

No. 41356-6-II

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

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

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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 RESPONDENT/CROSS-APPELLANT**

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## I. INTRODUCTION

This appeal arises out of Nissan North America, Inc.'s ("NNA") exercise of its contractual and statutory right to withhold consent to the proposed sale of the dealership operated by its authorized new motor vehicle dealer, Puyallup Nissan, to Tacoma Auto Mall, Inc. ("TAM"). While negotiating a proposed purchase of Puyallup Nissan's dealership assets, TAM was well aware of NNA's right to review the proposed sale, and of the requirement that TAM apply for, and be approved as, a Nissan dealer as a condition precedent to the sale. This is standard in the industry and was repeatedly stated in the documents that Puyallup Nissan and TAM signed memorializing their proposed transaction.

When NNA evaluated TAM as a prospective Nissan dealer it discovered that not only had TAM's sales and service agreement recently been terminated by Chrysler, resulting in Chrysler appointing another dealer in the same location, TAM also did not meet Nissan's normal, reasonable, and uniformly applied standards for appointment as an authorized Nissan dealer. Accordingly, TAM was not approved as a Nissan dealer, and NNA withheld approval of the proposed sale. Puyallup Nissan, as the authorized Nissan dealer and owner of the dealership assets, was the entity that had a right to contest that Nissan lacked good cause for this decision. Instead, Puyallup Nissan accepted the decision, and continues to operate its dealership to this day.

TAM nonetheless commenced the action underlying this appeal in Superior Court. It did so despite: (1) Puyallup Nissan's decision not to file a protest; (2) having expressly acknowledged in writing that it had no right to purchase the dealership without NNA's approval; (3) statutory language precluding it from filing a protest; (4) an exclusive statutory scheme barring its claims; and (5) a lack of any actionable claims or damages. Undeterred, TAM alleged violation of Washington's New Motor Vehicle Dealers' Franchise Act (RCW Chapter 46.96), promissory estoppel, tortious interference, and breach of contract theories.

NNA moved for summary judgment, and the Honorable Ronald Culpepper, Pierce County Superior Court, determined that a prospective purchaser of a motor vehicle dealership has no cause of action under RCW Chapter 46.96, which governs the relationship between motor vehicle manufacturers and their authorized dealers. Judge Culpepper also determined that NNA had a clear right to review the application of TAM for a Nissan dealership. He therefore dismissed the promissory estoppel and breach of contract claims on summary judgment, leaving only a tortious interference with contract claim remaining in the case.

The Superior Court's dismissal of these claims is correct for several independent reasons. Regarding TAM's lack of standing, the relevant statutory provision, RCW 46.96.200, expressly provides that prospective purchasers may not object to the manufacturer's refusal to approve a proposed sale of a dealership. In other words, the very statute it seeks to rely upon specifically bars TAM from pursuing these claims. As

the administrative scheme reflects, only the owner of the dealership assets who is also the only party with whom the manufacturer has a contractual relationship, holds the right to trigger a review of the reasonableness of the manufacturer's decision regarding a proposed sale. As a result, there is no standing for TAM to pursue these statutory claims. Indeed, if it were true that TAM had standing, it would have had to first exhaust its administrative remedies, which neither it nor Puyallup Nissan did, providing an independent basis for affirmance.

TAM's common law promissory estoppel and breach of contract claims were also fatally flawed from the outset, and were correctly dismissed. As Judge Culpepper found, it was obvious that a promissory estoppel claim could not be made when there was no promise made by NNA to TAM. Similarly, a third party beneficiary claim could not be maintained where there was no suggestion that the parties intended to convey a benefit on TAM. Finally, a unilateral contract could not exist as there was no offer by NNA to enter a contract upon TAM's performance of some specific act. Rather, as emphasized in numerous documents, there was no promise of any kind made to TAM by NNA.

The court's rulings may also be affirmed for the independent reason that all common law claims are preempted by the exclusive statutory remedy provided in RCW 46.96.200. If this were not the case, and disappointed purchasers were allowed to bring parallel proceedings regarding the same decision in state or federal court, the comprehensive administrative scheme would be rendered meaningless. The manufacturer,

selling dealer, other dealers, and the public would be forced to wait years for the statute of limitations to expire on various common law claims in order to understand the nature of the business relationship. In the meantime, it would be unclear if the dealer could sell the dealership to another entity, or what legal claims might loom over the manufacturer's relationship with its dealer. Such uncertainty is contrary to the quick and efficient determination required by the administrative scheme, and would threaten the availability of reliable services for the consuming public.

Finally, the Superior Court erred in denying summary judgment regarding TAM's claim for tortious interference for at least three reasons. First, the claim fails on the merits because NNA did not improperly interfere with any valid business expectancy of TAM when it exercised its contractual and statutory right to turn down the proposed sale. Second, this claim is also barred by Washington's exclusive statutory scheme, which effectively vests any inquiry into the reasonableness of NNA's decision with Puyallup Nissan. Third, TAM offered no evidence that could support its speculative lost future profit claim for a business it never operated, leaving it with no recoverable damages.

Accordingly, for the foregoing reasons, NNA respectfully requests that this Court affirm the Superior Court's grant of summary judgment on TAM's statutory violation, promissory estoppel, and breach of contract claims, and assign error to the Superior Court's denial of summary judgment on TAM's tortious interference claim.

## **II. COUNTER-STATEMENT OF ISSUES PRESENTED**

1. Whether the Superior Court correctly concluded that TAM lacked standing under the Motor Vehicle Code given that prospective purchasers are expressly excluded from pursuing statutory claims.

2. Whether the Superior Court correctly granted summary judgment on TAM's promissory estoppel claim given that NNA never made a promise of any kind to TAM.

3. Whether the Superior Court correctly granted summary judgment on TAM's breach of contract claims where TAM was not a third party beneficiary to Puyallup Nissan's dealer agreement with NNA, and NNA made no offer to enter a unilateral contract with TAM.

4. Whether the Superior Court erred in denying summary judgment regarding TAM's tortious interference claim given that NNA did not improperly interfere with any valid business expectancy of TAM when it exercised its contractual and statutory right to turn down the proposed sale

5. Whether the Superior Court erred in denying summary judgment regarding TAM's tortious interference claim when Puyallup Nissan did not protest NNA's decision, and TAM's common law claims were barred by Washington's exclusive administrative scheme.

6. Whether the Superior Court erred in denying summary judgment regarding TAM's tortious interference claim when TAM failed to supply any evidence that it had non-speculative damages.

### **III. ASSIGNMENTS OF ERROR**

1. The Superior Court erred when it determined that the comprehensive regulatory scheme imposed by RCW Chapter 46.96 does not bar all of TAM's common law claims.

2. The Superior Court erred when it refused to dismiss TAM's tortious interference claim on summary judgment.

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

#### **A. Issues Relating to Assignment of Error No. 1.**

1. Whether RCW 46.96.200 preempts common law claims on the part of a disappointed purchaser.

#### **B. Issues Relating to Assignment of Error No. 2.**

1. Could TAM maintain a tortious interference claim when NNA had a contractual right to review and approve proposed purchasers.

2. Did TAM's failure to provide evidence that it had a valid business expectancy, or that NNA engaged in improper interference, bar its tortious interference claim.

3. Were TAM's claims barred by its failure to supply evidence that could support of its speculative lost future profits.

### **V. STATEMENT OF THE CASE**

#### **A. NNA's Only Agreement Is with Its Authorized New Motor Vehicle Dealer, Puyallup Nissan.**

For over 20 years, NNA has been a party to a Nissan Dealer Sales and Service Agreement ("Dealer Agreement") with its dealer, Puyallup Nissan. *See* CP 49-70. This Dealer Agreement authorizes Puyallup

Nissan to sell Nissan vehicles, and to operate its Nissan dealership at its current location in Puyallup, Washington. Puyallup Nissan's rights and obligations related to the dealership are set forth in detail in the Dealer Agreement. One aspect of the relationship between NNA and Puyallup Nissan addressed in the Dealer Agreement is the manner in which Puyallup Nissan may propose to sell dealership assets to another party. As is standard in the industry, the Dealer Agreement outlines when and how changes in the ownership of a Nissan dealership may take place. CP 50.

The Dealer Agreement emphasizes the personal services nature of the relationship, and provides that NNA must approve a potential purchaser as a Nissan dealer as a pre-condition to any proposed transfer. *Id.* The Dealer Agreement also acknowledges NNA's legitimate interest in both the Nissan brand and the ability of its authorized dealers to serve Nissan customers by granting it the right to review any proposed purchase agreement between Puyallup Nissan and a prospective purchaser:

Dealer agrees that any change in the ownership of Dealer specified herein requires the prior written consent of [NNA] . . . . No such change, and no assignment of this Agreement or of any right or interest herein, shall be effective against [NNA] unless and until embodied in an appropriate amendment to or assignment of this Agreement, as the case may be, duly executed and delivered by [NNA] and by Dealer.

*Id.* (emphasis added). In other words, Puyallup Nissan agreed that NNA must approve any proposed transferee before a sale could be consummated. Given the close business relationship between a

manufacturer and its dealers, this provision is essential to protect NNA's brand, which also benefits other NNA dealers and Washington consumers.

