IN THE SUPREME COURT OF MISSOURI

PARKTOWN IMPORTS, INC.	)	
	)	
Appellant,	)	
	)	
v.	)	Case No. SC89611
	)	
AUDI OF AMERICA, INC.,	)	
	)	
Respondent.	)	

Petition for Review from the Administrative Hearing Commission

June Striegel Doughty, Commissioner

On Transfer from the Missouri Court of Appeals, Western District

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INTRODUCTION AND SUMMARY

This case involves Audi of America, Inc.'s ("Audi") establishment of a new franchised dealer in west St. Louis County. It presents the legal question of whether an existing Audi-franchised dealer, in this case Appellant Parktown Imports, Inc. ("Parktown"), can, under specific provisions of the Missouri Motor Vehicle Franchise Practices Act ("MVFPA" or the "Act"), invoke the jurisdiction of the Administrative Hearing Commission (the "Commission") to block a new dealer from entering the market.

Two substantive, and one procedural, sections of the MVFPA are relevant to the statutory analysis, and those are: (1) Section 407.817, which provides that establishing or relocating new dealerships within a statutorily-defined distance from existing dealers requires a showing of "good cause;" (2) § 407.825(1), which prohibits a motor vehicle franchisor from engaging in "capricious, in bad faith, or unconscionable conduct" towards its dealers; and (3) § 407.822, which provides certain administrative remedies to enforce some of the substantive provisions of the Act. Audi contends, and the Commission below agreed, that, because the legislature intended § 407.817 to be the sole and exclusive mechanism for challenging the establishment of new dealerships, § 407.825(1) could not be used for that purpose. Therefore, the Commission properly dismissed Parktown's complaint because it lacked jurisdiction to hear it.

Section 407.817 provides that, before a motor vehicle franchisor can establish a new dealer within a "relevant market area" where it already has a dealer (in this case, defined in that section as an area within six miles of the proposed new dealer), it must give prior notice to its dealers within that area, and any such dealers may bring an action before the Commission, the filing of which prevents the franchisor from establishing the dealer unless and until it is able to demonstrate that it has "good cause" to do so. In this case, because Appellant Parktown is located beyond the six-mile "relevant market area" of the new dealer, it had no standing to bring a challenge under § 407.817. Undeterred by this lack of standing, however, Parktown instead brought an action under § 407.825(1), contending that the Commission had jurisdiction to block Audi's proposed establishment on the asserted grounds that it would constitute "capricious, in bad faith, or unconscionable" conduct. The Commission dismissed the complaint for lack of jurisdiction, holding that the legislature did not intend § 407.825(1) to regulate the establishment of new dealerships.

The Commission's decision is correct, and should be affirmed, for the reasons that:

(a) Applying established rules of statutory construction, it is clear that the legislature did not intend that § 407.825(1) be used, as Parktown advocates, to challenge the establishment of new dealerships because such interpretation would

be contrary to the statute's historical and stated purpose, as well as its plain language; because the specific language of § 407.817 (regulating dealer establishments) prevails over the general language of § 407.825(1) ("capricious, etc."); and because the legislature, which is presumed not to adopt statutes which create absurd results, cannot have intended § 407.825(1) to be used in the manner which Parktown proposes, which would create such absurd results; and

(b) Allowing dealers to invoke the jurisdiction of the Commission to block the establishment of a new dealer using § 407.825(1) would violate principles of due process, would constitute an unlawful restraint of trade, and would be an impermissible interference with interstate commerce in violation of the Commerce Clause of the United States Constitution.

STATEMENT OF FACTS[1]

Audi's proposal for a new dealership

In late 2006, having studied the St. Louis metropolitan market over a period of several years, Audi decided that the market, then served by two dealers, could support a third dealer to serve customers in the rapidly-growing west St. Louis County area where Audi had no dealer. (L.F. 3-4, 25-45.) Audi offered both existing dealers in the metro market (Parktown in Kirkwood and Plaza Motors, Inc. in Creve Coeur) the opportunity to submit proposals to establish the new dealership, and both declined. (L.F. 4.) Audi then presented the opportunity to Frank Bommarito Oldsmobile, Inc. ("Bommarito"), which accepted and proceeded to take steps to establish the new Audi dealership. (L.F. 12.)

This possibility of establishing the new Bommarito dealership required Audi to review its legal obligations to existing Audi dealerships under Missouri law. When Audi (or any other motor vehicle franchisor) seeks to establish a new dealer (a process generally referred to in the industry as a dealership "add-point"), it must review applicable state laws to determine whether any of its existing dealers have standing to challenge the proposed new dealership under the various territorial

[1] Because the Statement of Facts in Appellant's substitute opening brief is incomplete, Audi sets forth its own Statement of Facts.

protection laws (usually referred to as "relevant market area" or "RMA" laws). Relevant market area laws exist in all but one state (Maryland), Missouri's being codified in § 407.817 of the MVFPA.

Under § 407.817, a motor vehicle franchisor proposing to establish a new, or relocate an existing, dealer must first give notice to any dealer of the same line-make located within a certain radius – the "relevant market area" – of the proposed new location. In counties having a population of greater than one hundred thousand (which is the case here), that radius is six miles.[2] Section 407.817 allows dealers within the relevant market area to bring an action challenging the proposed new dealership before the Commission, pursuant to the administrative hearing provisions of § 407.822. If such an action is filed within 30 days of notice, the franchisor will be permitted to establish the new dealer only if it demonstrates that it has "good cause" for the establishment. If, however, no challenge is timely filed, the franchisor is permitted to establish the proposed new dealer without such a "good cause" determination.

Because Bommarito was proposing to locate its new Audi dealership in Ellisville, Missouri, more than 10 miles from each of the two existing Audi dealers (L.F. 10), § 407.817 did not require Audi to give notice, and neither dealer had

[2] For counties with a population of less than one hundred thousand, the radius is ten miles. § 407.817(2).

standing to challenge the establishment.

