

No. SC89611

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IN THE SUPREME COURT OF MISSOURI

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PARKTOWN IMPORTS, INC.,

Petitioner-Appellant,

v.

AUDI OF AMERICA, INC.,

Respondent.

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On Petition for Review

From The Administrative Hearing Commission

June Striegel Doughty, Commissioner

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APPELLANT'S SUBSTITUTE OPENING BRIEF

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## SUMMARY OF THE ARGUMENT

Appellant Parktown Imports, Inc. (“Parktown”) seeks review of the final decision of the Administrative Hearing Commission (the “Commission”) dismissing for lack of jurisdiction Parktown’s Complaint brought under the Missouri Motor Vehicle Franchise Practices Act (“MVFPA”) (Mo. Rev. Stat. § 407.810 through § 407.835).

The MVFPA is designed to protect Missouri motor vehicle dealerships by leveling the playing field between them and the more powerful motor vehicle manufacturers and distributors. Section 407.825 of the MVFPA declares certain conduct by motor vehicle franchisors to be “unlawful practices” and provides specific remedies to Missouri dealers who are damaged by such conduct. Of relevance here is § 407.825(1) which declares damaging “capricious, bad faith or unconscionable” conduct by a franchisor to be an “unlawful practice.” *See* Appendix, A14. In accord with the language of the statute, Parktown filed its Complaint under Mo. Rev. Stat. § 407.822.3, which provides for administrative review,<sup>1</sup> seeking a determination by the Commission that Respondent Audi of America, Inc. (“Audi”) did not have good cause to engage in a pattern of

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<sup>1</sup> Mo. Rev. Stat. § 407.822.3 provides in pertinent part that “any franchisee receiving a notice from a franchisor. . . *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.” *See* Appendix, A12 (Emphasis added).

damaging “capricious, bad faith or unconscionable” conduct beginning in 2004 and leading to the establishment of a new Audi dealership in the St. Louis Metropolitan area.

There is no question that “unlawful practices” under § 407.825 are subject to the Commission’s authority under § 407.822.3. The Commission dismissed Parktown’s Complaint, however, holding that another section of the MVFPA — Mo. Rev. Stat. § 407.817, a “dealer add point” provision limited to addressing new dealerships within a certain geographic range of an existing dealer — completely preempted Parktown’s Complaint brought under § 407.825(1).<sup>2</sup> *See* Appendix, A10. The Commission reasoned that § 407.817 was enacted chronologically later than § 407.825(1) and deals with more specific subject matter, therefore § 407.817 preempts § 407.825(1). As discussed below, the Commission’s interpretation is contrary to the express language of the statute, undermines the intent of the MVFPA, and is not a proper application of the statutory construction principles handed down by this Court.

The MVFPA, including § 407.825(1), was enacted in 1980. Section 407.817 was added to the MVFPA in 2001 to expand the protections already in place for franchisees. The new section recognized that when a new dealer is placed too close to an existing

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<sup>2</sup> It is undisputed that Parktown’s action was not, and could not have been, brought under § 407.817. That provision applies only to new dealer locations that are (in Parktown’s case) six miles or less from the existing dealer. *See* Mo. Rev. Stat. § 407.817.1(1), and .3. To the best of Parktown’s knowledge, Audi has not attempted to establish a new dealer within six miles of Parktown.

dealer, the incumbent dealer's investment and business is at risk of damage from the newcomer. To safeguard against such harms and to protect pro-competitive public interests, the General Assembly installed certain procedural hurdles for a franchisor to surmount before adding a new franchise particularly close to an existing dealer's location. Section 407.817 creates a statutory presumption of harm by instilling a prior notice and burden-shifting procedure that requires the franchisor to establish it has "good cause" *before* opening a new franchise within the "relevant market area" (here, six miles) of an existing franchisee. The benefits given Missouri dealers in § 407.817 are in addition to the protections under § 407.825 that were already in effect. This 2001 amendment did not address — and certainly did not limit, preempt, or eliminate — the long-standing protections afforded Parktown and other Missouri automobile dealers under § 407.825.

Equally significant is the fact that there is no inconsistency or repugnancy between the two sections. Unlike the "dealer add point" statutes of some states, such as Massachusetts (discussed *infra*), § 407.817 does not concern itself with whether the franchisor is acting in a capricious, unconscionable, or bad faith manner that damages an existing franchisee when installing a new dealer. Such conduct is an "unlawful practice" only under § 407.825, the section upon which Parktown's Complaint was properly based.

Despite the MVFPA's protective purpose, the Commission's statutory interpretation (and this is a case of first impression) ironically cuts back the protections afforded motor vehicle franchisees under the MVFPA. The ruling gives franchisors

blanket immunity from practices that are otherwise unlawful under § 407.825(1). According to the Commission, Missouri dealers now have no remedy under the MVFPA — whether administrative or in court — for damaging capricious, bad faith, or unconscionable conduct by their franchisor if the franchisor’s conduct relates to the establishment of a new dealership outside the “relevant market area” as defined by Mo. Rev. Stat. § 407.817. Under this view, if Audi sets up a new dealership 5.9 miles from Parktown, it is subject to only the provisions of § 407.817; if the new dealership is 6.1 miles from Parktown, it has no restrictions whatsoever, and (since the time of the 2001 amendment) Audi can engage in the most dastardly and damaging conduct imaginable with no fear whatsoever of being held liable under § 407.825(1). The Commission’s interpretation is contrary to the express and unrestricted language of Mo. Rev. Stat. § 407.825(1) and § 407.822.3. Moreover, creating such carte blanche immunity for powerful international motor vehicle franchisors, such as Audi, turns the MVFPA on its head.

## **JURISDICTIONAL STATEMENT**

The Commission's final decision dismissed Parktown's Petition for Review. Parktown sought review of the Commission's final decision in the Missouri Court of Appeals, Western District, pursuant to Supreme Court Rule 100.02 and Mo. Rev. Stat. § 407.822.2. The issue for review was whether the Commission's interpretation of the MVFPA and resulting dismissal of Parktown's Complaint were authorized by law. *See* Mo. Rev. Stat. § 407.822.2; Mo. Const. Article V, § 18.

On July 8, 2008, the court of appeals reversed the Commission's final decision in a unanimous opinion, and remanded the case to the Commission for further proceedings. The court of appeals denied Audi's application for transfer. This Court granted Audi's application for transfer.

The Court has jurisdiction under Article V, § 10 of the Missouri Constitution, and Supreme Court Rules 83.04 and 83.09.

## **STATEMENT OF FACTS**

Parktown's Complaint was dismissed before any hearing on the merits occurred. Accordingly, Parktown summarizes below the facts alleged in its Complaint.

Parktown has long been an established Audi dealer in St. Louis, beginning operations in 1973. During its 34 years as an Audi dealer, Parktown has typically met or exceeded Audi's yearly business plan objectives (sales goals) and other performance criteria, as compared to other dealers in the Great Plains Geographic Area ("Chicago Area") as determined by Audi. L.F. 2-3 (Complaint, ¶¶ 6-8) (Exhibit A). Beginning in

2004, Audi began taking impulsive, unprincipled, and unpredictable steps that threatened Parktown's livelihood. Audi's vacillating behavior ran afoul of § 407.825 of the MVFPA and damaged Parktown. L.F. 12-13 (Complaint, ¶¶ 43-47).