The Standard Provisions that are incorporated into the Dealer Agreement detail the procedure that the parties must follow regarding any proposed sale. Specifically, Section 15A of the Standard Provisions provides that Puyallup Nissan must notify NNA prior to closing any sale, and that the prospective purchaser must apply to NNA for a Dealer Sales and Service Agreement. CP 102. Section 15B of the Standard Provisions states that within sixty days after NNA has received a dealer's written request, application, and requested information, NNA must notify Puyallup Nissan of its decision regarding the proposed sale or transfer. CP 102-103. Section 17I of the Standard Provisions further emphasizes that any transfer without NNA approval is void, stating:

Dealer [Puyallup Nissan] shall not transfer or assign any right or transfer or delegate any obligation of Dealer under this Agreement without the prior written approval of the Seller [NNA]. Any purported transfer, assignment or delegation made without the prior written approval of Seller shall be null and void.

CP 104-06 (emphasis added).

None of the Standard Provisions in the Dealer Agreement grant rights to anyone other than the two parties to the agreement—NNA and Puyallup Nissan. In fact, these provisions make it abundantly clear that nothing in the Dealer Agreement is intended in any way to be for the benefit of a third party:

This Agreement is entered into by and between [NNA] and [Puyallup Nissan] for their sole and mutual benefit.

Neither this Agreement nor any specific provision contained in it is intended or shall be construed to be for the benefit of any third party.

*Id.* at Section 17L (emphasis added).

**B. Puyallup Nissan's Proposed Asset Purchase Agreement with Tacoma Auto Mall Was Conditioned on NNA Approval.**

In keeping with the Dealer Agreement, when Puyallup Nissan and TAM negotiated the terms of the sale of the dealership assets, they included clauses in the Asset Purchase Agreement explicitly conditioning the sale on NNA's approval. *See* CP 109-69. Two sections, entitled "Conditions Precedent to Obligations of Purchaser" and "Conditions Precedent to Obligations of Seller" both emphasize that fact. *Id.* at ¶¶ 7.1, 7.5, 8.4, 8.5. Puyallup Nissan also reiterated to TAM that it still needed to obtain NNA's approval in a letter, providing: "Upon approval of the purchaser by Nissan North America, the transaction will close consistent with the Asset Purchase Agreement." CP 171-72 (emphasis added).

On November 30, 2009, NNA sent a letter to Puyallup Nissan, with a copy to TAM, acknowledging the receipt of Puyallup Nissan's request to evaluate the proposed Asset Purchase Agreement, and asking TAM to submit certain information and documentation in order to begin the evaluation process. CP 174-77. This letter also stated: "**Please realize that this does not constitute approval and acceptance of the conditions placed on Nissan in the APA.**" *Id.* (bold and underline in the original). TAM completed the dealer applications in the process, explicitly acknowledging and agreeing that the application was supplied "as a

convenience only, and Nissan North America, Inc. shall not incur any obligation or liability by receipt of this application.” CP 179-81 (emphasis added). The applications further stated that submission had no meaning until approved by the President or Vice President of NNA:

No one other than the President or an authorized Vice President of [NNA] has the authority to approve the undersigned’s application for a Nissan Dealer Sales & Service Agreement. Final approval will be upon the execution of the Nissan Dealer Sales & Service Agreement by any one of the above named officers.

*Id.* TAM’s representatives both signed directly below this language. *Id.* NNA’s clearly expressed right to review and approve or disapprove of the proposed dealer applicant was of course no surprise, given TAM’s prior experience in the industry. *See* CP 101, at ¶ 8.

**C. Puyallup Nissan Had a Statutory Right to Protest if It Disagreed with NNA’s Decision Regarding the Proposed Sale.**

Puyallup Nissan, as the authorized Nissan dealer, had the ability to file a protest with the Department of Licensing regarding NNA’s decision to withhold consent to its proposed sale. These rights are memorialized in Washington’s detailed administrative scheme. *See* RCW 46.96 *et seq.* Among other things, the purpose of these regulations is to provide automobile dealers various rights and obligations in relation to their dealerships, and to govern the relationship between manufacturers and their dealers. RCW 46.96.010. These regulations are administered by the Department of Licensing as part of a comprehensive regulatory scheme,

and they provide a framework for analyzing all proposed sales, transfers, or exchanges of a franchise by a dealer.<sup>1</sup> See RCW 46.96.200, 210, 220.

Under the statute, when a sale is proposed the manufacturer may exercise a right of first refusal, RCW 46.96.220, or the manufacturer may approve or turn down the sale on its merits. RCW 46.96.200. With respect to evaluation of the merits of a proposed sale, the statute provides that a manufacturer must conduct its review within sixty days after receiving a written request from the selling dealer on forms proscribed by the manufacturer. See RCW 46.96.200(1). As part of the process the manufacturer may conduct due diligence regarding the proposed purchaser, who must “promptly provide such personal and financial information as is reasonably necessary to determine whether the sale, transfer, or exchange should be approved . . . .” *Id.*

If the proposed sale is denied, the manufacturer must provide the seller, proposed purchaser, and Department of Licensing with notification by certified mail. RCW 46.96.200(2). If the proposed purchaser provided financial data, the sixty-day decision deadline runs from receipt of such data. *Id.* The manufacturer may deny the sale based on the normal, reasonable, and uniformly applied standards established by the manufacturer for appointment of a new dealer. RCW 46.96.200(1);

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<sup>1</sup> In 2010, the Washington legislature amended RCW 46.96.200. Laws of 2010, ch. 178, § 7 (“ESHB 2547”). The amendment did not take effect until after TAM filed this lawsuit. Accordingly, the pre-2010 version applies to this case. See *State v. McClendon*, 131 Wn.2d 853, 861, 935 P.2d 1334 (1997) (statutory amendment is presumed to apply prospectively).

46.96.050. The notice must “state the specific grounds for the refusal to approve the sale . . . .” RCW 46.96.200(3).

Once that denial is issued, it then falls to the current authorized dealer to determine whether to protest this decision. The dealer must file any protest within 20 days with the Department of Licensing. RCW 46.96.200(4). An administrative proceeding is then commenced before the Office of Administrative hearings to determine whether the manufacturer had good cause. RCW 46.96.200(4)-(6); 46.96.050. This evaluation of whether the manufacturer had good cause, and determination of whether to pursue judicial review under this standard, is expressly vested only with the dealer. RCW 46.96.200(1)-(6).

**D. NNA Exercised Its Right to Deny the Proposed Sale and Puyallup Nissan Did Not Object.**

Pursuant to its rights under: (1) the Dealer Agreement and Standard Provisions; (2) the proposed Asset Purchase Agreement; (3) TAM’s application for a Nissan Dealer Sales & Service Agreement; (4) the correspondence between the parties; and (5) Washington statute, NNA analyzed whether it should approve or deny the proposed sale of its authorized dealer’s dealership assets to TAM. NNA made this determination after reviewing information that had been supplied by TAM. *See* CP 43-46 ¶¶ 3-17; CP 183-185. Among other things, that information indicated that TAM had previously operated a Dodge dealership. CP 45 at ¶¶ 10-11. TAM supplied data from its operation of a Dodge dealership for 2006-2008, and part of 2009. *Id.* Out of a possible

score of 1,000 on Dodge's performance reports, TAM received a range of 410 to 487, with year-over-year declines as high as 30% before the automobile industry downturn began. *Id.* at ¶ 10. Shortly before TAM attempted to purchase Puyallup Nissan, Chrysler had terminated TAM as a Dodge dealer. *Id.* TAM was then replaced with a new Dodge and Jeep dealer at the same location. *Id.*

However, rather than simply relying on this negative history, NNA conducted its own substantive review of TAM's sales data. This included examining TAM's performance through NNA's standard Regional Sales Effectiveness ("RSE") analysis which is used for all Nissan dealers. *Id.* The RSE analysis employed by NNA looks beyond raw sales figures to calculate the performance of a dealer by considering the dealer's sales compared to the opportunity available, as reflected by actual competitive registrations of vehicles in that dealer's individual market. *See id.* at ¶¶ 12-16. NNA then compares the dealer's performance to the performance of other dealers in the same region to determine the dealer's RSE. *See id.*

This was important because in operating a Dodge dealership in a major market like Tacoma, TAM would naturally sell a large number of cars. *Id.* at ¶ 13. However, a large number of sales does not necessarily indicate satisfactory performance, when viewed against the total new car registrations (opportunity) in the dealer's market. *Id.* at ¶¶ 13-14. For example, a small market dealer selling 100 vehicles a year in a market with 1,000 total new cars registered a year would be capturing 10% of the available opportunity. By contrast, a dealer selling 500 vehicles a year in

a market with 10,000 total new cars registered would only be doing half as well in capturing 5% of the available opportunity in the market. *Id.* at ¶ 13. In order to objectively evaluate TAM as a proposed Nissan dealer, NNA did not rely on raw sales volume alone, but rather reviewed TAM's sales volume as compared to its opportunity in the Tacoma market, which provides a more accurate picture of dealership performance.