Parktown's complaint with the Commission and the automatic stay

The fact that Audi was permitted to establish the Bommarito dealership without RMA challenge, unfortunately, did not provide the safe harbor from challenge that Audi contends § 407.817 was intended to confer. While Parktown was not entitled to receive formal notice of the proposed new dealership under § 407.817, it was certainly well aware that the dealership was about to open. In addition to Audi having communicated to its dealers about the proposal months earlier, on March 20, 2007, Audi sent a letter informing Parktown that it had entered into an agreement with Bommarito and that the new dealership would soon begin selling vehicles. (L.F. 3-12.)

Because Parktown was outside the six-mile radius defined in § 407.817, however, it was precluded from bringing its action under that (RMA) statute. Instead, on March 27, 2007, Parktown brought its complaint before the Commission, claiming a violation of § 407.825(1), which prohibits a motor vehicle franchisor from "engag[ing] in any conduct which is capricious, in bad faith, or unconscionable and which causes damage to a motor vehicle franchisee or to the public." (L.F. 1-74.) By this point, Audi had entered into a Dealer Formation Agreement with Bommarito, and had prepared formal dealer agreement documents. Bommarito had readied its dealership facility to open, hired its

employees, and publicly announced the dealership's opening, and vehicles were ordered and scheduled for delivery within days. (L.F. 108.)

Upon the filing of Parktown's complaint, the Commission followed what it perceived to be its obligations under the administrative hearings provision of the MVFPA - that is, § 407.822. Thus, under § 407.822(1): "[u]pon receiving a timely application for a hearing, the administrative hearing commission shall enter an order fixing a date, time and place for a hearing [and] [t]he order shall also state that the party against whom relief is sought shall not proceed with the initiation of its activity or activities until the administrative hearing commission issues its final decision or order . . . ."[3] The Commission issued just such an order and the opening of the dealership came to an abrupt halt. (L.F. 86.)

On April 13, 2007, Audi moved to dismiss Parktown's complaint on several grounds, including lack of jurisdiction. (L.F. 75-78.) On May 10, 2007, the

[3] For reasons explained in section I.B below, Audi contends that, irrespective of whether a dealer is allowed to challenge a dealership establishment using the substantive provisions of § 407.825(1), the Commission did not have the power, authority, or obligation to enter this automatic stay order because, under the language of § 407.822(1), the automatic stay provision applies only to hearings on actions which involve specified time periods within which such actions must be filed.

Commission granted Audi's motion. (L.F. 123-31.) Following that ruling, Audi and Bommarito resumed their efforts to establish the new dealership, and the dealership opened for business shortly thereafter. Parktown appealed the Commission's ruling, and on July 8, 2008, the Court of Appeals issued its opinion overturning the Commission's order of dismissal. Audi filed a Motion for Rehearing and an Application for Transfer pursuant to Missouri Supreme Court Rules 83.02 and 83.05 on July 23, 2008, both of which the court summarily denied on September 2, 2008. On September 17, 2008, Audi filed its Application for Transfer pursuant to Missouri Supreme Court Rules 83.04 and 83.05, which this Court granted.

STANDARD OF REVIEW

The controlling issues here, all questions of law, involve the first construction by this Court of the MVFPA. Although Audi moved to dismiss on several grounds, the Commission's determination that it lacked jurisdiction to adjudicate the dispute was based exclusively on the Commission's interpretation of the relevant provisions of the MVFPA. Where the order or decision on appeal was based on a legal issue such as the correct interpretation of a statute, this Court's review is *de novo*. MO. CONST. Art. V, § 8; *Tendai v. State Bd. of Registration for the Healing Arts*, 161 S.W.3d 358, 365 (Mo. *Banc* 2005).

ARGUMENT

I. The Commission correctly held that it lacked jurisdiction to regulate the establishment of new dealerships using § 407.825(1) because the intent of the legislature is clear that it was not to be used for that purpose.

Ultimately, the issue on appeal is whether the Missouri legislature - either in the first instance or, in any event, once it later adopted § 407.817 - intended to allow the general "capricious, etc." language of § 407.825(1) to be used as the basis for challenges to the activity of establishing and relocating dealerships within the state. Audi contends, and the Commission below agreed, that § 407.825(1) is not intended for that purpose, but rather that § 407.817 is the sole and exclusive basis on which such a challenge could be brought. The Commission's correct interpretation is compelled in this instance, because: *first*, the plain language of § 407.825(1), as well as the procedures for enforcing a remedy under that section, do not support its use within the context of the activity of establishing and relocating dealerships; *second*, to the extent that one argues, as Parktown does here, that the "capricious, etc." provision can be construed to apply to dealership establishments, then, under established rules of statutory construction, the statute addressing the subject of establishments in a specific way (*i.e.*, § 407.817) would prevail over the more general statute prohibiting "capricious, etc." conduct; and *third*, Parktown's interpretation of the statute to allow applicability to add-point cases would yield

absurd results, which the legislature cannot be presumed to have intended.

A. As evident by the historical context of dealer protection statutes, as well as the plain language of the MVFPA, § 407.825(1) was never intended to regulate the activity of establishing new dealerships.