***Audi's Dishonest, Impulsive, and Unpredictable Conduct***

Despite sales numbers and market penetration numbers indicating the contrary, Audi decided in 2004 that it needed a sales point in the far western part of the St. Louis Metropolitan Area. L.F. 3 (Complaint, ¶¶ 9-10). This presented a problem for Audi because it knew that St. Louis (already with two sales points), like other similarly sized Midwestern cities, could not support a third sales point. L.F. 4 (Complaint, ¶ 11). Audi has a documented history of demanding that its St. Louis dealers renovate and rebuild their facilities to Audi's specifications, only to change those specifications from year to year, costing its dealers money. L.F. 5 (Complaint, ¶ 15) (Exhibit E). Audi knew that the two existing Audi dealers (who have been in place for numerous years) were located more centrally and not likely to be willing to move their facilities to accommodate Audi's latest fad *de jure*. L.F. 5 (Complaint, ¶ 14).

On September 2, 2004, Audi proceeded to implement its plan by sending a letter to Parktown asking Parktown to relocate to the Chesterfield Valley.<sup>3</sup> L.F. 3 (Complaint, ¶ 9). Although the letter was couched in terms of opening a third point and allowing

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<sup>3</sup> "Chesterfield Valley" is the common reference for the rapidly developing commercial area of the Missouri River valley along Interstate 64 in Chesterfield, Missouri, in far West County of St. Louis.

Parktown the first opportunity to compete for the third point, *id.*, this was clearly an attempt by Audi to entice Parktown to move its facilities to the far western part of the St. Louis Metropolitan Area. *Id.* Parktown responded that it was not interested in moving its facilities, and outlined several reasons why opening a third point in St. Louis was unnecessary and would be harmful to Parktown. L.F. 4 (Complaint, ¶ 11) (Exhibit C). Audi replied by stating that a third point would remain open in the far western part of the St. Louis Metropolitan Area. L.F. 4 (Complaint, ¶ 12).

In May 2005, Audi continued to use the threatened opening of a third point as a club to force Parktown to build a new facility. L.F. 5 (Complaint, ¶ 14). Audi's Area General Manager, Dave Ryan, informed Parktown that if Parktown would build a new Audi "hanger" (an exclusive stand-alone store designed to look like an airplane hanger), that Audi would close the third point. *Id.* In so doing, Ryan acknowledged what Parktown already knew — that St. Louis, like other similar cities in the midwest, was a "two-point town" and should remain a "two-point town." *Id.*

Concerned by Audi's unpredictable behavior, on May 6, 2005, Parktown sent a letter to Johan de Nysschen (the Executive Vice President for Audi) detailing the dishonest, impulsive, and unpredictable manner in which Audi had dealt with Parktown, including "a series of contradictions, doubletalk, and reversed decisions."<sup>4</sup> L.F. 5-6 (Complaint, ¶¶ 15, 17).

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<sup>4</sup> Johan de Nysschen was hired by Audi in 2004. L.F. 5 (Complaint, ¶ 16). In addition, Tom Del Franco (Audi's National Sales Manger) was also hired by Audi in about 2005,

Audi and Parktown agreed to meet in Michigan to discuss the situation. L.F. 5-6 (Complaint, ¶¶ 17-20). Prior to the meeting, Reinhard Fischer (Audi’s Director of Sales Planning and Distribution) represented to Parktown that Audi had “agreed on a good proposal that [will be presented] to [Parktown] [at the meeting].” L.F. 6 (Complaint, ¶ 20) (Exhibit H). With this inducement in hand, representatives of Parktown — Steven King (President) and Darren Woodford (General Manager) — traveled to Audi’s headquarters in Michigan, and on May 26, 2005, met with representatives of Audi, Dave Ryan and Richard Howse (the Central Regional Manager for Audi).<sup>5</sup> L.F. 6-7 (Complaint, ¶¶ 22-23).

At the meeting, Ryan and Howse told Parktown that Audi wanted to do more research on the possible third point, but that Parktown should not read anything into this

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and was previously employed as an executive of Mazda Motor Corporation and maintains close connections at Mazda. *Id.* Mr. Del Franco has resigned from Audi at the same time lawsuits at various locations in the United States have been brought by Audi dealers against Audi regarding its business practices. *See Molle Automotive Group LLC d/b/a Kansas City Audi v. Audi of America, Inc.*, No. 06-1583FV (Missouri Administrative Hearing Comm’n); *Legend Autorama, Ltd. et al v. Audi of America, Inc. and Tom Del Franco*, No. 2:07-cv-02027-TCP-ETB (E.D.N.Y.) (filed May 14, 2007).

<sup>5</sup> Upon information and belief, Richard Howse resigned from Audi in May 2007, shortly after Del Franco’s resignation in the wake of lawsuits challenging Audi’s business practices.

research or otherwise be worried about a third point in St. Louis. *Id.* As to the aforementioned “good proposal,” Ryan and Howse suggested that if Parktown would buy out the underperforming Plaza Motors (the other existing Audi dealership in the St. Louis Metropolitan Area), Audi would then grant Parktown the first right of refusal to build the new point in the Chesterfield Valley area. This again reinforced Audi’s representation that St. Louis was a “two-point town,” and Audi simply wanted Parktown to move west. *Id.*

In the Fall of 2005, Ryan met with King and told him that Audi decided it was not going to award a third point and that the point was now closed. L.F. 7 (Complaint, ¶ 24). At this meeting, Ryan presented King with an “Area of Responsibility” (territory) map prepared by Audi showing St. Louis as a two-point (i.e., two dealership) city. *Id.* (Exhibit J). Apparently, at this point Audi knew that St. Louis could not support a third sales point and realized that Audi — under the MVFPA — could not terminate Parktown’s or Plaza’s franchise or otherwise force them to move their facilities or build a “hanger” to accomplish Audi’s ongoing and changing fads. *See Mo. Rev. Stat. § 407.825(5).*

After the Fall of 2005 meeting with Ryan, about a year elapsed during which there were no further communications between Audi and Parktown regarding the opening of a third point of sales in the St. Louis Metropolitan area. L.F. 7 (Complaint, ¶ 25). Based upon Audi’s representations, Parktown justifiably believed that the issue was resolved, and St. Louis would, as Audi had repeatedly recognized, remain the “two-point town” it

had been over the past three decades. *Id.* Also significant is that during the next year, Audi made no mention to Parktown that Audi believed Parktown was underperforming in any way (Audi was required under the “Dealer Performance Review” section of the Dealer Agreement between Audi and Parktown to notify Parktown of such), or that Audi was in any way considering opening a third point in St. Louis. *Id.*

On September 11, 2006, the situation dramatically and unexpectedly changed — Dave Ryan suddenly informed King and Woodford that Audi had attempted to buy out Plaza Motors, but that very morning Plaza had refused to sell. L.F. 7-8 (Complaint, ¶ 26). Ryan told Parktown that in response to Plaza’s refusal to sell, Audi had immediately re-opened the third point. *Id.* Totally surprised, on September 15, 2006, Parktown sent a letter to Audi’s Johan de Nysschen asking numerous questions about Audi’s sudden and impulsive decision to re-open the third point, to which de Nysschen responded by claiming that the decision to add a third point was made because Plaza Motors and (for the first time) Parktown were supposedly not adequately representing Audi in St. Louis. L.F. 8 (Complaint, ¶¶ 27-28).

Audi’s new claim that Parktown’s performance was deficient was a complete shock to Parktown. L.F. 8 (Complaint, ¶ 29). Audi had never reviewed any such claimed deficiencies with Parktown (as required under the “Dealer Performance Review” section of the Dealer Agreement between Audi and Parktown), and the fact that Audi was now using such claims as “justification” for its decision to install a new dealer in St. Louis was contrary to all Audi’s representations and statements to Parktown. *Id.*

On September 16, 2006, Parktown responded, protesting the assertions in de Nysschen's email. *Id.* Mr. de Nysschen replied on September 19, 2006, stating that Audi had "multiple conversations with you about facility upgrades and capacity expansion." L.F. 9 (Complaint, ¶ 30). This was false; there had been no such conversations. *Id.* The de Nysschen reply cited a report from an unnamed source (stating that he or she believed Parktown was not committed to the Audi brand, as it relates to facility upgrades and capacity expansion), and stated: "This is their impression. If it is incorrect, then it is up to you to demonstrate the contrary. So far, my team advises me they have seen little evidence of your engagement with the Brand." *Id.* Mr. de Nysschen offered to set up a meeting in Michigan "for the purpose of finding a constructive solution and securing progress, but we are running out of time." *Id.* (emphasis added).

