lacked standing because Shell Oil had refused to consent to an assignment of the franchise. 160 Cal. App.3d at 759. On appeal, the *Don Rose* court recognized the inherent incongruity in requiring that the franchisor consent to a transfer before allowing the purchaser to sue the franchisor:

Shell [the franchisor] may be able to establish that it acted reasonably in withholding its consent. If it does, then it may be said that such a finding proves that Rose [the purchaser] had no right to the relief prayed for. Meanwhile, however, he cannot be denied access to the courts. The rule is one of necessity. Rose had to sue Gifford [the seller] in the instant action to force it to request Shell to consent to the assignment; Gifford has no interest in prosecuting an action against Shell on Rose's behalf. Indeed, Gifford might benefit if Rose fails to obtain relief. If Rose cannot obtain redress, Gifford may be able to keep the franchise.

The trend in the law is toward the assignability of contract rights. [citations omitted] Starting with the end of World War II, franchises have increased in number and value. The law should accommodate itself to new forms of business endeavor and meet the reasonable expectations of franchisors, franchisees and their respective successors in interest. To do otherwise would deny a substantial segment of the economy access to justice.

Although the assignment was conditional, the condition is totally within Shell's control. Shell's position is tantamount

to contention that because of the conditional nature of the assignment, Rose cannot sue it without its consent—a concept so outrageous that extensive and computer-assisted research of all reported cases in all 50 states and in all federal courts has not located a single case where such an argument has been advanced.

It is inconsistent of Shell to admit for the purposes of the motion for summary judgment that it may not refuse consent unreasonably, but argue that a conditional assignment-subject only to Shell's consent-creates no rights in the assignee.

Whether or not Shell has reasonable grounds for withholding consent is a factual question.

*Don Rose*, 160 Cal. App. at 759-60. For these reasons, the *Don Rose* court reversed the summary judgment in favor of the franchisor.

The position taken by Shell in *Don Rose* is the same position taken by Nissan here. According to Nissan, it cannot be sued by TAM unless it consents to the transfer of the franchise, which is, as *Don Rose* pointed out, tantamount to saying that TAM cannot sue Nissan unless Nissan consents to the suit.

As in *Don Rose*, this Court should recognize the absurdity in Nissan's position. As in *Don Rose*, this Court should hold that whether Nissan acted reasonably in withholding its consent is a factual issue which renders summary judgment inappropriate.

**C. The Trial Court Erred in Dismissing TAM's Promissory Estoppel Claim Because TAM Had the Right To Rely Upon Nissan's Implicit Promise To Comply With Washington Law.**

Promissory estoppel occurs when there is (1) a promise, (2) a reasonable expectation that the promisee will change his or her position,

(3) a change in his or her position, (4) justifiable reliance by the promisee, and (5) an injustice that can only be avoided by enforcing the promise. *Klinke v. Famous Recipe Fried Chicken, Inc.*, 94 Wn.2d 255, 259 n. 2, 616 P.2d 644 (1980). A “promise” is “a manifestation of intention to act or refrain from acting in a specified way, so made as to justify a promisee in understanding that a commitment has been made.” *Havens v. C & D Plastics, Inc.*, 124 Wn.2d 158, 171, 876 P.2d 435 (1994).

Here, Nissan established an application process which required TAM to provide Nissan with substantial documentation establishing TAM’s qualifications as a dealer. CP 216. By establishing a procedure for prospective purchasers of a dealership to apply for a franchise to operate a Nissan dealership, Nissan manifested its intention to comply with Washington law by not unreasonably rejecting a qualified dealer seeking to purchase a dealership that operated one of its franchises in this state. Regardless of Nissan’s efforts to disclaim any obligation to such applicants, Nissan had a duty to comply with the Franchise Act and an implicit promise to act in good faith in accepting or rejecting such applications.

TAM had the right to rely on Nissan’s implicit promise to comply with the Franchise Act and this reliance is crucial to its promissory estoppel claim. Because TAM had the right to rely upon Nissan’s promise to comply with Washington law, the trial court erred in dismissing TAM’s promissory estoppel claim.

**D. The Trial Court Erred in Dismissing TAM's Breach of Contract Claims.**

Nissan's failure to comply with its application process and with the Franchise Act also supports TAM's breach of contract claim based upon (1) TAM's status as a third-party beneficiary of Nissan's contract with Puyallup Nissan and (2) TAM's claim based upon a unilateral contract with Nissan.