The relationship between motor vehicle franchisor and franchisee is extensively regulated under both federal and state law. Enacted to address what was perceived to be a disparity in bargaining power between automobile manufacturers and their dealers, the first such statute was the federal Automobile Dealer's Day in Court Act, 15 U.S.C. §§ 1221-1225, adopted in 1956, which made it unlawful for automobile manufacturers to engage in conduct towards their dealers which would constitute "coercion, intimidation, or threats of coercion or intimidation." (15 U.S.C. § 1221(e).) Thereafter, states began enacting their own statutes, so that, at present, virtually every state extensively regulates the industry.[4]

State statutes regulating the industry fall into two broad categories. The first category includes statutes which proscribe various abusive actions by a franchisor within the context of the franchise relationship. Examples of such conduct include

[4] A good summary of the development and evolution of these statutes can be found at *New Motor Vehicle Board of California v. Orrin W. Fox,* 439 U.S. 96, 98-103 (1978).

terminations without cause, failing to deliver an adequate supply of product, discriminating among dealers in various ways such as price of vehicles supplied to the dealer, imposing unreasonable performance or facility standards, delaying the reimbursement of warranty repairs, refusal to allow the sale of the dealership, coercing the participation in advertising programs, and others. In a similar manner, § 407.425 of the MVFPA lists a series of practices that it proscribes as "unlawful," including: coercing a franchisee to accept product or tools it does not need (¶2); unreasonably refusing to deliver vehicles in reasonable quantity (¶3); coercing an agreement by threatening to terminate (¶4); terminating without cause (¶5); preventing a change in the dealer's capital structure (¶6); preventing the sale of the dealership (¶7); preventing a change in management (¶8); imposing unreasonable performance standards (¶9); requiring a release waiving certain liabilities (¶10); prohibiting the right of free association (¶11); requiring onerous conditions in a lease; (¶12); refusing to buy back vehicles and equipment on termination (§13); refusing to honor ownership succession (¶14); coercing a waiver of rights under the MVFPA (¶15); requiring a dealer to enter into a site control arrangement (¶16); preventing a dealer from representing other line-makes (¶17); and refusing to supply to the dealer all models offered by the franchisor (¶18). All of these unlawful activities involve the franchisor abusing its superior position within the context of the franchise relationship, in effect leveraging its superior position to

extract benefits that go beyond those specified in its agreement.

In addition to these specifically-defined "unlawful practices," the Missouri legislature included in its list the "catch-all" type provision at issue here - § 407.825(1) - which defines as a unlawful the practice of "engage[ing] in any conduct which is capricious, in bad faith, or unconscionable and which causes damage to a motor vehicle franchisee or to the public. . . ." At least seven states have "catch-all" provisions similar to the statute at issue in this case.[5]

The second category of statutes found in dealer protection laws are those which regulate, not the balance of power as set forth in the dealer agreement and the relationship defined therein, but instead the manner and extent to which a franchisor can add new dealerships or relocate existing ones. These statutes (§ 407.817 being Missouri's version) are typically referred to as "relevant market area" or "RMA" laws because they give existing dealers a limited ability to protect a defined area within which it can block the entry of an intra-brand competitor unless the franchisor can demonstrate "good cause" to establish the new dealer (or relocate an existing one). These RMA statutes, while certainly designed to provide

[5] Those states are: Alabama (Ala. Stat. Ann. § 8-20-4(2)); Georgia (Ga. Stat. Ann. § 10-1-631); Illinois (815 ILCS 710/4(b)); Maine (10 M.R.S. § 1174.1); Maryland (Md. Code Ann. Transp. § 15-206.1); New Hampshire (N.H. R.S.A. § 357-5.1-4(a)); and South Carolina (S.C. Code Ann. § 56-15-40(1)).

existing dealers with protection (from invasive intra-brand competition), they are of a fundamentally different type than the statutes in the first category. Specifically, they do not prevent the franchisor from taking advantage of its rights (or the absence of dealer's rights) under the franchise relationship as defined in the dealer agreement; rather, they regulate the placement of dealers within a market.[6]

At the present, every state has a series of laws which proscribe specifically-defined abusive conduct, and every state except Maryland has some form of RMA law. Missouri enacted the MVFPA in 1980. Part of the Act was § 407.825, including subparagraph (1) (proscribing "capricious, etc." conduct). Missouri's

[6] An aid to statutory construction would seem to apply here. "[U]nder the principle of *ejusdem generis* 'where general words follow specific words in a statutory enumeration, the general words are construed to embrace only objects similar in nature to those objects similar in nature to those objects enumerated by the preceding specific words.'" *Vocational Services, Inc. v. The Developmental Disabilities Resource Board,* 5 S.W.3d 625, 630-31 (Mo. App. 1999). While the general words of subsection (1) of § 407.825 do not *follow* the remaining subsections, the order would not seem to matter, and the principle would be the same. The types of "unlawful practices" enumerated throughout § 407.825 all arise out of the franchise relationship; they do not, as an add-point challenge does, relate to whether *another* franchise should be allowed to enter the market.

RMA law, codified in § 407.817, was added in 2001. Significantly, since the passage of § 407.825(1) in 1980, there has *never* been an attempt to interpret it to apply to establishments or relocations, either before or after Missouri's RMA law was adopted in 2001 - at least until Parktown filed its action below in 2007. Hence, it is clear that the legislature never intended § 407.825(1) to be used to block the establishment of new dealerships.

Audi's position here is buttressed by cases interpreting similar statutes in other states. While this cannot be counted as binding precedent, it is instructive to note that these "catch-all" statutes (at least as far as Audi's research has been able to detect) have *never* been interpreted to apply to an add-point scenario. They have been used to challenge alleged racial discrimination in financing,[7] new facility requirements,[8] and the misallocation of new vehicles between two dealerships,[9] but never (at least successfully) to an attempt to establish a new dealer.[10] Notably, the

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[7] *In re Suburban Dodge of Berwyn, Inc.*, No. 04-B-42931, 2007 Bankr. LEXIS 1479 (N.D. Ill. Apr. 24, 2007).

[8] *Scuncio Motors, Inc. v. Subaru of New England, Inc.*, 555 F. Supp. 1121 (D.R.I. 1982).

[9] *Serra Chevrolet, Inc. v. Edwards Chevrolet, Inc.*, 850 So. 2d 259 (Ala. 2002).