When NNA analyzed TAM's performance as a Dodge Dealer using NNA's RSE analysis, that analysis also showed that TAM had been performing quite poorly, despite being located in one of the largest, highest opportunity markets in Washington. *Id.* at ¶¶ 15-16. TAM ranked 29th out of 34 Dodge dealers in Washington State, and 2,036th out of 2,638 Dodge dealers in the United States. *Id.* at ¶ 16. TAM's poor performance in RSE did not meet NNA's uniform standards for the appointment of a new dealer. *Id.* at ¶ 17. Following this review, NNA concluded that the sale would not be approved. *Id.* at ¶ 17 and Ex. H.

Since NNA's denial of the proposed sale, Puyallup Nissan has continued as a Nissan dealer. *Id.* at ¶ 18. Puyallup Nissan, as the existing authorized new motor vehicle dealer, had the sole statutory right to protest NNA's decision to deny the proposed sale to TAM. Instead of protesting the denial, Puyallup Nissan accepted NNA's decision, and decided not to sell the dealership assets. *Id.* It also declined NNA's offer to help locate a suitable purchaser, and continues to operate it successfully.

**E. The Superior Court Dismissed Most of TAM's Claims.**

TAM filed suit against Nissan on February 24, 2010, alleging violations of the Motor Vehicle Code (RCW Chapter 46.96), promissory estoppel, tortious interference, and breach of contract claims. CP 3-7. NNA moved for summary judgment on all claims. CP 19-40. The Honorable Ronald Culpepper, Pierce County Superior Court, granted summary judgment to NNA on the Motor Vehicle Code, promissory estoppel, third party beneficiary contract, and unilateral contract claims. CP 293-95. Judge Culpepper denied summary judgment with regard to the tortious interference claim, but stated, "at trial, very frankly, I think it's going to be an uphill burden for Tacoma Auto Mall . . . ." RP 3-4.

On October 27, 2010, TAM filed a Notice of Discretionary Review regarding dismissal of claims based upon RCW Chapter 46.96, promissory estoppel, and breach of contract. CP 296-300. NNA subsequently filed a Notice of Discretionary Cross-Review, seeking review of the trial court's denial of summary judgment on issues relating to the tortious interference claims, lack of damages, and preemption by Chapter 46.96. CP 301-03. Discretionary review of all claims was granted. *See* February 1, 2011 Ruling Granting Motion for Discretionary Review and Granting Cross-Motion for Discretionary Review.

**VI. ARGUMENT**

**A. Standard for Reviewing Summary Judgment Orders.**

Appellate courts review grants of summary judgment de novo, engaging in the same inquiry as the trial court. *Christensen v. Grant Cnty.*

*Hosp. Dist. No. 1*, 152 Wn.2d 299, 305, 96 P.3d 957 (2004). Construction of a statute is a question of law that is also reviewed de novo. *McGowan v. State*, 148 Wn.2d 278, 289, 60 P.3d 67 (2002). Summary judgment is proper where there are no disputed issues of material fact, and the moving party is entitled to judgment as a matter of law. CR 56(c); *McGowan v. State*, 148 Wn.2d 278, 289, 60 P.3d 67 (2002). The moving party bears the initial burden of establishing its right to judgment as a matter of law. *Young v. Key Pharms. Inc.*, 112 Wn.2d 216, 225 (1989). Once the moving party has met its burden, the nonmoving party has the burden to show a triable issue exists. *Doherty v. Mun. of Metro. Seattle*, 83 Wn. App. 464, 468 (1996). Summary judgment may be affirmed “on any correct ground, even though that ground was not considered by the trial court.” *Nast v. Michels*, 107 Wn.2d 300, 308, 730 P.2d 54 (1986).

When a motion for summary judgment is properly made, “an adverse party may not rest upon the mere allegations or denials of his pleading” but instead “must set forth specific facts showing that there is a genuine issue for trial.” CR 56(e); *see also Young*, 112 Wn.2d at 225; *Seven Gables Corp. v. MGM/UA Entm’t Co.*, 106 Wn.2d 1, 13 (1986). When considering a summary judgment motion, “CR 56(e) requires that the court consider only admissible evidence.” *Cotton v. Kronenberg*, 111 Wn. App. 258, 266 (2002). In evaluating the evidence, summary judgment is proper where “reasonable minds could reach but one conclusion regarding the material facts.” *Cotton*, 148 Wn.2d at 264.

**B. The Superior Court Properly Concluded that TAM Has No Rights Under RCW 46.96.200.**

Washington's statute is clear in providing by its explicit terms that only manufacturers and dealers have standing regarding a decision to withhold consent to a proposed sale of dealership assets. Judge Culpepper agreed, stating, "I don't find any right to Tacoma Auto Mall in the statute, so I'm going to grant the summary judgment on finding no right of action under the statute." RP 4. TAM's lack of standing to bring statutory claims under the Washington Motor Vehicle Code deprived the trial court of jurisdiction and warranted the dismissal of such claims. TAM ignores this plain language, case law on statutory interpretation, and the great weight of authority from other jurisdictions in arguing to the contrary.

Standing is "jurisdictional" in nature—without it, a court lacks power to hear a plaintiff's claims. *See Branson v. Port of Seattle*, 152 Wn.2d 862, 876-79 (2004) (affirming dismissal of action due, in part, to plaintiff's lack of standing); *High Tide Seafoods v. State*, 106 Wn.2d 695, 702 (1986) ("If a plaintiff lacks standing to bring a suit, court lacks jurisdiction to consider it"); *Bercier v. Kiga*, 127 Wn. App. 809, 823-24 (2004) (declaratory judgment request to bar third party from entering into an agreement with another was subject to dismissal for lack of standing). A plaintiff seeking standing under a statute must establish at minimum that "the interest sought to be protected by the complainant is arguably within the zone of interests to be protected or regulated by the statute ... in question." *City of Seattle v. State*, 103 Wn.2d 663, 668 (1985).

Washington's regulatory scheme governing manufacturer and dealer relations makes clear that its exclusive focus is on the manufacturer and its dealer. The Chapter itself is entitled "Manufacturers' and Dealers' Franchise Agreements." RCW 46.96. Furthermore, the legislative findings emphasize that the purpose is to regulate how manufacturers and their dealers "conduct business with each other," . . . "by dealers being assured of the ability to manage their business enterprises under 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." RCW 46.96.010.

In keeping with this purpose, the Washington Motor Vehicle Code makes clear that a manufacturer's denial of a proposed sale of a franchised car dealership is exclusively an issue between the manufacturer and its selling dealer. *See* RCW 46.96.200(5)-(6). Recognizing that the business owner must be the ultimate rights-holder, the regulatory scheme has limited the rights of prospective purchasers. RCW 46.96.200 requires the manufacturer to notify the prospective purchaser of the grounds for refusing the proposed sale, but explicitly states that only the selling dealer has the right to protest the reasonableness of the manufacturer's decision. *See* 46.96.200(2)-(4). Indeed, the statute provides "only the selling . . . new motor vehicle dealer and the manufacturer may be parties to the hearing," and further, that "only the selling . . . new motor vehicle dealer and the manufacturer may appeal the final order of the administrative law judge to superior court." RCW 46.96.200(5), (6).

TAM nonetheless baldly asserts that the statute protects the interests of prospective buyers “by its express terms.” Br. Appellant, at 13. According to TAM, such terms include the fact that manufacturers may not “unreasonably withhold consent” to sell a dealership to a qualified buyer and that the manufacturer must provide the prospective purchaser with an explanation for denying its applications. *See* RCW 46.96.200(1)-(3). TAM fails to mention, however, the language expressly barring the prospective purchaser from protesting the manufacturer’s denial of the sale. *See* RCW 46.96.200(5)-(6). Given that the prospective purchaser is specifically prohibited from objecting to the manufacturer’s denial, its interests in opposing the denial of sale are not within the zone of interests to be protected by RCW 46.96.200. *See id.*

Rather than confront such explicit language, TAM can only cite to case authority with no relevance to the present dispute. TAM primarily relies on *Nelson v. Appleway Chevrolet, Inc.*, 160 Wn.2d 173, 157 P.3d 847 (2007), which holds that a customer charged for business and occupation tax on the sale of a car has standing to sue under a statute which prohibits business owners from levying such tax upon consumers.<sup>2</sup> The Washington Supreme Court relied on the plain meaning of the statute in question, which prevented the car dealer from directly imposing the tax on customers. *Id.* at 179-80. Nowhere did the statute indicate that

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<sup>2</sup> TAM also cites to *Gustafson v. Gustafson*, 47 Wn. App. 272, 734 P.2d 949 (1987), which recognizes a “narrow exception” for shareholders to bring derivative suits despite the general principle that a party does not have standing to bring suit for wrongs done to a separate entity. This has no relevance here.

customers may not object to being overcharged. *Id.* Thus, *Nelson* does not remotely stand for the proposition that the rights of a party are “within the zone of interests to be protected” by the statute when there is an express bar to pursuing the stated remedy under that same statute.