**1. TAM is a Third-Party Beneficiary of Nissan's Contract with Puyallup Nissan.**

A third-party beneficiary is one who, though not a party to a contract, will nevertheless receive direct benefits from it. *McDonald Const. Co. v. Murray*, 5 Wn. App. 68, 70, 485 P.2d 626 (1971). If the contract requires "the promisor to confer a benefit upon a third person, then the contract, and hence the parties thereto, contemplate a benefit to the third person." *Lonsdale v. Chesterfield*, 99 Wn.2d 353, 361, 662 P.2d 385 (1983). Intent is to be construed from the terms of the contract as a whole, in light of the circumstances under which it is made. *Postlewait Constr., Inc. v. Great Am. Ins. Cos.*, 106 Wn.2d 96, 99-100, 720 P.2d 805 (1986). The test for intent is objective—whether performance under the contract would necessarily and directly benefit the third party. *Lonsdale*, 99 Wn.2d at 361. A third party for whose direct benefit a contract is intended may sue for breach of the contract. *See Jeffery v. Hanson*, 39 Wn.2d 855, 239 P.2d 346 (1952).

Here, TAM is a third-party beneficiary of Nissan's contract with Puyallup Nissan because the contract explicitly requires Nissan to confer a

benefit on a third party: a qualified buyer. As a qualified buyer, TAM is the direct beneficiary of Nissan's agreement not to reject a qualified buyer.

## **2. Nissan Breached Its Unilateral Contract with TAM.**

A unilateral contract is an offer by one party to do a certain thing in the event another party performs a certain act. *Cook v. Johnson*, 37 Wn.2d 19, 23, 221 P.2d 525 (1950). For example, a multiple listing agreement that provides for payment of 3% of the selling price of real property to a cooperating broker is a unilateral contract; upon performance by the broker, the obligation to pay a commission arises. *Roger Crane & Associates, Inc. v. Felice*, 74 Wn. App. 769, 875 P.2d 705 (1994).

Here, Nissan entered into a unilateral contract in which it agreed to approve the sale of existing dealerships to qualified buyers, and to appoint such qualified buyers as Nissan dealers. TAM complied with Nissan's request for extensive documentation, and met all of the requirements of a qualified buyer. Nissan, however, breached its unilateral contract with TAM by rejecting it on unreasonable grounds.

At the very least, genuine issues of material fact exist regarding whether Nissan breached its contract with TAM. Therefore, the trial court erred when it summarily dismissed these claims.

## **VI. CONCLUSION**

In enacting the Franchise Act, the legislature addressed not only the disparity in bargaining power between manufacturers and dealers, but also the right of dealers to freely transfer ownership of their franchises

without undue constraints by manufacturers. To that end, the Franchise Act prohibits manufacturers from unreasonably withholding consent to a transfer and states that a manufacturer's failure to approve a transfer to a qualified purchaser is presumed to be unreasonable. The Franchise Act adds that venue for a lawsuit arising under the Franchise Act between a manufacturer and one or more dealers lies in Washington. Thus, the Franchise Act, read in its entirety, is intended to protect a prospective purchaser from a manufacturer's unreasonable failure to consent to a transfer.

The trial court, however, thwarted the protections provided by the Franchise Act when it held that TAM lacked standing to sue for violations of the Franchise Act, even though Nissan acted unreasonably when it refused to approve the transfer to TAM. Because genuine issues of material fact exist as to whether Nissan violated the Franchise Act, summary judgment should not have been granted. In addition, Nissan's failure to approve the transfer to TAM raises genuine issues of material fact that support TAM's promissory estoppel and breach of contract claims. For these reasons, TAM requests that this Court reverse the trial court's dismissal of TAM's claims for violation of the Franchise Act,

promissory estoppel and breach of contract, and allow these claims to proceed to trial.

DATED this 1<sup>st</sup> day of July, 2011.

VANDEBERG JOHNSON & GANDARA,  
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**Appendix:** RCW 46.96.200 (1994)

Captions not law—2003 c 21: See note following RCW 46.96.020.

**46.96.190 Prohibited practices by manufacturer.** A manufacturer shall not coerce, threaten, intimidate, or require a new motor vehicle dealer, as a condition to granting or renewing a franchise, to waive, limit, or disclaim a right that the dealer may have to protest the establishment or relocation of another motor vehicle dealer in the relevant market area as provided in RCW 46.96.150. [1994 c 274 § 6.]

**46.96.200 Sale, transfer, or exchange of franchise.** (1) Notwithstanding the terms of a franchise, a manufacturer shall not unreasonably withhold consent to the sale, transfer, or exchange of a franchise to a qualified buyer who meets the normal, reasonable, and uniformly applied standards established by the manufacturer for the appointment of a new dealer or is capable of being licensed as a new motor vehicle dealer in the state of Washington. A decision or determination made by the administrative law judge as to whether a qualified buyer is capable of being licensed as a new motor vehicle dealer in the state of Washington is not conclusive or determinative of any ultimate determination made by the department of licensing as to the buyer's qualification for a motor vehicle dealer license. A manufacturer's failure to respond in writing to a request for consent under this subsection within sixty days after receipt of a written request on the forms, if any, generally used by the manufacturer containing the information and reasonable promises required by a manufacturer is deemed to be consent to the request. A manufacturer may request, and, if so requested, the applicant for a franchise (a) shall promptly provide such personal and financial information as is reasonably necessary to determine whether the sale, transfer, or exchange should be approved, and (b) shall agree to be bound by all reasonable terms and conditions of the franchise.