[10] One case, *Love Pontiac, Cadillac, Buick GMC Truck, Inc. v. General*

only state without an RMA statute, Maryland, has twice rejected attempts to use its catch-all statute as a method for challenging the addition of a new dealership. *Heritage Oldsmobile-Imports v. Volkswagen of Amer., Inc.*, 264 F. Supp. 2d 282, 288 (D. Md. 2003); *Antwerpen Dodge, Ltd. v. Herb Gordon Auto World, Inc.*, 699 A.2d 1209 (Md. Ct. Spec. App. 1997).

In addition to these decisions, only one case has directly addressed the issue of whether a statute which prohibited "arbitrary or capricious" conduct could be interpreted to apply to the addition of a new dealership - that is, addressing precisely the situation in the present case. That case is *American Honda Motor Co. v. Bernardi's, Inc.*, 735 N.E.2d 348 (Mass. 2000), which held that the activity of adding new dealerships was governed solely by Massachusetts's RMA statute, and not the general statute which prohibited "arbitrary or capricious" conduct. That is precisely how the Commission ruled below in interpreting the Missouri statute.

Motors Corp., No. 97-2490, 1999 U.S. App. LEXIS 3769 (4th Cir. 1999), involved the challenge to a new dealership through South Carolina's statute prohibiting "arbitrary, bad faith, or unconscionable actions." While the court ultimately held that the car manufacturer's actions in adding a new dealership were not in bad faith, the case pre-dated South Carolina's RMA statute.

B. The plain language of § 407.822 does not envision an administrative hearing to remedy an alleged violation of § 407.825(1), nor an automatic stay as described in subsection (1) thereof.

Quite apart from the historical and industry context of the statutes at issue here, the language of § 407.825(1), and the language setting forth the process by which such an injury is to be remedied, belies the notion that it was intended to be used to challenge establishments and relocations. Parktown's attempt to shoehorn an RMA case into a non-RMA statute is a decidedly ill fit. While Parktown's argument follows the statute, and, at first blush has *some* surface plausibility, a careful reading of the statutes at issue makes it abundantly clear that the § 407.822 administrative remedy which Parktown seeks is not available. Parktown's logic, applied with blinders which camouflage the context, is as follows:

(a) § 407.825(1) defines as unlawful the practice of "engage[ing] in any conduct which is capricious, in bad faith, or unconscionable and which causes damage to a motor vehicle franchisee or to the public," and further provides that "the remedies for which are set forth in section 407.835;"

(b) § 407.835 provides that "*[i]n addition to* the administrative relief provided in sections 407.810 to 407.835," any motor vehicle franchisee may bring an action for damages in court;

(c) § 407.822.3 contains one example of such "administrative relief" by providing that "[a]ny franchisee receiving a notice from a franchisor pursuant to the provisions of section 407.810 to 407.835, or any franchisee adversely affected by a franchisors acts or proposed acts described in the provisions of sections 407.810 to 407.835, shall be entitled to file an application for a hearing before the administrative hearing commission for a determination as to whether the franchisor has good cause for its acts or proposed acts;" therefore,

(d) Being adversely affected (or at least, stretching the language only a bit, being under threat of being adversely affected) by Audi's proposed new dealer, which it alleges is "capricious, etc.," Parktown is afforded an administrative remedy under § 407.822(3), and thus may challenge Audi's proposed dealer establishment outside the context of the RMA statute.

This logic, however, quickly dissolves as one continues through the actual verbiage of the statute. First of all, there are two "remedial" subparagraphs under § 407.822 - subparagraph (1) and subparagraph (3), but only the former appears to reconcile with the procedural process of dealership add-points. And, neither subsection fits into the context of an action filed to remedy an alleged violation of § 407.525(1). Taking them in reverse order, subparagraph (3), which Parktown is attempting to use here, provides that "any franchisee receiving notice from a

franchisor pursuant to the provisions of sections 407.810 to 407.835, or any franchisee adversely affected by a franchisor's acts or proposed acts described in the provisions of sections 407.810 to 407.835, shall be entitled to file an application for a hearing before the administrative hearing commission for a determination as to whether the franchisor has good cause for its acts or proposed acts."

The first half of this subparagraph has language which begins to suggest a fit with an add-point case,[11] because an add-point case involves the concepts of notice and "good cause": the franchisor sends notice, and the protesting dealer brings an action to determine whether the franchisor has good cause to establish the new dealer. However, the second half of subparagraph (3) clearly does not fit this language within the context of a claim to remedy conduct which is unlawful under § 407.825(1) ("capricious, etc."). This is because the trailing clause of that sentence - describing the nature of this action being to determine whether the franchisor has "good cause" for its act - makes no sense in that context. That is, it makes no sense, either under common language usage or in anything defined in the statute, to speak in terms of whether a franchisor has "good cause" to commit

[11] However, for reasons explained below, it appears that the legislature intended that add-point cases be heard under the procedural provisions of subsection (1), not subsection (3).

"capricious, in bad faith, or unconscionable" conduct. Conduct is either "capricious, etc." or it is not. "Good cause" has nothing to do with it. Therefore, subsection (3) clearly was intended to be read to mean that an action under this subparagraph may be brought by a franchisee adversely affected by a franchisor's acts or proposed acts (but only) where a "good cause" determination is an issue.[12] That is the only way to give any meaning to the phrase "good cause" in that sentence, something that is required under established rules of statutory interpretation. *Boyd v. State Bd. of Registration for the Healing Arts*, 916 S.W.2d 311, 314 (Mo. Ct. App. 2000) ("A legislative act's provisions must be construed and considered together and, if possible, all provisions must be harmonized and every clause given some meaning.").