TAM returns to the issue of standing in later sections of its opening brief and quotes extensively from *Don Rose Oil Co., Inc. v. Dale Lindsley*, 160 Cal. App. 3d 752 (1984). However, this California case did not involve any rights asserted under a statutory scheme. *Id.* at 759. Rather, it considered whether a party could seek to enforce a contract provision when he was not an assignee to the contract. *Id.* In fact, the appellate court noted that the trial court had inaccurately described standing as an issue in the case, when the ultimate question was whether plaintiff was a real party in interest to the contract. *Id.* The assignability of contract rights is not comparable to the exclusive statutory right of a motor vehicle dealer to file an administrative protest.

TAM also relies upon *Big Apple BMW, Inc. v. BMW North America*, 974 F.2d 1358 (3rd Cir. 1992) to argue that it has standing in this case. *Big Apple BMW, Inc.* sought to predict how the Pennsylvania Supreme Court would rule if it evaluated whether third parties to the manufacturer-dealer relationship had standing to assert claims under Pennsylvania Board of Vehicles Act. *Id.* at 1382. The Court was confronted with a statutory provision that specifically allowed “any person who is or may be injured” to assert a statutory claim in court. *Id.* at 1383. The Court noted that no existing case authority had construed such broad

language. *Id.* Accordingly, it felt compelled to conclude that standing existed under the expansive language of this provision. *Id.*

The Washington statute, by contrast, is quite specific in providing that only a dealer may assert statutory claims, that such claims must be asserted in an administrative proceeding in a prescribed manner and time frame, and that proposed purchasers may not engage in their own statutory protest. *See* RCW 46.96.200. Thus, there is no doubt that Washington Manufacturers' and Dealers' Franchise Agreements provisions do not contain the unusually broad language allowing any person who is or may be injured to assert a claim, that the *Big Apple BMW, Inc.* court concluded allowed statutory claims by third parties. *See, e.g., Seto v. Am. Elevator, Inc.*, 159 Wn.2d 767, 774, 154 P.3d 189 (2007) (statute should be interpreted so as not to render any portion superfluous); *Washington State Dept. of Revenue v. Hope*, 82 Wn2d 549, 52, 512 P.2d 1094 (1973) (words of statute should be given their usual meaning).<sup>3</sup>

Although no reported Washington case has addressed this issue, the Code is similar to the vast majority of statutes in other jurisdictions where courts have held that disappointed prospective purchasers do not have standing. *See e.g., Roberts v. General Motors Corp.*, 643 A.2d 956, 958-59 (N.H. 1994) (no standing for prospective purchaser, and observing “the great majority of other States have construed their dealership statutes”

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<sup>3</sup> TAM also points to *Fladboe v. Am. Isuzu Motors, Inc.*, 150 Cal. App. 4th 42 (2007). However, *Fladboe* simply assumed that standing would exist in the process of dismissing claims asserted by a proposed dealership transferee, and awarding damages in favor of the manufacturer. *Id.* at 55.

to exclude such claims); *Tri-County Motors, Inc. v. American Suzuki Motor Corp.*, 494 F. Supp.2d 161, 176 (E.D.N.Y. 2007), *aff'd* 301 Fed. Appx. 11, No. 07-3275-cv, 2008 WL 5063291 (2nd Cir. 2008) (prospective purchaser lacked standing under state statute); *Hand v. Chrysler Corp.*, 30 F. Supp.2d 667, 670-72 (D. Vt. 1998) (no standing for prospective purchaser under state statute or contract principles); *Statewide Rent-A-Car, Inc. v. Subaru of America*, 704 F. Supp. 183, 186 (D. Mont. 1988) (no standing for prospective purchaser); *Key v. Chrysler Motors Corp.*, 918 P.2d 350, 358-64 (N.M. 1996) (no standing for prospective purchaser); *Beard Motors, Inc. v. Toyota Motor Distrib., Inc.*, 480 N.E. 2d 303, 304-07 (Mass. 1985) (no standing for prospective purchaser).

Indeed, Courts have denied prospective purchasers standing even where the statute's language is broader than that applied in Washington. For example, in *Roberts*, the court denied the prospective purchaser standing even though the statute conveyed standing upon "any person who is injured in his business or property by a violation of this chapter." *Id.* at 536-537. This is much broader than Washington's statutory scheme, which specifically focuses on limiting any rights to the actual owner of the dealership. *See* RCW 46.96.200(4)&(6) (only the manufacturer and selling dealer may be parties). The *Roberts* court nonetheless concluded that the prospective purchasers lacked standing based on the overall purpose of protecting the investment and property interests of dealers that hold an actual ownership interest in a dealership. *Id.*

The case of *Statewide Rent-A-Car, Inc. v. Subaru of America*, 704 F. Supp. 183, 186 (D. Mont. 1988), provides another ready example. In that case a Subaru dealer, Shamrock Motors, Inc., entered into a contract to sell its Subaru dealership to Statewide Rent-A-Car. *Id.* at 184. As in the instant case, the sale was conditioned on approval by the manufacturer, and Subaru did not approve the proposed sale. *Id.* Statewide Rent-A-Car filed a lawsuit asserting claims under Montana's statutory scheme, and the common law. *Id.* In the process of dismissing Statewide Rent-a-Car's claims, the court reviewed the Montana statute, explaining:

Taken as a whole, the language of § 61-4-205, Mont. Code Ann. (1987), clearly regulates the relationship between a motor vehicle franchisor and its franchisees (*i.e.* Subaru of America and Shamrock Motors, Inc., herein). Furthermore, a review of the pertinent legislative history evidences the legislature's intent, in designing the Montana Automobile Dealership Law, was to protect motor vehicle franchisees and dealers from those injuries to which they were susceptible by virtue of the economic inequality between themselves and their franchisors.

*Id.* at 185. Accordingly, the court concluded that third parties to this relationship, such as proposed purchasers, were clearly not intended to be covered by the statute. *Id.* As discussed, the Washington Code likewise makes it clear that its focus is also the dealer-manufacturer relationship. Judge Culpepper was correct in concluding that third parties such as TAM have no standing to assert statutory claims.

**C. The Superior Court Correctly Dismissed TAM’s Promissory Estoppel Claim on Summary Judgment.**

Judge Culpepper dismissed TAM’s Promissory Estoppel claim on the basis that it could not even establish the first element of promissory estoppel—that there was a promise by NNA to TAM. RP 3. TAM argues this was error because it “had the right to rely on Nissan’s implicit promise to comply with the Franchise Act....” Br. Appellant, at 20. The only cases that TAM cites in support of this contention are *Klinke v. Famous Fried Chicken, Inc.*, 94 Wn.2d 255, 616 P.2d 644 (1980) and *Havens v. C & D Plastics, Inc.*, 124 Wn.2d 158, 876 P.2d 435 (1994).

In *Havens*, the Court affirmed the *denial* of plaintiff’s promissory estoppel claim, on the basis that defendant had not made a legally enforceable promise. 124 Wn.2d at 171. This case offers TAM no support. Reliance on *Klinke* is similarly misplaced. In *Klinke*, a franchisor explicitly promised to enter into a contract with a franchisee (“Klinke”). 94 Wn.2d at 257. Klinke relied on that promise, and even moved from Alaska to Tacoma as had been demanded by the franchisor. *Id.* The franchisor wrote “expressing satisfaction that he had made the move and that they would be doing business together in Washington.” *Id.* Klinke then worked with the franchisor to find a suitable location, and was told to proceed with the site acquisition. *Id.* at 257-58. After all of this had occurred, the franchisor changed its mind. *Id.* at 258.

Unsurprisingly the *Klinke* Court concluded that there was evidence of an explicit promise to enter a contract and reliance thereon. *Id.* at 260.

The record is entirely to the contrary here. Not only did NNA never promise to accept TAM as a dealer, it emphasized that lack of promise at every opportunity. Unlike *Klinke*, the only basis on which TAM could conceivably rely upon an alleged promise by NNA was the application it submitted to NNA—the very same application that TAM explicitly acknowledged and agreed created no obligation on the part of NNA. See CP 179 (application supplied “as a convenience only, and Nissan North America, Inc. shall not incur any obligation or liability by receipt of this application”); see also CP 132 (“**Please realize this does not constitute approval or acceptance of the conditions placed on Nissan in the APA**”) (bold and underline in the original).

Despite the fact that NNA unambiguously informed TAM that the application in no way promised anything, TAM argues that the application procedure itself creates an implicit promise. Br. Appellant, at 20. TAM’s own alleged perceptions of the procedure do not create a binding promise under Washington law. See *Elliot Bay Seafoods, Inc. v. Port of Seattle*, 124 Wn. App. 5, 13 (2004); *Havens*, 124 Wn.2d at 174-75. There can be no doubt that NNA clearly articulated that review of TAM’s application did not constitute a promise of acceptance, and TAM acknowledged in writing that it understood. The doctrine of promissory estoppel cannot be relied upon to supply a promise that does not exist. See *Elliot Bay Seafoods, Inc.*, 124 Wn. App. at 13. TAM has offered no facts or case law to support the finding of an unarticulated promise, and thus, the trial court’s dismissal of the promissory estoppel claim should be affirmed.