Following up on de Nysschen's missive, Parktown immediately contacted Audi which scheduled a meeting in Michigan for November 7, 2006 at 2:00 p.m. L.F. 9 (Complaint, ¶ 31). In the meantime, Parktown began preparing a Power Point presentation to address Audi's new concerns and purchased plane tickets to Michigan for the aforementioned meeting. *Id.* Audi then aborted the meeting, calling Parktown to cancel "because the Germans [Audi] were in town [Detroit]." *Id.*

Parktown tried to reschedule the promised meeting, but Audi was non-responsive. L.F. 9-10 (Complaint, ¶ 32). Finally, after King continued to try to arrange the promised meeting, Dave Ryan informed Parktown that a meeting would be irrelevant because the third point would likely be awarded to Bommarito Automotive Group, a huge mega

dealer in St. Louis. *Id.* After receiving this latest information, King contacted Richard Howse on several occasions, asking him provide the data that Audi used in declaring the open point and the criteria used to select Bommarito Automotive Group as the recipient of the third point. L.F. 10-12 (Complaint, ¶¶ 35-40) (Exhibit P). Mr. Howse refused by curtly and dismissively stating:

We are already down the road with this decision and I have explained how we go about making that decision therefore there is no need to provide all this information you are requesting. *The best thing to do is focus on your business and continue to sell cars and satisfy customers.*

L.F. 12 (Complaint, ¶ 40) (Exhibit R) (emphasis added).

To the contrary, Howse, had explained nothing. Instead, Audi had impulsively and unpredictably flip-flopped again, and Parktown's efforts to work with Audi were futile. The damage to Parktown from Audi's pattern of "capricious, bad faith or unconscionable" conduct had occurred and is continuing to occur. L.F. 12-14 (Complaint, ¶¶ 43-47).

***Bommarito Automotive Group and its "Mazda Connections"***

Among its many line makes and locations, Bommarito Automotive Group ("Bommarito") operates three Mazda dealerships in the St. Louis Metropolitan area. L.F. 10 (Complaint, ¶ 33). Audi's new third point was to be awarded to the Bommarito Mazda dealership that is located on Manchester Road in Ellisville, Missouri, which is just ten miles away from Parktown's Audi facility on the same road. *Id.* Bommarito was not

to be an exclusive stand-alone Audi dealer and is not located in the Chesterfield Valley area — failing to satisfy the two requirements for a third point that Audi originally communicated to Parktown. *Id.*

In addition, throughout the Fall of 2006, Tri-Star Mercedes showed interest in acquiring the third point of sales but Audi refused to return its calls. L.F. 10 (Complaint, ¶ 34). Tri-Star would have met Audi’s originally touted requirements of an Audi exclusive stand-alone dealership in the Chesterfield Valley area. *Id.* In addition, Tri-Star would have been located in the existing territory of Plaza Motors (the dealer that Audi had continuously claimed was underperforming, should be replaced, and in fact tried to replace) and the damage to Parktown would be less severe. *Id.* Yet instead of awarding a third point to Tri-Star, Audi awarded the third point to Bommarito. Bommarito is located in Parktown’s territory, does not meet Audi’s originally stated criteria, and is franchised by Mazda — the company with which Audi’s executive Tom Del Franco was previously an executive and maintains close connections. *Id.* Again, the decision to open a third point, let alone award it to Bommarito, further demonstrates Audi’s impulsive, dishonest, and unprincipled conduct toward Parktown.

***Parktown’s Complaint, Audi’s Motion To Dismiss, And Oral Argument***

Left with little choice, on March 23, 2007 Parktown filed its Complaint before the Administrative Hearing Commission challenging Audi’s “capricious, bad faith or unconscionable” conduct that had damaged and would continue to damage Parktown. Audi filed its Motion to Dismiss on April 13, 2007, followed by Suggestions in Support

filed on April 19, 2007, arguing that despite no specific language so indicating, Mo. Rev. Stat. § 407.817 preempted Parktown's Complaint brought under Mo. Rev. Stat. § 407.825(1). L.F. 75-78, 79-90. Parktown filed its Memorandum in Opposition on April 26, 2007. L.F. 91-106. Audi filed a Reply and Parktown filed a Surreply. L.F. 107-115, 116-122.

On May 2, 2007, counsel for Parktown and Audi appeared before the Administrative Hearing Commission for oral argument on the Motion to Dismiss. Tellingly, during this argument Audi's counsel conceded that if Parktown could show it has been damaged by Audi's capricious conduct (which Parktown alleged in its Complaint) then Parktown would have a cause of action under Mo. Rev. Stat.

§ 407.825(1):

MR. VOGLER [Audi's counsel]: And as I said, if theoretically, once this is established and that was -- and Parktown believes that that was a capricious act and that establishment has damaged it, it can bring an action here, I suppose, although that would probably be a superfluous act because you then would have to go into court anyway eventually to get any damage or injunctive relief. *But, theoretically, if the actual establishment of a dealership is deemed by Parktown to have been capricious and that establishment damages it, then it could go into court to pursue that remedy.*

Tr. 18:10-21 (emphasis added).

Upon hearing this admission, the Commission correctly noted that Audi's motion was asking the Commission to read a preemption into the MVFPA:

COMMISSIONER DOUGHTY: All right. Let me ask you one more question, and I guess this just kind of goes to my difficulty with your argument. Aren't you really asking me to look at 407.825 and to read into that section, particularly the provision that says one of the actions that can be brought is a challenge to -- an action that is engaging in any conduct which is capricious, aren't you really asking me to read in there something like any other conduct or any different conduct? Aren't you asking me to add words to a statute?

MR. VOGLER: No. I think you have to look at the actual words in the statute, which is capricious, in bad faith, unconscionable and which damages the franchisee.

COMMISSIONER DOUGHTY: Right. That goes to the merits of the case. We're here on a motion to dismiss. So in order to grant a motion to dismiss, how can I grant a motion to dismiss, saying I don't have jurisdiction at all, which is really what you're asking me to say --

MR. VOGLER: That's correct.

COMMISSIONER DOUGHTY: -- without doing something to the words of the statute?

MR. VOGLER: No. Because if you follow the words of the statute, there are no -- I mean, take the most obvious one. There are no time periods set forth under --

COMMISSIONER DOUGHTY: Well, but you just said theoretically this action could be brought here. Now, whether or not it has any ultimate benefit to Parktown, that's not the question. The question here is do I have jurisdiction?

Tr. 19:6 – 20:16.

Although clearly recognizing that it would have to add words to the MVFPA to grant Audi's motion, on May 10, 2007 the Commission nevertheless dismissed Parktown's Complaint, holding that because Parktown's Complaint challenging Audi's "capricious, bad faith or unconscionable" conduct under Mo. Rev. Stat. § 407.825(1) "as a whole, is essentially a challenge to Audi's award of the third sales point to Bommarito," that it is preempted by Mo. Rev. Stat. § 407.817, and the Commission has no jurisdiction. Order, pp. 7-9. Parktown timely filed its Petition for Review in the Missouri Court of Appeals, Western District, on May 18, 2007.