Turning to the other remedial subsection of § 407.822, subsection (1): it becomes clear that subsection (1) (solely) is meant for the purpose of administratively challenging a dealership establishment under § 407.817. Subsection (1) provides that "[a]ny party seeking relief pursuant to the provisions of sections 407.810 to 407.835 may file an application for a hearing with the

[12] For example, "good cause" determinations in the context of dealer terminations under subparagraph (5), the sale of the dealership under subparagraph (7), dealership succession under subparagraph (14), and extending factory ownership of a dealer under § 407.826.1(1)(a).

administrative hearing commission *within the time periods specified in this section*." "This section" being § 407.822, there *are* some time periods set forth therein.[13] More significantly, the RMA statute, which specifically provides that add-point actions should be heard under § 407.822,[14] provides the "time period" which subsection (1) of that section requires.

The use of § 407.822(1) as the exclusive procedural mechanism for (true) add-point cases appears warranted for one final reason. As noted earlier, when an action is brought under subsection (1) of § 407.822, the automatic stay provision (the order fixing the hearing date "shall state that the party . . . against whom relief is sought shall not proceed with the initiation of its activity . . . until the administrative hearing commission issues its final decision or order") is implicated. Subsection (3) (which Parktown is attempting to use here) does not contain the same automatic stay language that is contained in subsection (1).[15] In any event,

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[13] Specifically, § 407.822(4) references subdivisions (5), (6), (7) and (14) of what it refers to as "subsection 1 of section 407.825," which, because there appears to be no such "subsection" meeting that description, appears to mean the subsections (5), (6), (7) and (14) of § 407.825.

[14] Section 407.817(4) provides that a dealer with standing to do so "may bring an action pursuant to section 407.822 . . . ."

[15] Whatever else can be said about whether and, if so, how subsections (1)

none of these procedural aspects of § 407.822 make sense in the context of a challenge to "capricious, etc." conduct.

C. Section 407.817, specifically intended to regulate add-point activity, prevails over the general "catch-all" § 407.825(1) in the context of challenges to dealer establishments.

Under Missouri law, "a legislative act's provisions must be construed and considered together and, if possible, all provisions must be harmonized and every clause given some meaning." *Boyd v. State Bd. of Registration for the Healing Arts*, 916 S.W.2d 311, 314 (Mo. Ct. App. 2000). Moreover, "[w]hen one statute deals with a particular subject in a general way, and a second statute addresses a part of the same subject in a more detailed way, the more general should give way to the more specific." (*Id.*) (*citing Casey v. State Bd. of Registration for the Healing Arts*, 830 S.W. 2d 478, 481 (Mo. Ct. App. 1992)). In this case, § 407.817 comprehensively addresses the subject matter of add-point challenges. Given that

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and/or (3) of § 407.822 are meant to apply to a § 407.825(1) claim, this much appears clear: given that the automatic stay language is *only* contained in subparagraph (1), automatic stay language should not be invoked in an action brought under subsection (3). Therefore, since Parktown is claiming subsection (3) as its jurisdictional underpinning, under no circumstances would the automatic stay language have been appropriate in this case.

Missouri has a statute addressing the specific subject matter, any attempt to shoe-horn broader add-point protest rights into a general statute that says nothing whatsoever about dealer establishments is clearly improper, and the Commission so held.

The *Boyd* case is instructive. In *Boyd*, the issue was whether a physician who was found to have carelessly completed certain Medicare forms could be disciplined under a general statute prohibiting physicians from engaging in unprofessional conduct where the physician was found not to have violated the specific statutory provision prohibiting physicians from knowingly making false statements with respect to payments under the Medicare program. *Boyd*, 916 S.W.2d at 312-13. The State Board sanctioned the physician under the general "unprofessional conduct" statute despite finding that the physician had not violated the statute specifically governing false statements in the Medicare context. *Id*. at 314. The appellate court reversed, holding that where a specific statute addressed false statements by physicians in the Medicare context, the physician had to be disciplined under the statute or not at all. *Id*. at 315-16. Allowing the physician to be disciplined under the general statute would nullify or otherwise render meaningless the more specific statute. *Id*.

Although *Boyd* was not an MVFPA case, the principle expressed by this Court in that case is squarely on-point. In fact, the *Boyd* rationale is particularly

apt given that § 407.817 was added to the MVFPA more than twenty years after the MVFPA was enacted. As a general rule, a "chronologically later statute, which functions in a particular way will prevail over an earlier statute of a more general nature, and the latter statute will be regarded as an *exception* to or qualification of the earlier general statute." *Moats v. Pulaski Cty. Sewer Dist. No. I*, 23 S.W.3d 868, 872 (Mo. Ct. App. 2000) (*citing Lett v. City of St. Louis*, 948 S.W.2d 614, 619 (Mo. Ct. App. 1996) (*quoting Goldberg v. State Tax Comm'n*, 639 S.W.2d 796, 805 (Mo. *banc* 1982)). In other words, the enactment of § 407.817 as an amendment to the MVFPA was the product of discrete decision-making on the part of the legislature, and, at the very least, would be construed to "carve out" any attempt to fashion an add-point challenge from any general statute.

Parktown attempts to distinguish *Boyd* and *Moats* on several grounds, none of which are valid. *First*, Parktown contends that the Commission's conclusion that an add-point challenge may only be brought under § 407.817 "effectively writes out of the MVFPA the express provisions of § 407.822.3, § 407.825(1), and § 407.835, which provide automobile dealers with a remedy for a franchisor's 'capricious, bad faith or unconscionable' conduct." (App. Br. at 32.) To the contrary, § 407.825(1)'s substantive prohibition against "capricious, bad faith, or unconscionable" conduct survives, just not in the context of an add-point case which it was not intended to cover in the first place. The Commission merely

confirmed that it cannot be used to create add-point protest rights that are governed by a specific statute.

Second, Parktown argues that the Commission was constrained to consider only the "plain" language of § 407.825(1) and was not allowed to analyze it in relation to the overall framework of the MVFPA. Contrary to this sentiment, however, as noted in *Boyd*, courts are not required to view statutes myopically and are, instead, expected to construe all of the provisions of a statute together in hopes of harmonizing or reconciling them.