**D. The Superior Court Correctly Dismissed TAM's Breach of Contract Claims on Summary Judgment.**

**1. TAM Is Not a Third-Party Beneficiary of NNA's Contract with Puyallup Nissan.**

TAM argues that it is a third-party beneficiary of the Dealer Agreement between NNA and Puyallup Nissan because "the contract explicitly requires Nissan to confer a benefit on a third party: a qualified buyer." Br. Appellant, at 21-22. However, this assertion ignores every relevant provision of the Dealer Agreement. To the contrary, that Agreement emphasized throughout that it did not create any rights of any kind for third parties. It states:

In view of the fact that this is a personal services agreement, and in view of its objectives and purposes, this Agreement and the rights and privileges conferred on Dealer hereunder are not assignable, transferable or salable by Dealer, and no property right or interest is or shall be deemed to be sold, conveyed or transferred to Dealer under this Agreement. Dealer agrees that any change in ownership specified herein requires the prior written consent of [Nissan].

CP 50 (emphasis added). NNA further outlined the many factors that were important in evaluating a proposed purchaser in the Standard Provisions to the Dealer Agreement. Just some of the language reinforcing this point, and the lack of any third party beneficiaries, follows:

[Nissan] is responsible for establishing and maintaining an effective body of Authorized Nissan Dealers to promote the sale and servicing of Nissan Products. Accordingly, [Nissan] has the right and obligation to evaluate each prospective dealer, its owner(s) and executive, manager, the dealership location and the dealership facilities to ensure

that each of the foregoing is adequate to enable Dealer to meet its responsibilities hereunder.

CP 102-03 (emphasis added).

Dealer shall not transfer or assign any right or transfer or delegate any obligation of Dealer under this Agreement without the prior written approval of [Nissan]. Any purported transfer, assignment, or delegation made without prior written approval of Nissan shall be null and void.

*Id.* at 32 (emphasis added).

This Agreement is entered into by and between [Nissan] and Dealer for their sole and mutual benefit. Neither this Agreement nor any specific provision contained in it is intended or shall be construed to be for the benefit of any third party.

*Id.* at 33 (emphasis added). As this language makes abundantly clear, nothing in the contract requires NNA to confer a benefit on a third party. Rather, the provisions specifically state that there were no third party beneficiaries to Nissan and Puyallup Nissan's dealer agreement.

In its opening brief TAM does not address these provisions, and instead simply relies on *Lonsdale v. Chesterfield*, 99 Wn.2d 353 (1983). That case concluded that "if the terms of the contract necessarily require 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." *Id.* at 361 (emphasis added). Key to this holding, is the "necessarily requires" language which TAM also ignores.<sup>4</sup>

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<sup>4</sup> TAM also relies on the inapplicable case of *Postlewait Cosntr., Inc. v. Great Am. Ins. Cos.*, 106 Wn.2d 96, 720 P.2d 805 (1986), which simply holds that a lessor who was not named as an additional insured on lessee's insurance policy was not a third party beneficiary under the policy.

In this case, as the above contract language demonstrates, there can be no doubt that the terms of the Dealer Agreement do not “necessarily require” NNA to confer a benefit on TAM. Furthermore, it is well-established that “[t]he creation of a third party beneficiary agreement requires that the parties intend, at the time they enter into the agreement, that the promisor assume a direct obligation to the beneficiary.” *Deep Water Brewing, LLC v. Fairway Resources Ltd.*, 152 Wn. App. 229, 256 (2009). Benefits must “flow directly from the contract,” versus being “incidental, indirect, or consequential,” and it is not sufficient that the performance of a promise may benefit a third person. *McDonald Const. Co. v. Murray*, 5 Wn. App. 68, 70 (1971). The record before the Court does not establish that NNA took on a required and direct obligation to benefit TAM as a consequence of its 1989 Dealer Agreement with Puyallup Nissan. Judge Culpepper agreed, stating, “[TAM is] not a third party beneficiary to the contract that was entered 20 years before they offered to purchase it . . . [I]n 1989 the parties in the contract had not idea that Tacoma Auto Mall might be interested.” RP 3. TAM has not put forward any evidence or case law to suggest that this finding was in error, and this Court should affirm Judge Culpepper’s ruling.

**2. There Was No Unilateral Contract.**

For a unilateral contract to be formed, there must be “an offer to enter a contract upon the doing of a bargained for act by the offeree.” *Knight v. Seattle First. Nat. Bank*, 22 Wn. App. 493, 496-96 (1979). TAM

attempts to assign error to Judge Culpepper's finding that there was no unilateral contract between TAM and NNA by arguing that NNA "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." Br. Appellant, at 22. However, as detailed above, NNA never made any type of an agreement regarding approval of TAM. To the contrary, NNA notified TAM in writing that review of its application "**does not constitute approval and acceptance of the conditions placed on Nissan in the APA**" (bold and underline in original). CP 174.

TAM provides no case authority to suggest that review of an application which explicitly emphasizes lack of any promise, creates an offer to enter into a contract upon the completion of a bargained for task. Rather, TAM cites *Roger Crane & Associates, Inc. v. Felice*, 74 Wn. App. 769 (1994), for the proposition that a contractual offer to pay 3% upon the sale of real property to a cooperating selling broker is a unilateral contract. While the Court actually found that no unilateral contract existed under the circumstances of that case, even this proposition simply emphasizes that an actual offer to enter a contract and acceptance through performance is required. Such facts do not remotely exist here. Not only did NNA not offer to accept any proposed purchaser, it in no way offered to accept any applicant as a Nissan dealer. Thus, as Judge Culpepper correctly concluded, there is no legal basis for TAM's unilateral contract theory.

**E. The Comprehensive Regulatory Scheme Embodied in Chapter 46.96 Precludes TAM's Common Law Claims.**

**1. RCW 46.96.200 Is the Exclusive Means of Litigating the Reasonableness of a Manufacturer's Decision.**

The Superior Court's ruling dismissing TAM's claims on summary judgment may also be affirmed for an independent reason: the comprehensive regulatory scheme imposed by Chapter 46.96 provides exclusive remedies for the denial of the proposed sale of a dealership. A statute preempts common law claims where the directives of the statute are so inconsistent with the common law that both cannot logically coexist. *State ex rel. Madden v. PUD 1*, 83 Wn.2d 219, 222 (1973) (where "the provisions of a later statute are so inconsistent with and repugnant to the prior common law that both cannot simultaneously be in force, the statute will be deemed to abrogate the common law"); *see also Washington Water Power Co. v. Graybar Elec. Co.*, 112 Wn.2d 847, 852-54 (1989) (holding that, even without an express preemption clause, the Washington Product Liability Act preempts common law product liability remedies because the Act would mean nothing without preemption). Absent an express preemption clause, Washington courts determine whether a statutory remedy is exclusive by considering the comprehensiveness of the remedy, as well as the purpose and origin of the statute. *Wilmot v. Kaiser Aluminum and Chem. Corp.*, 118 Wn.2d 46, 61-65, 821 P.2d 18 (1991). Notably, statutory remedies that "provide a simple, quick resolution of disputes through an administrative procedure" also weigh in favor of preemption. *Id.* at 59.

RCW Chapter 46.96 imposes a comprehensive and accelerated dispute resolution scheme to administer the relationship “between automobile manufacturers and their dealers.” RCW 46.96.010. The framework relies upon the principles of efficiency and certainty:

The legislature recognizes it is in the best interest for manufacturers and dealers of motor vehicles to conduct business with each other in 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....

RCW 46.96.010. Accordingly, the protest procedure for the proposed sale of a dealership moves rapidly to ensure continuity in the operation of dealerships. If a manufacturer denies a proposed sale of a dealership, the motor vehicle dealer must file a protest within twenty days of receiving the notice of refusal. RCW 46.96.200(4). An administrative law judge must then conduct a hearing, in which only the selling dealer and manufacturer may be parties, and rule on the protest “as expeditiously as possible,” but no later than one hundred twenty days after the protest is filed. RCW 46.96.200(5). The manufacturer or selling dealer has thirty days from the final order of the administrative law judge to appeal to superior court. RCW 46.96.200(6); 46.96.050(3); 34.05.542(2).

Efficiency is crucial as prolonged disputes regarding the ownership of a dealership threaten the availability of reliable services to the consuming public. *See* RCW 46.96.010. Absent preemption, the decision could be litigated in two forums, under extremely different schedules. Litigation in state or federal court would extend many months, if not

years, beyond the one hundred twenty day administrative deadline. In the process, the right of selling dealers to secure accelerated administrative review in order to efficiently proceed with the sale of their dealerships would be eviscerated.

There would also be considerable uncertainty if the administrative scheme did not preempt common law claims. Without preemption, a manufacturer would approve or deny a proposed sale and have no way of knowing the ramifications, despite the expiration of the statutory protest period. While the selling dealer, as here, may elect not to protest the refusal of a proposed sale, it would likely be a necessary party to the superior court or federal court action commenced by the disappointed purchaser. In cases where a selling dealer proposes multiple prospective purchasers, a manufacturer could not assure that any decision would escape costly and time-consuming multi-party litigation. This would generate substantial ambiguity regarding the relationship between the manufacturer and the selling dealer. Both would be forced to wait for the statute of limitations to expire on various overlapping common law claims in order to understand the nature of their business relationship.