The case was fully briefed in the court of appeals and oral argument was held on April 9, 2008. On July 8, 2008, the court of appeals issued its unanimous Opinion reversing the Commission's final decision. Audi's Motion for Rehearing and Application for Transfer in the court of appeals were both denied on September 2, 2008. This Court granted transfer on October 28, 2008. This appeal follows.

## **POINT RELIED ON**

I. The Administrative Hearing Commission erred in dismissing Parktown's Complaint, because the Commission's decision was not authorized by law as reviewed under Mo. Rev. Stat. § 407.822.2, in that Mo. Rev. Stat. § 407.817 does not preempt a complaint brought under Mo. Rev. Stat. § 407.825(1) seeking redress for the damaging "capricious, in bad faith, or unconscionable" conduct by a franchisor simply because the conduct in question relates to the establishment of a new franchise.

Mo. Rev. Stat. § 407.825(1)

Mo. Rev. Stat. § 407.822.2

*Wolff Shoe Co. v. Director of Revenue*, 762 S.W.2d 29 (Mo. banc 1988)

*State ex rel. McKittrick v. Carolene Products Co.*, 144 S.W.2d 153, 155-56 (Mo. banc 1940)

*Stone Motor Co. v. General Motors Corp.*, 293 F.3d 456 (8th Cir. 2002)

## **ARGUMENT**

### ***Standard of Review***

Because there was no evidentiary hearing and the Commission's final decision was based purely on its interpretation of a statute, this Court's review is *de novo* to determine whether the Commission's interpretation was authorized by law. Mo. Const. Art. V, §§ 10, 18; *see Burlington Northern R.R. v. Director of Revenue*, 785 S.W.2d 272, 273 (Mo. banc 1990) ("[W]hen an administrative agency's decision is based on the

agency’s interpretations of law, the reviewing court must exercise unrestricted, independent judgment and correct erroneous interpretations.”); *Tendai v. Missouri State Bd. of Registration for Healing Arts*, 161 S.W.3d 358, 365 (Mo. banc 2005) (“When the [Administrative Hearing Commission] has interpreted the law . . . the review is *de novo*.”).

### I.

***The Administrative Hearing Commission erred in dismissing Parktown’s Complaint, because the Commission’s decision was not authorized by law as reviewed under Mo. Rev. Stat. § 407.822.2, in that Mo. Rev. Stat. § 407.817 does not preempt a complaint brought under Mo. Rev. Stat. § 407.825(1) seeking redress for the damaging “capricious, in bad faith, or unconscionable” conduct by a franchisor simply because the conduct in question relates to the establishment of a new franchise.***

This case presents an issue of pure statutory construction. Parktown’s Complaint is brought under § 407.825(1) which is clear and unambiguous, as is the operative provision of § 407.822.3, which provides that “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. . . .” There is no dispute that Parktown has properly pled that claim. Accordingly, because there is no ambiguity (neither Audi nor the Commission has said the statute is ambiguous), the canons of statutory construction require that the inquiry

should have ended there with the Commission determining that Parktown had properly pled its Complaint under the MVFPA and that the Commission had jurisdiction over the matter.

Nevertheless, the Commission dismissed the properly pled Complaint on the basis that it is preempted by Mo. Rev. Stat. § 407.817. In order to reach this step of construction, the statutory interpretation rules as laid down by this Court required the Commission to *first* determine that the relevant portions of the MVFPA are ambiguous (which they are not) or in conflict (which they are not) and *second* determine that preemption was consistent with the legislative intent of the MVFPA (which it is not). The Commission did not follow these rules of statutory construction, and its result is not authorized by law.

Contrary to the Commission's interpretation, when § 407.817 was added to the MVFPA by amendment in 2001, the General Assembly *expanded* the protections given to franchisees — it did not limit or preempt them — by adding a statutory presumption of harm and the protections of a notice procedure, placing the burden on the franchisor to establish that it has “good cause” before opening of a new franchise within the “relevant market area” of an existing franchisee. This amendment did not address, and certainly did not limit or eliminate, the long-standing protections afforded franchisees under § 407.825 in effect since 1980. Further, the amendment (which also amended portions of § 407.825) failed to add any preemption language.

Extending the Commission’s statutory interpretation to its logical conclusion impermissibly leaves Parktown without a remedy at all under the MVFPA — administrative or in court — for Audi’s damaging “capricious, bad faith, and unconscionable” conduct. This is an absurd result and contrary to both the plain language of the MVFPA (specifically, §§ 407.822, 407.825, and 407.835) and the General Assembly’s intent “to level the playing field” between powerful international automobile franchisors and local Missouri automobile dealers. *See Stone Motor Co. v. General Motors Corp.*, 293 F.3d 456, 464 (8th Cir. 2002).

The Commission based its preemption interpretation on two Missouri cases (*Boyd v. State Bd. of Regis’n for the Healing Arts*, 916 S.W.2d 311 (Mo. App. E.D. 1995) and *Moats v. Pulaski County Sewer Dist. No. 1*, 23 S.W.3d 868 (Mo. App. S.D. 2000)), and also relied on a case from Massachusetts (*American Honda Motor Co., Inc. v. Bernardi’s, Inc.*, 735 N.E.2d 348 (Mass. 2000)). But the principles applied in the Missouri cases cannot be applied here because there is no inconsistency or repugnancy between the two supposedly competing sections. *See State ex rel. McKittrick v. Carolene Products Co.*, 144 S.W.2d 153, 155-56 (Mo. banc 1940); *Laughlin v. Forgrave*, 432 S.W.2d 308, 313 (Mo. banc 1968). And the Massachusetts case is inapplicable because the statute it interprets is materially different from the MVFPA, and is not persuasive, let alone binding, authority.

Had the Commission used the appropriate rules of statutory construction and applied them correctly, Audi’s motion to dismiss would have been denied because (1) the

plain and ordinary meaning of the words of the MVFPA provide Parktown the right to file its Complaint before the Commission, and (2) even if the MVFPA was ambiguous, it must be interpreted in line with the intent of the General Assembly which is to protect local Missouri automobile dealers from powerful international automobile manufacturers. The Commission's failure to follow either standard led to an erroneous result, not authorized by law. Accordingly, and for the reasons discussed below, Parktown respectfully requests that this Court reverse the Commission's Decision dismissing Parktown's Complaint.

***A. Because the Relevant Sections of the MVFPA Are Not Ambiguous And Specifically Allow Parktown's Complaint, The Commission Should Have Denied Audi's Motion To Dismiss.***

The Commission's authority to interpret Missouri statutes has been established by this Court:

The primary rule of statutory construction is to ascertain the intent of the legislature from the language used, to give effect to that intent if possible, and to consider the words used in their plain and ordinary meaning. And, where a statute's language is clear and unambiguous, there is no room for construction. In determining whether the language is clear and unambiguous, the standard is whether the statute's terms are plain and clear to one of ordinary intelligence. *Moreover, the plain and unambiguous language of a statute cannot be made ambiguous by administrative*

*interpretation and thereby given a meaning which is different from that expressed in a statute's clear and unambiguous language.*

*Wolff Shoe Co. v. Director of Revenue*, 762 S.W.2d 29, 31 (Mo. banc 1988) (emphasis added); *see Norberg v. Montgomery*, 173 S.W.2d 387, 390 (Mo. banc 1944) (“Rules for the interpretation of statutes are only intended to aid in ascertaining the legislative intent, ‘and not for the purpose of controlling the intention or of confining the operation of the statute within narrower limits than was intended by the lawmaker.’ If the intention is clearly expressed, and the language used is without ambiguity, all technical rules of interpretation should be rejected.”); *Chapman v. Sanders*, 528 S.W.2d 462 (Mo. App. 1975) (“The rule of liberal construction only operates to resolve an ambiguity within a statute and not to create one. When the language of the statute is unambiguous and conveys a plain and definite meaning, ‘the courts have no business foraging among such rules to look for or impose another meaning.’”).