(2) If a manufacturer refuses to approve the sale, transfer, or exchange of a franchise, the manufacturer shall serve written notice on the applicant, the transferring, selling, or exchanging new motor vehicle dealer, and the department of its refusal to approve the transfer of the franchise no later than sixty days after the date the manufacturer receives the written request from the new motor vehicle dealer. If the manufacturer has requested personal or financial information from the applicant under subsection (1) of this section, the notice shall be served not later than sixty days after the receipt of all of such documents. Service of all notices under this section shall be made by personal service or by certified mail, return receipt requested.

(3) The notice in subsection (2) of this section shall state the specific grounds for the refusal to approve the sale, transfer, or exchange of the franchise.

(4) Within twenty days after receipt of the notice of refusal to approve the sale, transfer, or exchange of the franchise by the transferring new motor vehicle dealer, the new motor vehicle dealer may file a petition with the department to protest the refusal to approve the sale, transfer, or exchange. The petition shall contain a short statement setting forth the reasons for the dealer's protest. Upon the filing of a protest and the receipt of the filing fee, the department shall promptly notify the manufacturer that a timely protest has been filed, and the department shall arrange for a hearing

with an administrative law judge as the presiding officer to determine if the manufacturer unreasonably withheld consent to the sale, transfer, or exchange of the franchise.

(5) In determining whether the manufacturer unreasonably withheld its approval to the sale, transfer, or exchange, the manufacturer has the burden of proof that it acted reasonably. A manufacturer's refusal to accept or approve a proposed buyer who otherwise meets the normal, reasonable, and uniformly applied standards established by the manufacturer for the appointment of a new dealer, or who otherwise is capable of being licensed as a new motor vehicle dealer in the state of Washington, is presumed to be unreasonable.

(6) The administrative law judge shall conduct a hearing and render a final decision as expeditiously as possible, but in any event not later than one hundred twenty days after a protest is filed. Only the selling, transferring, or exchanging new motor vehicle dealer and the manufacturer may be parties to the hearing.

(7) The administrative law judge shall conduct any hearing as provided in RCW 46.96.050(2), and all hearing costs shall be borne as provided in that subsection. Only the manufacturer and the selling, transferring, or exchanging new motor vehicle dealer may appeal the final order of the administrative law judge as provided in RCW 46.96.050(3).

(8) This section and RCW 46.96.030 through 46.96.110 apply to all franchises and contracts existing on July 23, 1989, between manufacturers and new motor vehicle dealers as well as to all future franchises and contracts between manufacturers and new motor vehicle dealers.

(9) RCW 46.96.140 through 46.96.190 apply to all franchises and contracts existing on October 1, 1994, between manufacturers and new motor vehicle dealers as well as to all future franchises and contracts between manufacturers and new motor vehicle dealers. [1994 c 274 § 7; 1989 c 415 § 18. Formerly RCW 46.96.120.]

**46.96.210 Petition and hearing—Filing fee, costs, security.** The department shall determine and establish the amount of the filing fee required in RCW 46.96.040, 46.96.110, 46.96.150, and 46.96.200. The fees shall be set in accordance with RCW 43.24.086.

The department may also require the petitioning or protesting party to give security, in such sum as the department deems proper but not in any event to exceed one thousand dollars, for the payment of such costs as may be incurred in conducting the hearing as required under this chapter. The security may be given in the form of a bond or stipulation or other undertaking with one or more sureties.

At the conclusion of the hearing, the department shall assess, in equal shares, each of the parties to the hearing for the cost of conducting the hearing. Upon receipt of payment of the costs, the department shall refund and return to the petitioning party such excess funds, if any, initially posted by the party as security for the hearing costs. If the petitioning party provided security in the form of a bond or other undertaking with one or more sureties, the bond or other undertaking shall then be exonerated and the surety or sureties under it discharged. [1994 c 274 § 8; 1989 c 415 § 19. Formerly RCW 46.96.130.]

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**CERTIFICATE OF SERVICE**

The undersigned makes the following declaration under penalty of perjury as permitted by RCW 9A.72.085.

I am a legal assistant for the firm of Vandenberg Johnson & Gandara. On the 1<sup>st</sup> day of July, 2011, I deposited in the mails of the United States a properly stamped and addressed envelope, and sent an email, containing a copy of the foregoing to:

James E. Howard  
Dorsey & Whitney LLP  
701 5th Ave, Ste 6100  
Seattle, WA, 98104-7043  
Email: howard.james@dorsey.com

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Dated this 1<sup>st</sup> day of July, 2011, at Tacoma, Washington.

Mark L. Gannett  
Mark L. Gannett