The threat of inconsistent results would also have paralyzing effects. A disappointed purchaser would be able to sue the manufacturer in state or federal court for alleged common law violations arising out of the same decision, while the actual owner of the dealership is clearly barred from doing so. *See* RCW 46.96.200 (4)-(6). During the months or years while the lawsuit progressed, the selling dealer would not know

whether it could proceed with selling its dealership, consumers would not know where to go for sale and service, the manufacturer would not know whether to suggest another candidate or approve another dealer, and a potential new dealer would not know if it could complete the sale without inviting further litigation or substantial business uncertainty.

Such uncertainty may lead to the delayed operation of a dealership placing “the continued availability and servicing of automobiles sold to the public” in jeopardy. RCW 46.96.010. Indeed, if Chapter 46.96 did not preempt common law claims, this uncertainty would plague many different decisions made by the manufacturer, including the decision to approve an additional dealership in the marketplace or to approve a relocation of a dealer. *See* RCW 46.96.140-150 (discussing accelerated protest rights when a new dealer is added to an existing dealer’s relevant market area, or an existing dealer relocates).

As the above discussion makes clear, Chapter 46.96 necessarily limits the rights of certain parties under specific circumstances for the sake of certainty and efficiency in dealings between motor vehicle manufacturers and their dealers. *See* Chapter 46.96.010. Like the Washington Product Liability Act (“WPLA”), Chapter 46.96 is a broadly defined legislative effort to reform the relationship between manufacturers and dealers. *See Washington Water Power Co. v. Graybar Elec. Co.*, 112 Wn.2d at 850-53 (“broad legislative effort” was intended to preempt common law remedies). This effort would be seriously compromised if parties expressly excluded from remedies under the Chapter were allowed

to bring parallel claims in state or federal court over the same decision. *Cf. Tynan v. General Motors Corp.*, 591 A.2d 1024, 1032-34 (N.J. Super. Ct. App. Div. 1991) (dismissing common law claims of disappointed purchaser because automobile franchise law “gives the franchisor the right to consent to a transfer of the franchise, and any wrongful lack of consent can be challenged by the existing franchisee pursuant to the Act.”).<sup>5</sup>

To argue against preemption, TAM relies on *Potter v. Washington State Patrol*, 165 Wn.2d 67, 196 P.3d 691 (2008). That case involved a vehicle impound procedure that the Washington Supreme Court had stricken down as unlawful. *Id.* at 75. Potter was the owner of certain unlawfully impounded vehicles which had been sold off at auction, and brought a class action claiming conversion. *Id.* The Washington State Patrol argued that Potter should have sought the return of the vehicles through an administrative process, and thus could not maintain a conversion claim, even though the vehicles were already sold. The *Potter* Court disagreed, concluding that conversion was an entirely separate remedy that was not inconsistent with the statutory scheme. *Id.* at 81-82. By contrast, for the many reasons stated above, common law claims challenging the basis of NNA’s denial of the proposed sale would be antithetical to RCW 46.96.

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<sup>5</sup> This portion of the opinion was unaltered on appeal to the New Jersey Supreme Court; an unrelated warranty issue was reversed on other grounds. *See Tynan v. General Motors Corp.*, 604 A.2d 99 (N.J. 1992).

TAM's reliance on RCW 46.96.240 is also misplaced. This provision is an assertion that Washington is the venue over disputes between manufacturers and dealers, regardless of any contractual attempt to require a different procedure or location. The reference to "one or more motor vehicle dealers" is simply to embrace the limited circumstances in which multiple dealers simultaneously protest. For example, more than one dealer may protest approval of a new or relocated dealership, and those protests are then consolidated. *See* RCW 46.96.150(1).

Similarly, the provision incorporates various forums on the basis that litigation may take place outside of an administrative proceeding. For example, after a violation is established in an administrative proceeding, a civil action may follow in Superior Court to recover damages flowing from violation of the Chapter. RCW 46.96.260. Thus, a provision on venue which necessarily incorporates every circumstance that may arise under the Chapter does not, as TAM asserts, stand for the proposition that the remedies afforded by Chapter 46.96.200 are not exclusive.

Finally, TAM relies on *Roberts v. Dudley*, 140 Wn.2d 58, 993 P.2d 901 (2000), to suggest that prospective purchasers may imply a civil remedy under Chapter 46.96 and thus escape preemption. When a statute protects a class of people by prohibiting or requiring certain conduct but does not express a civil remedy for violation of such conduct, it is true that a court may infer a cause of action under the common law of torts. *See Restatement (Second) Torts 2d* § 874A at 301 (1977); *see also Bennett v. Hardy*, 113 Wn.2d 912, 920, 784 P.2d 1258 (1990) (applying the

*Restatement (Second) Torts* 2d § 874A). In *Bennett*, the Washington Supreme Court established the factors for determining whether to imply a cause of action:

[F]irst, whether the plaintiff is within the class for whose ... benefit the statute was enacted; second, whether legislative intent, explicitly or implicitly supports creating or denying a remedy; and third, whether implying a remedy is consistent with the underlying purpose of the legislation.

*Id.* at 920-21.

TAM fails all three factors. First, prospective purchasers are entitled to very limited protection under—namely, to be notified of the manufacturer’s grounds for the refusal of sale. RCW 46.96.200(2). They are also expressly barred from objecting to a manufacturer’s decision. *See* RCW 46.96.200(5)-(6). Thus, there is nothing left to be implied. The statute articulates a right: that manufacturers may not unreasonably withhold consent to a sale; and a remedy: a hearing before an administrative law judge, with the final order appealable to Superior Court. That same statute specifically excludes the class to which TAM belongs. RCW 46.96.200(1), (5), (6). There can be no doubt that the statute was not enacted for prospective purchasers. *Cf. Tynan v. General Motors Corp.*, 591 A.2d at 1033 (“[I]t can hardly be suggested that statutory rights adopted for the benefit of the franchisee can be the basis for a common-law suit on behalf of someone not protected by the Act.”)

Second, RCW 46.96.200 could not be any more clear that prospective purchasers are not entitled to a remedy for a manufacturer’s refusal to approve the sale. The provision provides prospective purchasers

with the right be notified of such refusal, but omits that class from the parties who may object the same. *See* RCW 46.96.200(2), (5)-(6). It would be erroneous to speculate that such omission resulted from legislative oversight. *Jepson v. Dep't of Labor & Indus.*, 89 Wn.2d 394, 403, 573 P.2d 10 (1977) (“We are not authorized to read into it those things which we conceive the legislature may have left out unintentionally.”). That should be particularly true where prospective purchasers were obviously considered, and explicitly limited.

Finally, for all of the reasons stated above, implying a civil remedy for prospective purchasers under the statute is inconsistent with the underlying purpose of Chapter 46.96. Allowing prospective purchasers to protest the same decision under common law theories in state or federal court would significantly delay the sale process and generate sustained uncertainty over ownership of the dealership. Such a remedy is contrary to the stated legislative purpose, and should not be implied in this case.

**2. The Superior Court Lacked Jurisdiction Because the Dealer Elected Not to Pursue Administrative Remedies.**

Judge Culpepper’s finding that TAM has no right of action under the statute may also be affirmed on the alternative ground that the administrative remedies required by RCW 46.96.200 were never pursued. *See Nast v. Michels*, 107 Wn.2d at 308 (finding that a grant of summary judgment may be affirmed on any correct ground). In other words, because no party exhausted the administrative remedies set forth in the statute, any Superior Court litigation is barred.

It is a well-established rule in Washington that where statutes prescribe procedures for the resolution of a particular type of dispute, courts require compliance before they will exercise jurisdiction over the matter. *James v. County of Kitsap*, 154 Wn.2d 574, 588 (2005) (Superior Court lacked jurisdiction where a party failed to comply with the procedural requirements specified in the statute) (citing *Fisher Bros. Corp. v. Des Moines Sewer Dist.*, 97 Wn.2d 227, 230 (1982); *Banner Realty, Inc. v. Dep't of Revenue*, 48 Wn.App. 274, 276-78 (1987) (Superior Court could not exercise its original jurisdiction where the party failed to comply with statutory procedural requirements); see also *Sullivan v. Purvis*, 90 Wn.App. 456, 459 (1998) (landlord's failure to follow notice procedure in landlord-tenant statutes deprived Superior Court of subject matter jurisdiction over eviction action brought by landlord). As outlined above, the dealership sale approval process is regulated by statute. RCW 46.96 *et seq.* Only after the Department of Licensing renders the final decision and enters a final order, may a party seek judicial review in Superior Court. RCW 46.96.050(3). Therefore, the parties must comply with the procedural requirements of RCW 46.96.200 before a Washington Superior Court may exercise its jurisdiction over a dispute arising under the Code.

Here, Puyallup Nissan did not engage in the statutory protest procedures enumerated in RCW 46.96.200, and the time for any such protest (by Puyallup Nissan, or otherwise) has long since passed. In other words, when no protest was filed with the Department of Licensing, the first required step in the administrative process was not accomplished.