With these rules in mind, the correct resolution of the issue before the Commission was simple and straightforward. Because the plain and ordinary meaning of the MVFPA allows Parktown to seek review of a violation of § 407.825(1) — and there is a complete absence of language indicating any intent for § 407.817 to preempt this section — the Commission should not have engaged in a statutory interpretation analysis. The inquiry should have stopped there with the denial of Audi’s Motion to Dismiss. *See Wolff*, 762 S.W. 2d at 31.

**1. The Commission Mischaracterized Parktown's Complaint.**

At the outset, it is important to note that the Complaint must be read as it is alleged, and in the light most favorable to Parktown. *See Duggan v. Pulitzer Pub. Co.*, 913 S.W.2d 807, 809-10 (Mo. App. E.D. 1995) (motion to dismiss “assumes all of plaintiff’s averments are true, and liberally grants to a plaintiff all reasonable inferences therefrom.”). The Commission failed to follow this well-accepted standard of review of a complaint.

Contrary to the Commission’s interpretation (Order, p. 3), Parktown’s Complaint is not limited to challenging the establishment of Bommarito as a new Audi dealer. In fact, the Commission acknowledged that the Complaint “alleges various instances of ‘dishonest, impulsive and unpredictable conduct.’” Order, p. 3. While the placement of a new Audi franchise is a central component to the allegations, the Complaint challenges Audi’s pattern of capricious, bad faith, and unconscionable conduct engaged in from 2004 to the present resulting in existing and continuing damage to Parktown. L.F. 2-47 (Complaint, ¶¶ 6-41, 43-47). These instances and pattern of conduct are more than sufficiently pled as violations of § 407.825(1). Contrary to the Commission’s view, simply because a central aspect of the Complaint is the new dealership establishment, the Complaint is not somehow “tainted.” Section 407.825(1) does not “carve out” an exception for bad manufacturer conduct related to new dealership establishment outside a six mile radius, nor would such an exception make sense in light of the remedial purpose of the MVFPA.

**2. The Plain and Ordinary Meaning of the MVFPA Contemplates  
Parktown's Complaint.**

At the heart of the Commission's erroneous interpretation of the MVFPA is the view that § 825(1) and § 817 cannot coexist because § 817 more narrowly describes the "unlawful practices" under § 825(1) which Parktown asserts in its Complaint, and thus Parktown's Complaint must have been brought under § 817.<sup>6</sup> Whatever the superficial appeal of this reasoning, it fades when exposed to the light of the plain language and statutory framework of the MVFPA.

Parktown's Complaint is clearly authorized under § 822. Section 822.3 sets forth two types of aggrieved franchisees, *both* of whom may petition the Commission in different proceedings:

Any franchisee *receiving a 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.

Mo. Rev. Stat. § 407.822.3 (emphasis added).

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<sup>6</sup> For ease of reading, references to the MVFPA provisions are from time to time shorted by omitting the prefatory "407."

The first category of aggrieved franchisees are those who have received “*notice*” from a franchisor pursuant to §§ 407.810 through 407.835. As described in § 822.4, this category includes the “unlawful practices” enumerated in § 825(5), (6), (7), and (14). The “notice” category of franchisees also includes protest actions under § 817 which requires prior notice from the franchisor of its intent to open a new franchise within six miles of an existing franchise (in counties with a population of greater than 100,000). *See Mo. Rev. Stat. § 407.817.4* (“Within thirty days after receiving the notice provided in subsection 3 of this section . . . a new motor vehicle dealer may bring an action *pursuant to section 407.822* to determine whether good cause exists . . .”) (emphasis added). It is important to note that under § 817.3, “*notice*” is required of the franchisor’s intent to take the action — thus, the notice must be sent and then received by the franchisee *before* the action (i.e., “acts”) is taken.

The second category of aggrieved franchisees who can exercise their right to an administrative hearing are those, such as Parktown, who bring actions where *no notice* is required (i.e., “or any franchisee adversely affected by a franchisor’s acts or proposed acts described in the provisions of sections 407.810 to 407.835.”). The plain language of § 822.3 includes the remaining 14 enumerated subsections of § 825 where notice is not required — including § 825(1), invoked by Parktown, which declares conduct that is “capricious, in bad faith, or unconscionable” to be an “unlawful practice.”

This distinction between actions requiring prior notice and those that do not is important because it affects the burden of proof. In § 822.7, the legislature explicitly set forth differing burdens of proof associated with these two types of actions:

In all proceedings before the administrative hearing commission . . . where the franchisor is required to give notice pursuant to subsection 4 of this section, the franchisor shall have the burden of proving by a preponderance of the evidence that good cause exists for its actions. *In all other actions, the franchisee shall have the burden of proof.*

§ 407.822.7 (emphasis added).

The appropriate — indeed the *only* reasonable — interpretation of § 822.3 is that it contemplates two types of actions: (1) those where notice is required, and (2) those where notice is not required. The purpose for this distinction is to differentiate between those acts that are so potentially pernicious that they are in effect presumed to be inappropriate (i.e., where notice is required, with an ability to challenge the proposed action before it is taken by the franchisor) and the remainder where harm is not presumed and prior notice is not required. Establishing a new sales point within six miles of a franchisee (*regardless* of whether it is done capriciously, in bad faith, or unconscionably) is one of those types of conduct that the General Assembly recognized as presumptively inappropriate, and therefore requires a notice and protest procedure to determine whether the franchisor can demonstrate that good cause exists, and the section enumerates factors

to be considered in making that determination.<sup>7</sup> Clearly, Parktown’s Complaint is not attempting to avail itself of the procedural protections afforded by § 817.

In contrast, a franchisor’s “capricious, bad faith or unconscionable conduct” under § 825(1) is one of the types of “unlawful practices” that is not presumed to be damaging, and thus franchisees such as Parktown are not entitled to notice, and in fact, it would make no sense to require notice of such conduct.<sup>8</sup> The Commission’s interpretation ignored the procedural difference between those actions brought under § 817 (or any other *notice* action) and those actions brought under § 825(1) (or any other *non-notice* action). Because Parktown did not qualify for the additional notice and burden shifting protections under § 817, it was relegated to bringing its action under § 825(1) without the

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<sup>7</sup> Other examples of conduct presumed to be damaging to a franchisee are: termination of a franchisee without good cause [§ 825(5)]; prevention of a franchisee from changing its capital structure (NOTE: no “good cause” requirement) [§ 825(6)]; prevention of a franchisee from transferring its franchise without good cause [§ 825(7)]; and prevention of the succession of a franchise to the franchisee’s heirs without good cause [§ 825(14)].

<sup>8</sup> Other examples of conduct *not* presumed to be damaging to a franchisee, and thus *not* requiring notice are: coercing a franchisee to accept deliveries [§ 825(2)]; franchisor’s unreasonable refusal to deliver vehicles [§ 825(3)]; coercing a franchisee to enter into an agreement with franchisor [§ 825(4)]; and those unlawful practices set out in §§ 825(8)-(13) and (15)-(18).

enhanced benefits bestowed by § 817. Such a Complaint is clearly contemplated by and in line with the MVFPA.

Moreover, there is a powerful indicator that the General Assembly would have carved out a “§ 817 exception/preemption” if the legislature had in fact so intended. That indicator is found in the fact that § 825(1) contains a proviso expressly exempting certain conduct by a franchisor (acting to protect its rights as a secured creditor). The General Assembly did not see fit to similarly exempt from § 825(1) conduct relating to new sales points. *See Wolff*, 762 S.W.2d at 32 (“Further, we recognize the rule of statutory construction that ‘the express mention of one thing implies the exclusion of another.’”).