Third, Parktown argues that the *Boyd/Moats* principles of statutory interpretation relied upon by the Commission only apply where there is some "irreconcilable conflict" or "necessary repugnancy" between the statutes at issue. In this regard, in an argument that appears to have gained come currency with the appellate court below, Parktown professes to find no conflict in applying both statutes in the add-point context using the curious argument that the legislature must have intended add-points inside of the six- (or ten-) mile RMA radius to be governed by one statute (§ 407.817) and add-points outside of that radius to be governed by another (§ 407.825(1)) - hence no conflict. Thus, Parktown strains to avoid finding any ambiguity of inconsistency between two statutes. (App. Br. § I.B.1.) But this requires one to accept the fantastic notion that the legislature was really focusing on matters relating to add-points as it included the hyper-generic

phrase "capricious, in bad faith, or unconscionable" when it adopted § 407.825. This notion is surely belied by the fact that, after its passage in 1980, the statute sat on the books unused for what Parktown claims is its purpose for 27 years while dealerships were continually being added and relocated with nary a challenge. It would seem far more likely that if the legislature really had intended to regulate add-points when it adopted § 407.825(1), it would have used the more conventional RMA language and process that it eventually did use when it passed the actual RMA law in 2001.

Moreover, contrary to Parktown's assertion that Audi has never suggested a conflict or ambiguity exists between these two statutes, there are obvious conflicts between § 407.817 and § 407.825(1) as Parktown would have it interpreted. One such conflict is the creation of a franchisee right to challenge an add-point that is outside the relevant market area under the "capricious" provision of §407.825(1), despite the fact that the legislature specifically addresses franchisee add-point protest rights under § 407.817 and limited those rights to add-points *within* the relevant market area. Also, although § 407.817 expressly limits the protest rights of existing dealers in other significant respects, including notice and limitations periods, an add-point protest under § 407.825(1) would not be subject to any such restrictions.

While the viability of an add-point protest under § 407.825(1) is an issue of

first impression in Missouri, courts in other states have rejected similar efforts by dealers to wring add-point protest rights out of general statutes prohibiting arbitrary, capricious, or unconscionable conduct. For example, in *American Honda Motor Co. v. Bernardi's, Inc*., 735 N.E.2d 348 (Mass. 2000), a franchisor brought an action seeking a declaration that two of its existing franchisees did not have standing to challenge the franchisor's proposed establishment of a new dealership outside of their respective statutorily-defined relevant market areas. Like the MVFPA, the Massachusetts Motor Vehicle Franchise Act contained a specific add-point protest statute and a general statute declaring "arbitrary, in bad faith, or unconscionable" conduct by franchisor to be unlawful. Just as Parktown has done here, the dealers in the Massachusetts case argued that the specific add-protest statute did not preclude them from challenging the establishment of a new dealership outside the defined relevant market areas as arbitrary, bad faith, or unconscionable. The Massachusetts court disagreed, holding that the specific add-point statute was the only statute under which an add-point protest could be maintained. The court reasoned that to hold otherwise would "undermine and essentially nullify" the existing statute in violation of the court's axiomatic duty to "construe the statute to avoid any part of the legislation being meaningless or duplicative."

Similarly, in *Antwerpen Dodge Ltd. v. Herb Gordon Auto World, Inc*., 117

Md. App. 290 (Md. Ct. App. 1997), the court rejected a dealer's attempt to assert an add-point challenge under a general provision of the Maryland motor vehicle franchise statute where the Maryland legislature had considered, but rejected, legislation which, if enacted, would have granted add-point protest rights to Maryland franchisees. Moreover, as noted in *American Honda Motor Co. v. Bernardi's, Inc.*, 735 N.E.2d 348 (Mass. 2000) (cited approvingly by the Commission) and as discussed more fully below, add-point statutes are not intended to simply protect existing dealers, but also to protect automobile manufacturers and potential Missouri dealers by lending certainty to their operations and by "providing an expedient mechanism for [them] . . . to test . . . whether a proposed new dealership unfairly poaches on an existing dealer territory." *Honda*, 735 N.E.2d at 435 (quoting *Lundgren v. American Honda Motor Co.*, 699 N.E.2d 11 (Mass. 1998)). In short, the protections afforded dealers by the MVFPA are not unlimited or ever-expanding and must be balanced in light of the rights of the potential new dealers and the automobile manufacturers.

D. Parktown's strained interpretation of § 407.825(1) would generate absurd results running contrary to the stated purposes of the MVFPA.

Another aid to statutory interpretation is the principle, enunciated by this Court in *In the Matter of the Care and Treatment of Wilbur Schottel v. State of*

Missouri, 159 S.W.3d 836, 842 (Mo. 2005) that "when examining statutes, this Court presumes that the legislature did not intend to enact an absurd law and favors a construction that avoids unjust or unreasonable results." In this case, interpreting the MVFPA as Parktown attempted before the Commission would do just that - yield absurd results, inconsistent with sound public policy, restrict consumer choice, and have a significant and severe chilling effect on the orderly placement and movement of new motor vehicle dealers in this state.

The plain language of the MVFPA, and specifically § 407.817, evidences a legislative intent to protect consumers, dealers, and manufacturers. Section 407.817 provides protection primarily through its geographic limitations (in this case, six miles) and temporal limitations (thirty days) on these establishment challenges. Section 407.817 protects consumers by promoting competition and thereby reducing monopolistic pricing, while still ensuring that a given market area is not sufficiently populated by multiple dealerships of the same line-make, and protects existing dealers in that a manufacturer must notify a potentially affected dealer if the manufacturer plans to open a new dealer within the relevant market area. Section 407.817 also protects prospective dealers and manufacturers by providing certainty as to where a new dealership can be maintained without interfering with and drawing objection from existing dealerships. It also provides certainty that no objections will arise after the expiration of the 30-day limitations

period. This limitations period allows any protests to the new dealership to be heard and decided prior to the manufacturer and the prospective dealer investing significant resources to the establishment of the new dealership.