Instead, Puyallup Nissan—the only party with protest authority—chose to accept NNA’s decision not to approve the proposed sale and instead decided to continue operating its dealership. This was Puyallup Nissan’s choice to make. Plaintiff, as the proposed purchaser, is explicitly given only the right to receive notice of the manufacturer’s decision, and must otherwise defer to the actual owner of the dealership. *See* RCW 46.96.200. In other words, the legislature contemplated the role of disappointed purchasers, and ultimately determined that they could not wrest control of the process from the actual owner of the dealership. Any statutory challenge to NNA’s decision is thus foreclosed.

In response, TAM argues that the administrative remedy prescribed by RCW 46.96.200 is not exclusive. While TAM is incorrect, for the reasons discussed above, this argument does not depend on exclusivity or the availability of additional common law claims, but rather, on the principle of exhaustion. Put another way, even if TAM could bring the claims it seeks to assert, it is nevertheless barred from asserting statutory rights in Superior Court before the required administrative proceeding has transpired. Contrary to TAM’s assertions, this does not contradict NNA’s point that the statute provides an exclusive remedy. If TAM could somehow assert statutory rights, despite the obvious prohibitions, Washington law would have required TAM to first pursue an administrative remedy, which it did not do. TAM would fare no better if it could somehow borrow Puyallup Nissan’s rights, as Puyallup Nissan also did not pursue an administrative remedy.

## CROSS-APPEAL

### A. The Superior Court Should Have Granted Summary Judgment On the Tortious Interference Claim.

#### 1. TAM Did Not Raise Questions of Fact for Trial on Necessary Elements of Its Tortious Interference Claim.

A claim for tortious interference with a contractual relationship or business expectancy requires five elements, among which are a valid contract or business expectancy, and intentional or improper interference. *Leingang v. Pierce Cy. Med. Bureau, Inc.*, 131 Wn.2d 133, 157 (1997). In its Motion for Summary Judgment, NNA showed that there was no triable question of fact on these elements. CP 37-38; 276-79. In response, TAM offered no evidence to establish that genuine issues of material fact remained. Accordingly, summary judgment on this claim was proper. *See Lynn v. Labor Ready, Inc.*, 136 Wn.App. 295, 151 P.3d 201 (2006) (courts are limited to considering admissible evidence on summary judgment).

#### a. TAM Did Not Show a Business Expectancy.

Regarding the valid business expectancy element, plaintiff must prove that a future business opportunity and profits are reasonable expectations and “not a matter of wishful thinking.” *Caruso v. Local Union No. 690 of Intern. Broth. of Teamsters, Chauffeurs, Warehousemen and Helpers of America*, 33 Wn. App. 201, 653 P.2d 638 (1982), *reversed on other grounds* 100 Wn.2d 343, 670 P.2d 240 (1983). Where a party expressly reserves the right to take a course of action, there can be no valid business expectancy that the party will not take such action. *Goodyear Tire & Rubber Co. v. Whiteman Tire, Inc.*, 86 Wn. App. 732,

935 P.2d 628 (1997). In *Goodyear*, plaintiff signed a dealer agreement that specifically provided, “Goodyear retains the right to establish its own outlets for the sale of Goodyear Products or to sell Goodyear Products to other customers in Dealer’s trade area or elsewhere.” *Id.* at 736. Plaintiff then alleged that Goodyear had tortiously interfered with his business expectancies on the basis that Goodyear had sold products in his general market when its representatives had assured him that they would not do so. *Id.* at 736-37. The Court held that there could be no business expectancy where the contract unequivocally reserved the right to compete with the dealer. *Id.* at 745-46.

Likewise, in the Dealer Agreement with Puyallup Nissan, NNA specifically reserved the right to review and approve or deny any proposed purchase agreement between Puyallup Nissan and a prospective purchaser, stating, “Dealer agrees that any change in the ownership of Dealer specified herein requires the prior written consent of NNA.” CP 50. In keeping with the Dealer Agreement, Puyallup Nissan and TAM included clauses in the Asset Purchase Agreement explicitly conditioning the sale on NNA’s approval. CP 126-28; CP 171 (NNA approval required to close); CP 181 (no obligation incurred if TAM filled out an application).

In every interaction regarding the proposed sale, TAM was notified that NNA expressly reserved its contractual and statutory right to deny the sale after appropriate review. As in *Goodyear*, TAM cannot claim tortious interference when NNA did what the contract allowed it to do, and what it advised from the start that it might do. TAM’s aspiration for approval

cannot be misconstrued as a valid business expectancy. Indeed, courts in other jurisdictions have routinely held that the right of the franchisor to select its franchisees precludes an action by the disappointed prospective purchaser for tortious interference. See *Tri-County Motors* 494 F. Supp.2d at 175 (manufacturer's right to turn down sale barred claim for tortious interference); *Roberts v. General Motors Corporation*, 138 N.H. 532, 541, 643 A.2d 956, 961-962 (N.H. 1994) (same); *Statewide Rent-A-Car, Inc. v. Subaru of America*, 704 F. Supp. 183, 186 (D. Montana 1988) (same). As one court aptly summarized: “[t]he franchise system becomes meaningless if franchisors lose the right to review potential franchisees and are forced to accept franchises they did not chose.” *Statewide Rent-A-Car* 704 F. Supp. at 186.

**b. TAM Did Not Show Improper Interference.**

The tortious interference claim also fails because there was no evidence the alleged interference was improper. TAM must establish that the interference was “wrongful by some measure beyond the interference itself.” *Newton Ins. Agency & Brokerage, Inc. v. Caledonian Ins. Group, Inc.*, 114 Wn. App. 151, 158, 52 P.3d 30 (2002). Every agreement memorialized that NNA was entitled to review and approve or deny TAM's application. RCW 46.96.200 also unambiguously acknowledges the right of a manufacturer to refuse a proposed sale. Accordingly, NNA's exercise of its contractual and statutory right to review TAM as a prospective Nissan dealer could not be improper interference.

When NNA was notified that a sale of TAM was proposed, it took all appropriate statutory steps. Despite the fact that TAM had recently been terminated as a Dodge dealer, and replaced by another Dodge dealer, NNA sought data about TAM's performance. CP 174-77. It carefully reviewed the data that TAM had available. *See* CP 43-46; 286-88. That data indicated that TAM historically had high raw sales volume, but that is far from sufficient, and would be expected of any dealer operating in a market as large as Tacoma. *See* CP 286 at ¶ 3. The crucial inquiry: how TAM performed compared to the opportunity available in the Tacoma market, is not addressed by such raw sales volume data.

TAM nonetheless focuses solely on this one raw sales volume metric from its Dodge dealer scorecards, and ignores the rest of the poor operating data. *See* CP 213-14 at ¶¶ 11-19. NNA's more comprehensive review disclosed that out of a dealer score of 1,000, TAM received a range of 410 to 487 for every year that it supplied data. *See* CP 45 at ¶ 10; CP 287 at ¶ 6. In addition, TAM was experiencing year-over-year sales volume declines beginning before the automotive industry downturn. *See* CP 45 at ¶ 10; CP 287 at ¶¶ 6-7. TAM's year-over-year retail sales plunged -30% in 2006, dropped -15% in 2007, declined a further -34% in 2008, and in 2009 sales bottomed -37%. *Id.* By 2009 its annualized sales were approximately 1/4 of sales in 2006. *Id.* In other words, TAM's raw sales volume, the very metric TAM now asserts shows it was qualified, slid significantly in 2006, and never stopped dropping until it was terminated as a Dodge dealer and replaced with another dealer. *Id.*

NNA, however, did not stop with this review. It also evaluated TAM's raw sales data based on its Regional Sales Effectiveness ("RSE") calculation. *See* CP 45-46 at ¶ 12-16. This measure is uniformly applied to all Nissan dealers, and it looks beyond raw sales volume—which may be largely the product of the size of the dealer's market—to actual dealer performance. *Id.*; *see also* CP 287 at ¶¶ 4-5. This measurement captures the percentage of opportunity (actual vehicle registrations) in the dealer's market which the dealer is capturing. This allows an "apples-to-apples" comparison of different dealers in different markets.

Under this measurement a 100% RSE score means the dealer is capturing the percentage of competitive registrations equal to an average dealer in his or her region. *Id.* By way of example, Puyallup Nissan penetrated their market at 163% RSE in 2009. *Id.* By contrast, based on the sales volume provided by TAM to NNA, TAM would have achieved only 59% RSE as a Nissan dealer—in effect, a dramatically failing grade. *See* CP 46 at ¶ 16; CP 287 at ¶ 5. Even when this score is compared to the score that other Washington Dodge dealers would receive using NNA's measurement, TAM ranked 29th out of 34 Dodge dealers in the State. *Id.* This indicated that TAM was not a qualified candidate based on NNA's normal, reasonable and uniformly applied standards. *Id.*

Considering that NNA made an informed business decision while exercising its contractual rights, there can be no claim for tortious interference. Under Washington law, "[e]xercising in good faith one's legal interests is not improper interference." *Havsy v. Flynn*, 88 Wn. App.