The Commission’s interpretation provides international motor vehicle powerhouses such as Audi with virtual immunity from the obligations and protections of the MVFPA set out in § 407.825. The plain language of the Act and rules of statutory construction do not permit such a result.

***B. Even If The MVFPA Were Ambiguous (Which It Is Not), The Commission Should Have Interpreted The MVFPA In Line With Its Legislative Purpose Which Is To Provide Additional Protections For Motor Vehicle Franchisees.***

Even assuming *arguendo* that the MVFPA is ambiguous (which it is not; Audi did not argue ambiguity and the Commission did not find such),<sup>9</sup> then the Commission should have considered the purpose for which the MVFPA was created, and given effect

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<sup>9</sup> Audi did not argue that the relevant provisions of the MVFPA are ambiguous. L.F. 75-78, 79-90 and 107-115.

to that purpose. *See Hudson v. Director of Revenue*, 216 S.W.3d 216, 221 (Mo. App. W.D. 2007). The Commission failed to do so.

The MVFPA is a “consumer protection” statute that was codified by the Missouri General Assembly, specifically in Chapter 407 of the Revised Statutes of Missouri titled “Merchandizing Practices.” In adopting the MVFPA, the General Assembly codified a public policy designed to protect local Missouri automobile franchisees, like Parktown (i.e., consumers), from the superior bargaining power and unlawful practices of powerful international automobile manufacturers like Audi. *See Stone Motor Co.*, 293 F.3d at 464 (purpose of the MVFPA is to “level the contractual playing field between local franchisees and motor vehicle manufactures”); *G.A. Imports, Inc. v. Subaru Mid-America, Inc.*, 608 F.Supp. 1571, 1579 (E.D. Mo. 1985) (“[T]he purpose of the MVFPA was to create a shift in the balance of power between new motor vehicle franchisors and franchisees.”); *see also* Gene J. Brockland, *Leveling the Playing Field for Auto Dealers: Missouri Motor Vehicle Franchise Practices*, 62 J. MoBar 12 (2006) (“The act starts off with a general prohibition against ‘any conduct [that] is capricious, in bad faith, or unconscionable and which causes damage to [the dealer] or to the public.’ Clearly, this general prohibition can be broadly construed to cover many different types of behavior.”).

Accordingly, the MVFPA (like other merchandizing practices acts) must be interpreted in line with the protective intent of the statute. *See Gibbons v. J. Nuckolls, Inc.*, 216 S.W.3d 667, 670 (Mo. banc 2007) (refusing to adopt interpretation of the

merchandizing practices act that would limit the protections afforded Missouri consumers in part because “[r]elevant precedent consistently reinforces the plain language and spirit of the statute to further the ultimate objective of consumer protection”); *State ex rel. Ashcroft v. Wahl*, 600 S.W.2d 175, 181 (Mo. App. 1980) (merchandizing practices statutes intended to protect consumers “must be given a liberal interpretation” “in keeping with that intent”).

As discussed above, the MVFPA framework recognizes the viability of two distinct types of actions with procedural and remedial differences, one under § 817 and another under § 825(1). As discussed below, the situation and statutory sections at issue in this case are in sharp contrast to those presented in *Boyd v. State Bd. of Regis’n for the Healing Arts*, 916 S.W.2d 311 (Mo. App. E.D. 1995), *Moats v. Pulaski County Sewer Dist. No. 1*, 23 S.W.3d 868 (Mo. App. S.D. 2000) and *American Honda Motor Co., Inc. v. Bernardi’s, Inc.*, 735 N.E.2d 348 (Mass. 2000), upon which the Commission relied to support its dismissal. *See* Order, p. 4-5.

**1. The Statutory Interpretation Principles Applied in *Boyd* and *Moats* Are Not Applicable Here.**

The Commission misapplied the statutory interpretation principles set forth in *Boyd* and *Moats* in reaching the conclusion that Parktown’s Complaint brought under § 825(1) was preempted by § 817. In *Boyd*, the Missouri Court of Appeals, Eastern District, reversed a decision of the Administrative Hearing Commission that found a physician could be disciplined under a general statute prohibiting “unprofessional

conduct” despite the lack of intent required for disciplinary action under a more specific prohibition in the same section designed to prevent Medicaid fraud.<sup>10</sup> 916 S.W.2d at 315. In *Moats*, property owners sued a sewer district seeking a declaration that the district had no authority to compel the owners to connect to the district’s sewer lines. The circuit court declared the district’s regulations invalid and the court of appeals affirmed, holding that the district’s regulation requiring that all wastewater facilities connect to its sewer lines was preempted by the Missouri Clean Water Act.

The *Boyd* and *Moats* cases were both decided by applying the principle of statutory construction that:

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<sup>10</sup> Specifically, the question in *Boyd* was whether a doctor could be subject to discipline under the broadly worded subsection (4)(a) of Mo. Rev. Stat. § 334.100.2 for inaccurately completing a Medicare application when he lacked the necessary element of scienter required by the more specific subsection (17). 916 S.W.2d at 314. Noting that specific statutes generally control where the same subject matter is addressed elsewhere in a more general fashion, the court focused on the effect of finding cause for discipline under subsection (4)(a). *Id.* at 315-16. It explained that, if a doctor were subject to discipline under subsection (4)(a) for merely completing Medicare forms carelessly, subsection (17), with its higher standard of scienter, would be meaningless. *Id.* Thus, the court found subsection (17) to be controlling with respect to discipline for improper Medicare filings. *Id.* at 316.

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.’ Where one statute deals with a particular subject in a general way, and a second statute treats a part of the same subject in a more detailed way, the more general should give way to the more specific.

Order, p. 7, quoting *Moats*, 23 S.W.3d at 872.

The *Boyd* and *Moats* cases are inapplicable here. As a starting point, the holdings in those cases do not allow the Commission to ignore the plain and unambiguous language of the statute. *See Wolff*, 762 S.W.2d at 31. As discussed above, the Commission’s interpretation effectively “writes out” of the MVFPA the express provisions of § 822.3, § 825(1), and § 835, which provide automobile dealers with a remedy for a franchisor’s damaging “capricious, bad faith or unconscionable” conduct. In addition, § 825(1) includes specific limitations on the conduct of a franchisor (acting to protect its rights as a secured creditor) without mentioning a limitation on actions involving franchisor vs. franchisee conduct that relates to a new sales point. *See Wolff*, 762 S.W.2d at 32 (“Further, we recognize the rule of statutory construction that ‘the express mention of one thing implies the exclusion of another.’”).

Most important, the well-recognized rule of statutory construction applied in *Boyd* and *Moats* is to be applied only when there is an “irreconcilable conflict” or “necessary

repugnancy” between the statutes in question, and after the court (or the Commission) has attempted “to reconcile them, if possible, with the general legislative purpose.” *State ex rel. McKittrick v. Carolene Products Co.*, 144 S.W.2d 153, 155-56 (Mo. banc 1940); *see Laughlin v. Forgrave*, 432 S.W.2d 308, 313 (Mo. banc 1968). This conclusion is fortified by examining the jurisprudential foundations upon which *Boyd* and *Moats* rest.

In *Boyd*, the court of appeals held that two subsections of Mo. Rev. Stat. § 334.100.2 could not coexist, thus the more specific subsection was to govern. 916 S.W.2d at 315. Similarly in *Moats*, the court of appeals held that the sewer district’s regulations and the Missouri Clean Water Act had the “potential for conflict,” thus the later enacted and more specific Clean Water Act was to govern. 23 S.W.3d at 873. In *Casey v. State Bd. of Registration for Healing Arts*, 830 S.W.2d 478, 480-81 (Mo. App. E.D. 1992) — which is the case that *Boyd* and *Moats* rely upon — the court of appeals held that Mo. Rev. Stat. § 195.030 and § 334.125 were inconsistent, and thus the more specific statute governed. In *O’Flaherty v. State Tax Com’n of Missouri*, 680 S.W.2d 153, 154-55 (Mo. banc 1984) — which is the case that *Casey* exclusively relied upon — this Court held that the provisions of the more general statute, Mo. Rev. Stat. § 138.110, were in “sharp contrast” to those contained in the more specific statute, Mo. Rev. Stat. § 138.430; because of this conflict, the more specific statute governed.