Contrary to these reasonable concerns and protections, applying the "capricious" statute to the RMA context would create protest rights for existing dealers that are broader than the protest rights available for the existing dealerships under § 407.817. Under Parktown's interpretation, an objection under § 407.825(1) could be brought at any time by any franchisee in the state, while existing dealers within the relevant market are subject to a thirty-day statute of limitations. Essentially, the more tenuous the geographic and temporal connection between the protesting franchisee and the new franchise, the more expansive the right to protest would become. Under Parktown's interpretation of § 407.825(1), a franchisee could stand by indefinitely (as indeed Parktown did here) while the franchisor and the prospective new dealer invested significant time and money in the new dealership before filing a challenge. Such a result would obfuscate the protections afforded by § 407.817 to consumers, existing dealers, prospective dealers, and manufacturers. These consequences are directly in play under the facts of this action as the challenged dealership (Bommarito) is currently open for business. Such a result could not occur if § 407.817 is the exclusive vehicle to challenge a new dealership.

In addition to eroding the temporal and geographic protections of § 407.817, Parktown's interpretation of the MVFPA would discourage the establishment of automobile dealers in Missouri, and chill any efforts by existing dealers to relocate, thereby limiting consumer choice, in a way that reaches far beyond Audi, Parktown, and Bommarito.

II. Allowing an add-point challenge using § 407.825(1) would violate due process, constitute an unlawful restraint of trade, and allow an impermissible interference with interstate commerce in violation of the Commerce Clause of the United States Constitution.

A. Allowing an add-point challenge under § 407.825(1) would violate due process and constitute an unlawful restraint of trade under the principles enunciated by the United States Supreme Court in *Orrin W. Fox*.

For the reasons expressed below, interpreting §407.825(1) to allow add-point challenges would run afoul of fundamental principles of due process, would allow a restraint of trade otherwise prohibited by federal antitrust laws without appropriate "state action" oversight, and would constitute an improper delegation of state power to a private citizen. Hence, the interpretation advanced by Parktown cannot be countenanced - either because the legislature cannot be presumed to have passed a law that is unconstitutional, or because, if that is what the legislature

did intend, the statute would be unconstitutional *as applied.*

When states began passing relevant market area laws in the early 1970s, one such law, adopted in the state of California, was reviewed by the United States Supreme Court in *New Motor Vehicle Bd. of Calif. v. Orrin W. Fox Co.*, 439 U.S. 96 (1978). Opponents of the law in that case argued, among other things, that allowing an existing dealer to protest the establishment of a new dealer within a statutorily-defined relevant market area (and by that protest to automatically block the establishment until good cause was shown), constituted a denial of due process and an unlawful restraint of trade. *Id.* at 104-05, 109. The statute's proponents in that case argued that, being a legislatively-established and, in any event, only a temporary restraint, such action by an existing dealer constituted a valid state action, as opposed to the private anticompetitive action by a dealer. *Id.* at 109-10.

While the Court in *Orrin W. Fox* upheld California's version of a relevant market area law, Parktown's interpretation of § 407.825(1) in this case - to allow a dealer to protest an add-point under that statute - would yield a different result under the *Orrin W. Fox* analysis. Central to the *Orrin W. Fox* court's analysis was that the denial of process to the manufacturer in the wake of the automatic stay provision of California's statute was only temporary and that the relevant market area law at issue was, because it contained a specific mileage definition, "clearly

articulated and affirmatively expressed." *Id.* at 109.[16] While one can certainly

[16] At least two cases since *Orrin W. Fox* have used this same rationale to reject attempts by dealers outside a legislatively determined relevant market area to challenge a new dealership by arguing that it was against the statute's expressed policy to protect dealers against the manufacturers. These cases acknowledge that it is in the public's best interest to promote fair and reasonable competition, despite any prefatory language that the RMA statutes were intended to protect dealers from over-reach by manufacturers. *See, e.g., BMW of North Amer. v. New Motor Vehicle Bd.*, 162 Cal. App. 3d 980, 991 (Ct. App. Cal. 1984) (noting that the California RMA statute "not only restricts the right of a franchisee to object to the appointment of a new dealer to a [legislatively-determined radius], but it also *implicitly recognizes the right of a franchisor to appoint new dealers*, subject of course to the right of an existing dealer to show good cause for precluding such appointment if it is to be within [the relevant market area] of the existing dealer") (emphasis added); *Northwest Datsun v. Okla. Motor Vehicle Comm'n*, 736 P.2d 516, 519 (Okla. 1987) ("[T]he Legislature was cognizant in passing [Oklahoma's RMA statute] that competition, if fair, is in the public interest. The Legislature made a choice in this legislation to regard the establishment of a new dealership in an area more than ten miles distant from an established dealer *as presumptively fair competition and in the public interest.* This legislation provides for no protest in

argue that a dealer's invocation of Missouri's RMA law (§ 407.817) to block the establishment of a new dealer until legislatively-defined "good cause" is shown is not a denial of due process, and constitutes legitimate "state action," the same cannot be said for Parktown's attempt to do the same thing under § 407.825(1). Allowing an add-point protest under § 407.825(1), without regard to a specific legislatively-established "relevant market area," thereby automatically blocking the new dealer's establishment (without notice, hearing, opportunity to be heard, etc.), would be tantamount to delegating the power of the state to the protesting dealer. Thus, by merely alleging that a manufacturer's conduct is "capricious," a new dealer would be automatically restrained from opening its business.