514, 519 (1997). Nor is “asserting an arguable interpretation of existing law,” as NNA indisputably did. *Leingang v. Pierce County Medical Bureau, Inc.*, 131 Wn.2d 133, 157 (1997). It is also “well established that one who in good faith asserts a legally protected interest of his own which he believes may be impaired by the performance of a proposed transaction is not guilty of tortious interference.” *Brown v. Safeway Stores, Inc.*, 94 Wn.2d 359, 375 (1980). And asserting one’s rights to maximize economic interests is not improper. See *Birkenwald Distributing Co. v. Heublin, Inc.*, 55 Wn. App. 1, 12 (1989) (dismissing tortious interference claim for refusal to approve proposed transferee and emphasizing, “bad motive is essential, and incidental interference will not suffice”).

NNA’s decision not to replace a strong Nissan dealer with a recently terminated Dodge dealer with substantial sales declines, uneven dealer scorecards, poor sales penetration, and a failing grade under NNA’s RSE measurement was within NNA’s rights. Protecting its economic interests, its brand, and its right to choose its business partner is not tortious interference as a matter of law. Accordingly, TAM failed to offer any facts indicating that NNA improperly interfered with its hope to be accepted as a Nissan dealer. Although he denied NNA’s motion for summary judgment on the tortious interference claim, Judge Culpepper essentially agreed, stating:

If Tacoma Auto Mall can prove that they intentionally interfered with [Ms. Miranda’s] application process, that might establish tortious interference, and if there are some improper purpose behind her denial, if they can prove that,

that might establish their claim. I think that's going to be kind of a tough burden.

RP 4 (emphasis added).

Judge Culpepper's decision to nonetheless allow TAM's claim to survive summary judgment was in error based on the above case law. It was also in error to rely on the possible future ability of TAM to find and provide evidence of improper interference. When opposing a motion for summary judgment, the adverse party must offer specific facts to establish that there is a genuine issue for trial. CR 56(e); *see also Young v. Key Pharmaceuticals, Inc.*, 112 Wn.2d 216, 225 (1989). Accordingly, TAM should not have been allowed to proceed based on nothing more than the assertion that in the future it might find evidence that the denial of sale was made with an improper motive. Given that TAM produced no evidence indicating that NNA improperly interfered with a business expectancy, summary judgment on this claim should have been granted.

**2. TAM's Tortious Interference Claim Was Preempted.**

TAM's tortious interference claim should be preempted by statute, for the reasons discussed above. The claim that NNA tortiously interfered with the conditional Asset Purchase Agreement between TAM and Puyallup Nissan is nearly identical to TAM's statutory assertion that NNA made an unreasonable decision. The right to contest the reasonableness of NNA's decision resides solely with Puyallup Nissan. TAM repeatedly acknowledged that the proposed sale by NNA might be turned down, and the statutory framework vesting protest rights with Puyallup Nissan was

incorporated as a matter of law in its contract. Accordingly, TAM's tortious interference claim is preempted.

This result is a term of TAM's proposed deal with Puyallup Nissan. TAM was well aware that the proposed sale was subject to review, and nevertheless voluntarily pursued a transaction with Puyallup Nissan. *See* CP 109-69. In entering into a contract with a Washington dealer, TAM is deemed to have done so pursuant to existing law. *See Shoreline Cmty. College v. Employment Sec. Dep't*, 120 Wn.2d 394, 410, 842 P.2d 938 (1992) (finding that parties are presumed to enter contracts in contemplation of existing law). That law provides that a manufacturer's decision may be reviewed to determine if it acted in good faith, but specifies that only the actual dealer can trigger this review. *See* RCW 46.96.200(4)-(6). Accordingly, in signing the Asset Purchase Agreement, TAM effectively agreed that any protest of the reasonableness of NNA's decision would be handled by Puyallup Nissan.

**3. The Superior Court Should Have Granted Summary Judgment Regarding Lost Future Profits.**

After properly dismissing TAM's claims for statutory violations, promissory estoppel, and breach of contract on summary judgment, Judge Culpepper allowed TAM's claims for damages to proceed despite his "feeling" that it might be "pretty tough to prove any damages." RP 4. TAM's damage claim was based on nothing more than a guess as to lost future profits from selling new cars, for a new manufacturer, at a new location, at dealership it never operated. In support of this exceedingly

speculative claim, TAM made a vague reference to past profits as a Dodge dealer, but submitted no evidence regarding lost future profits as a Nissan dealer that raised a question of fact for trial. However, allowing TAM's claims to proceed past summary judgment on nothing more than the most speculative damage assertion was error. This provides an alternative basis for affirming all claims, and required the Superior Court to enter summary judgment on TAM's tortious interference claim *See* CR 56(e); *see also Young v. Key Pharmaceuticals, Inc.*, 112 Wn.2d 216, 225 (1989).

Under Washington law, lost profits are recoverable when they were within the contemplation of the parties at the time of contract, they are a proximate result of the defendant's breach, and they are proven with reasonable certainty. *See Tieggs v. Watts*, 135 Wn.2d 1, 17-18 (1998); *Farm Crop energy v. Old Nat'l Bank of Wash.*, 109 Wn.2d 923, 927-928 (1988). The Dealer Agreement, proposed Asset Purchase Agreement, correspondence regarding the proposed sale, and the dealer application all memorialize that lost profits were nowhere within the contemplation of the parties, as they all reflect that any deal was entirely contingent on NNA approval. *See* CP 43-181. Furthermore, TAM's claim is far too speculative to survive as a matter of law. In its Motion for Summary Judgment, NNA pointed out that TAM had asserted that if it had been approved as a new Nissan dealer, and if it had purchased the dealership, and if it had found success in a new business venture selling Nissans, it might have made approximately \$3,000,000 over some indeterminate period of time. *See* CP 6 at ¶ 6.2; CP 10-11 at ¶¶ 10-11. TAM had never

operated a Nissan dealership, and conceded that this number was plucked from the air. *See* CP 10-11 at ¶¶ 10-11. Its only argument was to point to net earnings as a former Dodge dealer. *See* CP 209, 211-18.

This is insufficient to survive summary judgment given that, under Washington law, a claim for damages cannot be based on a guess as to the profits that could be made in the future through a new franchise with which TAM had no history, cars that TAM had never sold, and a new dealership that TAM had never operated. *See Tiegs*, 135 Wn.2d at 18 (“[l]ost profits cannot be recovered where they are speculative, uncertain and conjectural”). In addition, under Washington’s new business rule, lost profits generally may not be asserted for a new business unless they can be determined with reasonable certainty. *Larsen v. Walton Plywood Co.*, 65 Wn.2d 1, 17, 390 P.2d 677 (1964). For example, in *Kaech v. Lewis County Public Utility Dist. No. 1*, 106 Wn. App. 260, 276-78, 23 P.3d 529 (2001), expert testimony from an economist was sufficient to overcome the presumption that lost profits of an unestablished business are too speculative. However, the expert opinion must be “supported by tangible evidence with a substantial and sufficient factual basis rather than by mere speculation and hypothetical situations.” *No Ka Oi Corp. v. Nat’l 60 Minute Time, Inc.*, 71 Wn. App. 844, 849, 863 P.2d 79 (1993).

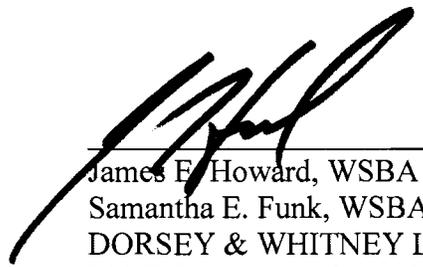
TAM, by contrast, did not put forth any expert opinion or tangible evidence and analysis of any kind regarding future profits as a Nissan dealer in opposition to NNA’s Motion for Summary Judgment. Accordingly, an exception to the new business rule cannot apply. TAM

simply failed to raise a question of material fact regarding profits if might have earned had it been approved as a Nissan dealer. Given that TAM has not met its burden, any assertions of lost profits should be dismissed.

## VII. CONCLUSION

For the foregoing reasons, this Court should conclude that the Superior Court properly dismissed the statutory violations, promissory estoppel, and breach of contract claims on summary judgment. Furthermore, given TAM's failure to show genuine issues of material fact to survive summary judgment on the tortious interference and future damages claims, this Court should assign error to the Superior Court's refusal to dismiss such claims.

Respectfully submitted this 15<sup>th</sup> day of August 2011.



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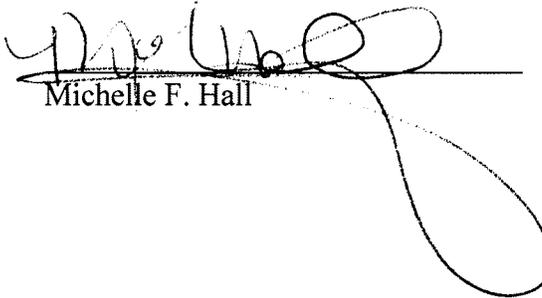
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### CERTIFICATE OF SERVICE

I hereby certify that on this date I caused to be served a copy of the foregoing on the following by the method indicated:

James A. Krueger	<input type="checkbox"/>	Via Messenger
Lucy R. Clifhorne	<input type="checkbox"/>	Via ECF Notification
Daniel Montopoli	<input type="checkbox"/>	Via Facsimile
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Dated this 15<sup>th</sup> day of August 2011.

  
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