The final buttress to the conclusion that conflict is required is found in *State ex rel. McKittrick* — the case that *O’Flaherty* exclusively relied upon, and was thus relied upon by reference in *Boyd and Moats*. In *McKittrick*, this Court refused to apply the statutory

principle later applied in *Boyd* and *Moats* where there was no “irreconcilable conflict” or “necessary repugnancy” between the two statutes at issue:

It is a cardinal rule of construction that every word, clause, sentence and section of an act must be given some meaning unless it is in conflict with the legislative intent. *‘It is the duty of the court, in construing statutes which appear to be in conflict, to reconcile them, if possible, with the general legislative purpose.’* With these rules of construction in mind, we believe the apparent conflict between Section 12408, supra, and Section 12409 can be reconciled . . . . To hold that there is *irreconcilable conflict* between these two sections (which we have just held to be to the contrary), we would be forced to reach the same conclusion under the rule announced in the case of *State ex rel. Greene County v. Gideon*, 273 Mo. 79, 199 S.W. 948, which holds that where there is irreconcilable conflict between two different parts of the same act, as a rule the last in order of position will control unless there is some special reason for holding to the contrary. Such reason does not exist in this case.

Now, in regard to the senate bill, Section 12413, we have already found that it is very similar to Section 12408, with the exception that it does not name emulsified cream. It is our duty to keep the legislative intent in mind, if it can be ascertained, and the whole act, or such portions thereof as are pari

materia should be construed together. *‘Where there is one statute dealing with a subject in general and comprehensive terms and another dealing with a part of the same subject in a more minute and definite way, the two should be read together and harmonized, if possible, with a view to giving effect to a consistent legislative policy; but to the extent of any necessary repugnancy between them the special will prevail over the general statute.*

Where the special statute is later, it will be regarded as an exception to, or qualification of, the prior general one; and where the general act is later, the special will be construed as remaining an exception to its terms, unless it is repealed in express words or by necessary implication.’

144 S.W.2d at 155-56 (emphasis added; citations omitted). Clearly, the rule of construction announced by this Court in *McKittrick*, and relied upon by the Commission in dismissing Parktown’s Complaint, requires a court (or the Commission) to reconcile statutes that appear to conflict and only reject a general statute in favor of a specific statute when there is an “irreconcilable conflict” or “necessary repugnancy” between them. Here, the Commission failed to recognize, let alone apply, that law of statutory construction correctly.

As described below and throughout this brief, there is no inconsistency, “irreconcilable conflict” or “necessary repugnancy” between § 817 and § 825(1). A review of the plain language of § 817 and § 825(1) reveals that they address entirely different conduct, with different remedies (i.e., penalties).

*First*, § 817 concerns itself entirely with competition, public consumer welfare, and the protection of relocating (as opposed to new) dealers. Specifically, § 817 sets forth the following factors for the Commission to consider in determining whether a franchisor has “good cause” to establish a new franchise within the “relevant market area” of an existing franchise:

- (1) Permanency of the investment;
- (2) Effect on the retail motor vehicle business and the consuming public in the relevant market area;
- (3) Whether it is injurious or beneficial to the public welfare;
- (4) Whether the new motor vehicle dealers of the same line-make in that relevant market area are providing adequate competition and convenient consumer care for the motor vehicles of that line-make in the market area, including the adequacy of motor vehicle sales and qualified service personnel;
- (5) Whether the establishment or relocation of the new motor vehicle dealer would promote competition;
- (6) Growth or decline of the population and the number of new motor vehicle registrations in the relevant market area; and
- (7) Effect on the relocating dealer of a denial of its relocation into the relevant market area.

Mo. Rev. Stat. § 407.817.

Noticeably absent from these factors is any legislative concern with whether the franchisor engaged in any “capricious, bad faith, or unconscionable” conduct that has damaged the existing franchisee, or has engaged in any other “unlawful practices” as defined in an entirely separate section — § 407.825. Thus, the purpose of § 817 is not to more narrowly regulate § 825’s prohibition of a franchisor’s “unlawful practices,” but rather to ensure that due consideration is given to issues of competition, public consumer welfare, and protection of relocating (as opposed to new) dealers. In fact, business related conduct of the manufacturer vis-à-vis its dealers, or “franchisor vs. franchisee conduct” (i.e., “unlawful practices”), is not even addressed in § 817. By contrast, § 825 addresses only “franchisor vs. franchisee conduct” (i.e., “unlawful practices”) and the public welfare/pro-competition considerations of § 817 are nowhere found in § 825.

This difference is further illustrated by the fact that the General Assembly chose to insert the provisions of § 817 in a separate section of the MVFPA, as opposed to adding them to § 825, which proscribes “unlawful practices.”<sup>11</sup> Additionally, House Bill 575,

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<sup>11</sup> As described in detail below, this is yet another material difference between Missouri’s statute and the statute in Massachusetts that concerned the Massachusetts Supreme Court in *American Honda Motor Co., Inc. v. Bernardi’s, Inc.*, 735 N.E.2d 348 (Mass. 2000), and which the Commission found to be persuasive. In Massachusetts, the state legislature placed the “add point” provisions in the same section as the prohibition on “arbitrary, bad faith and unconscionable” conduct — both of which were defined as unlawful practices with the same remedies.

enacted in 2001, not only included the addition of § 817, but it also amended the pre-existing § 825. If the General Assembly had intended the provisions of § 817 to regulate or limit what could be considered an “unlawful practice” under § 825, it could have done so in that section, but chose instead to create an entirely different section. *Cf. Boyd*, 916 S.W.2d at 315 (“This rule of statutory construction is applicable, and arguably more so, in the present case where the two provisions at issue are contained within the same section of a statute, § 334.100.2.”). Furthermore, in amending § 825, the General Assembly could also easily have inserted the “preemption” language that the Commission strained to graft on where no such language exists. Indeed, after stating its concern at oral argument that adopting Audi’s position would require such grafting, the Commission inexplicably went ahead and did it anyway by erroneously applying *Boyd* and *Moats* to justify its approach.

In *McKittrick*, this Court directed lower courts (and the Commission) to harmonize two statutes if they deal with the same subject. *See also Laughlin*, 432 S.W.2d at 313. The Commission erred in interpreting § 817 and § 825 to deal with the same subject, and in making that erroneous conclusion it further erred in failing to “read together and harmonize[] [the two sections], if possible, with a view to giving effect to a consistent legislative policy . . . .” 144 S.W.2d at 156.

**Second**, as discussed above, the remedies available to a franchisee under § 817 and § 825 are also different. A decision by the Commission that a franchisor does not have “good cause” to place a new franchise under § 817 has the effect of an automatic

permanent injunction. *See* § 822.2. In contrast, a finding by the Commission that a franchisor has engaged in damaging capricious, bad faith and unconscionable conduct does not by itself create an injunction, but rather must be enforced at the circuit court level. *See* § 822.2. Under the latter section, as discussed above, the franchisee challenging such behavior is not entitled to notice from the franchisor and does not receive the benefit of the statutory presumption of harm that is inherent in § 817.