The same concerns that the Supreme Court found persuasive in *Orrin W. Fox* in upholding California's RMA statute – the temporary nature of the restraint on trade and the legislatively-determined relevant market area – are not present if § 407.825(1) is allowed as an unchartered avenue for dealers outside the RMA to challenge new dealerships. The appellate court's rote quotation of *Orrin W. Fox* as upholding California's RMA statute ignores the very criteria the court used to uphold the statute. *Parktown Imports, Inc. v. Audi of Amer.*, WD68390, 2008 Mo. App. LEXIS 917, at *22-23 (Mo. Ct. App., W.D., July 8, 2008). Upon closer

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that event, and *it is quite clear that we may not infer an intent to the contrary*.") (emphasis added).

examination and analysis, it is apparent that, while those criteria are undeniably present in § 407.817, those criteria are unequivocally *not* present in § 407.825(1). This analysis is important because, as stated above, § 407.825(1) should be construed so as to avoid these constitutional implications.

B. Allowing an add-point challenge under § 407.825(1) would constitute an unlawful burden on interstate commerce.

The entire thrust of Parktown's action is its attempt to challenge an add-point without regard to the geographic limitation (the six-mile relevant market area) set forth in § 407.817. The practical impact of Parktown's position, if accepted by this Court, would be the creation of statewide add-point protest rights. This is because, under that interpretation, § 407.825(1), and the administrative remedies under § 407.822, could be invoked by any dealer in the state merely by alleging that the add-point proposal was capricious and would cause that dealer damage. Contrary to this (attempted) interpretation, however, statutes granting franchisees statewide protest rights have been held to unduly burden interstate commerce in violation of the Commerce Clause of the U.S. Constitution, art. I, § 8, cl. 3.[17] Thus, the federal Fourth Circuit Court of Appeals in *Yamaha Motor Corp.*

[17] While Audi addressed the constitutional implications of Parktown's interpretation of § 407.825(1) in its Application for Transfer to this Court, Parktown did not address those issues in its substitute brief before this Court.

v. Jim's Motorcycle, Inc., 401 F.3d 560 (4th Cir. 2005), held that statewide add-point protest provision of Virginia motorcycle franchise act unduly burdened interstate commerce and thereby violated the Commerce Clause. In that case, the issue before the Fourth Circuit was whether the provision of the Virginia Motorcycle Franchise Act authorizing motorcycle franchisees to challenge the establishment of a new same-line motorcycle dealership anywhere in the Commonwealth violated the dormant Commerce Clause of the U.S. Constitution. As the Fourth Circuit explained, the dormant Commerce clause involves a two-tiered analysis, one evaluating whether the challenged legislation discriminates against out-of-state interests and the other evaluating whether, even if nondiscriminatory, the challenged legislation imposes undue burdens on interstate commerce. *Id*. at 567. Although the court suggested that the Virginia statute might also discriminate against out-of-state interests (*id*. at 573), its primary focus was its undue burden analysis (so-called *Pike* balancing). *Id*. at 567 (citing *Pike v. Bruce Church, Inc*., 397 U.S. 137, 90 S.Ct. 844 (1970)). Under *Pike*, "where the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. *Pike*, 397 U.S. at 142.

The Fourth Circuit readily accepted the franchisee's argument that the

statewide protest statute served a legitimate local public interest, but found that the burdens imposed on interstate commerce greatly outweighed that interest. *Yamaha Motors*, 401 F.3d at 571-72. Among other things, the *Yamaha Motors* court noted that protests were "virtually certain" to occur in response to any proposal for a new dealership, which would have a ripple effect of thwarting the establishment of new dealerships because prospective dealers will not be able to secure financing to acquire new locations because manufacturers will be reluctant to provide the necessary commitment letters when protests are virtually certain.[18] The court also noted that the reduction in dealerships would necessarily cause a relative reduction in intra-brand and inter-brand competition, which would be damaging to consumers. Thus, the court concluded that the Virginia statewide add-point statute would have an impermissibly chilling effect on both franchisors and prospective franchisees. The same chilling effect would result under Parktown's theory here.

[18] Given that the Fourth Circuit characterized the Virginia statute as "uniquely anti-competitive even as dealer protection laws go," it must be noted that the Virginia statute is actually *less* onerous than the statutory regime Parktown suggests in at least one respect. Unlike any add-point protest under the MVPFA where the complaining franchisee is entitled to an automatic stay, the complaining franchisee under the Virginia statute was at least required to make a threshold showing of entitlement to a formal hearing before a stay would issue. *Id*. at 571.

CONCLUSION

The issue before this Court is simple: is § 407.817 the sole means by which a Missouri motor vehicle franchisee may bring a statutory add-point protest, or is such a protest also cognizable under the general provisions of § 407.825(1) as an unlawful "capricious, in bad faith, or unconscionable" practice. The answer is also simple: a Missouri motor vehicle franchisee may bring an add-point protest under § 407.817 or not at all. The later-enacted, more specific provisions of § 407.817 carve out the subject area of add-point protests from the province of any other general provision of the MVFPA. In addition, not only are add-point protest rights under § 407.825(1) wholly incompatible with the overall structure of the MVFPA, they would effectively nullify the core precepts on which § 407.817 is based. Finally, allowing add-point protests under § 407.817, if interpreted in the manner which Parktown advocates, would violate the due process and Commerce Clause provisions of the United States Constitution, and constitute an unlawful restraint of trade. For each of these reasons, the Commission's dismissal of Parktown's complaint should be affirmed.

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that this brief contains the information required by Rule 55.03, complies with the limitations in Rule 84.06(b), and it contains 9,175 words, excluding the parts of the brief exempted; has been prepared in proportionally spaced typeface using Microsoft Word 2003 in 14 point Times New Roman font; and includes a virus free 3.5” floppy disk in Microsoft Word 2003 format.

CERTIFICATE OF SERVICE

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