The narrow provisions of § 817 are additional *protections* (with additional remedies) afforded to Missouri franchisees, not a *limitation or penalty* like in *Boyd*. In contrast to the situation in *Boyd*, allowing Parktown's challenge under § 825(1) would not render section § 817 meaningless. In *Boyd*, the two subsections at issue described types of conduct that could serve as the basis of a disciplinary action. *See Boyd*, 916 S.W.2d at 314-15; Mo. Rev. Stat. § 334.100.2 (1994). Each was sufficient to trigger the same result, and one was more inclusive than the other. Therefore, if the more specific did not control, its existence could not be justified. Here, however, § 817 offers *greater and different* protection to a franchisee than is available under § 825(1). Section 825(1) speaks in terms of "unlawful practices," and damage resulting from conduct that is "capricious, in bad faith, or unconscionable." Those words are found nowhere in § 817, which instills protections and procedural benefits grounded in the geographic proximity of new franchises, and which analyzes public welfare and competition concerns.

For these reasons, the Commission misapplied the statutory construction principles of *Boyd* and *Moats*, which are not applicable here.

**2. The Statutory Interpretation Principles Applied in Massachusetts to a  
Massachusetts Statute Are Not Applicable Here.**

The Commission also adopted the interpretation of a Massachusetts case cited by Audi that is inapposite to the Missouri MVFPA, and not persuasive, let alone binding, authority. See *American Honda Motor Co., Inc. v. Bernardi's, Inc.*, 735 N.E.2d 348 (Mass. 2000). While the Commission acknowledges that “the Massachusetts statutes are somewhat different from the Missouri statutes” (Order, p. 7), the Commission’s ruling fails to appreciate the materiality of these differences. In *American Honda*, Honda sought a declaratory judgment in federal court to determine whether two dealerships had standing under the Massachusetts’ Motor Vehicle Franchise Practices Act, codified at Ma. G.L. c. 93B, § 1, *et al.*, to challenge the placement of Honda’s proposed new franchise.<sup>12</sup> 735 N.E.2d at 349-50. The district court certified the question to the Massachusetts Supreme Court.

The issue in *American Honda* was how to define the relevant market area in the Massachusetts “add point” provision of the Massachusetts statute (G.L. c. 93B, § 4(3)(1)). The supreme court determined, on an issue of first impression, that the area was a geographic area circular in shape, and contiguous to the existing dealer’s location. *Id.* at 351-55. Accordingly, because in that case the proposed franchisee was located outside the existing dealers’ “relevant market area,” the incumbent dealers lacked standing.

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<sup>12</sup> The statute at issue in this case was significantly amended in 2002.

The court also held that the addition of the new franchisee could not be challenged under the more general provision of the Massachusetts statute (G.L. c. 93B, § 4(1)) that prohibited “arbitrary, in bad faith, or unconscionable” conduct by a franchisor that damages a franchisee. But as discussed above, Missouri’s add point provision (§ 817) is unlike the Massachusetts add point provision (§ 4(3)(1)) because § 817 does not provide for a challenge of “capricious, bad faith, or unconscionable” conduct by a franchisor. Those challenges are specifically reserved for actions under § 825, and (unlike the Massachusetts’ statute) § 825 imposes no “relevant market area” standing requirement as a condition precedent to an aggrieved dealer’s claim.

Thus, in Missouri, failure to have “good cause” under § 817 to add a new franchise within the relevant market area of an existing franchise is not an “unlawful practice” under § 825. That is not the case in Massachusetts. Under the Massachusetts law, not only were the two competing provisions contained in the same statutory section titled “Violations,” but each section was prefaced by language stating: “It shall be deemed a violation of paragraph (a) of section three for any manufacturer, factory branch, factory representative, distributor or wholesaler, distributor branch, distributor representative or motor vehicle dealer to . . . .” *Compare* §§ 93B, § 4(1) and § 4(3)(1). The referenced “paragraph (a) of section three” states: “Unfair methods of competition and unfair or deceptive acts or practices, as defined by section 4, are hereby declared to be unlawful.” § 93B, § 3. Thus, under the Massachusetts statutory scheme, it is an unlawful practice both:

1. to engage in damaging “*arbitrary*, bad faith or unconscionable” conduct under § 4(1); and

2. to add an “*arbitrary*” new sales point inside an existing franchise’s “relevant market area” under § 4(3)(1).

The operative language of the Massachusetts add point provision specifically prohibits the addition of a new franchisee in an existing franchisee’s relevant market area “arbitrarily and without notice to existing franchisees” and the key determination made when reviewing all the enumerated factors is whether the “proposed appointment is *arbitrary* . . . .” 93B, § 4(3)(1) (emphasis added). Thus, under the Massachusetts scheme, the operative language of the “general” section and “specific” section is the same — both address whether the franchisor’s action or proposed action is “arbitrary.” Accordingly, while the rationale is strained, it is not entirely surprising that the Massachusetts Supreme Court held that the narrow “arbitrary” standard<sup>13</sup> preempted the more general “arbitrary” standard<sup>14</sup> in the same section. As described above, the Massachusetts statutory analysis is not transferable to § 817 and § 825(1) of the Missouri MVFPA.

Additionally, § 817 was an amendment to the existing MVFPA provisions, and was intended to provide enhanced protections, not to supplant the safeguards already existing in the statute. Yet another difference is that the Massachusetts statute, unlike the

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<sup>13</sup> Ma. G.L. c. 93B, § 4(3)(1) (prohibiting the “arbitrary” placement of new dealerships).

<sup>14</sup> Ma. G.L. c. 93B, § 4(1) (regulating franchisor’s “arbitrary, bad faith, and unconscionable” conduct).

Missouri statute, does not set forth a burden-shift related to the more specific statute, and does not entitle the franchisee to an injunction upon satisfying the requirements of the more specific statute.

Finally, the analysis of the Massachusetts Supreme Court is not binding or even persuasive in Missouri, especially where the foreign statute is materially different and there is no evidence of a preemptive legislative intent in the Missouri statute.

### **CONCLUSION**

The Commission's final decision interpreting the MVFPA is erroneous and not authorized by law because the Commission failed to properly apply the rules of statutory construction set forth by the Supreme Court of Missouri. Because the MVFPA is unambiguous, the Commission was without authority to "write in" an exemption in Mo. Rev. Stat. § 407.825(1). Instead, the Commission was required to interpret the statute according to its plain and ordinary meaning, in which § 825(1) and § 822.3 clearly provide an administrative remedy for the conduct alleged in Parktown's Complaint.

Even if the MVFPA were ambiguous (which it is not) or § 817 and § 825(1) were in conflict (which they are not), the Commission was required to harmonize the statutory provisions of the MVFPA and interpret them in line with the legislative purpose behind the statute — the protection of Missouri's local automobile dealers against powerful international automobile manufacturers like Audi. The Commission's ruling made no attempt to harmonize the statutes, but instead subverts the protections of § 825. The Commission's final decision reaches an absurd result in holding that when a

manufacturer's damaging "capricious, bad faith, and unconscionable" conduct relates to the establishment of a new sales point, that the manufacturer is not bound by the limitations placed on its conduct by § 825(1). Section 817 does not somehow immunize a manufacturer and allow it to engage in free-wheeling bad faith conduct simply because its capricious acts involve a new dealer point more than six miles from the franchisee being damaged by the conduct. There is no reason why § 817 should reduce the protections already afforded by § 825(1).

For the foregoing reasons and in accordance with the cited authorities, Parktown respectfully requests that the Court reverse the Commission's final decision dismissing Parktown's Complaint and remand the case to the Commission for proceedings on the merits.

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 11,648 words, excluding the parts of the brief exempted; has been prepared in proportionally spaced typeface using Microsoft Word 2003 in 13 point Times New Roman font; and includes a virus free 3.5" floppy disk in Microsoft Word 2003 format.

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