

No. SC89611

IN THE SUPREME COURT OF MISSOURI

PARKTOWN IMPORTS, INC.,

Petitioner-Appellant,

v.

AUDI OF AMERICA, INC.,

Respondent.

On Petition for Review

From The Administrative Hearing Commission

June Striegel Doughty, Commissioner

APPELLANT'S SUBSTITUTE REPLY BRIEF

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INTRODUCTION

Parktown's position is simple — a dealer that has been concretely damaged by the “capricious, bad faith, or unconscionable” conduct of its manufacturer (regardless of the context of that conduct), is entitled to seek relief under § 825(1) of the Missouri Motor Vehicle Franchise Practices Act (“MVFPA”).¹ There is no “immunity” for such conduct simply because it relates to the establishment of a new dealership.

To serve its purposes, Audi's Brief casts Parktown's Complaint as something it is not — a § 817 add-point protest. With ostrich-like ignorance, Audi refuses to acknowledge that throughout Parktown's Opening Brief and Parktown's filings before the Commission, Parktown unequivocally and consistently states that its Complaint is not seeking to take advantage of the added franchisee protections (or what Audi calls “protest rights”) contained in § 817, rather it is seeking relief from Audi's damaging “unlawful practices” proscribed in § 825(1). Opening Br. 1-4, 18-21, 23-39; L.F. 96; L.F. 121; Tr. 22:21-31:18.

Because the plain and ordinary meaning of § 825(1) contemplates Parktown's Complaint and Parktown sufficiently alleged a claim under § 825(1), the well-established rules of statutory construction required the Commission to give effect to the words of the statute and hear Parktown's Complaint. *Only* if there was ambiguity or conflict, should the Commission have proceeded to look at the General Assembly's legislative intent in

¹ As in Parktown's Opening Brief, for ease of reading, references to the MVFPA provisions are from time to time shorted by omitting the prefatory “407.”

enacting the MVFPA to resolve the apparent conflict or ambiguity. And even if Commission had found ambiguity or conflict (which it did not, and there is none), the legislative intent inquiry required the Commission to attempt to harmonize the potentially conflicting provisions to give effect to the General Assembly's protective purpose in enacting the MVFPA and its subsequent amendments. The Commission did not do any of this. Accordingly, this Court, like the court of appeals, should reverse the Commission's Final Decision and remand the case to the Commission for proceedings on the merits.

REPLY TO AUDI'S STATEMENT OF FACTS

"In reviewing an order sustaining a motion to dismiss, all facts alleged in the petition are deemed true and plaintiff is given the benefit of every reasonable intendment." *Deane v. S.F. Pizza, Inc.*, 229 S.W.3d 223, 224 (Mo. App. S.D. 2007). Audi's Brief disregards this maxim, narrating the "facts" alleged in Parktown's Complaint in a light favorable to Audi instead of Parktown, and in so doing, even embellishing the facts by detouring from the record on appeal.

For example, Audi states as "fact" that it and Bommarito entered into a dealer formation agreement prior to Parktown filing its Complaint. Resp. Br. 6-7. This "fact" is found nowhere in the Complaint, and in any event is misleading because it fails to mention that this dealer formation agreement (essentially, a letter of intent) specifically contemplated that a legal proceeding could be filed challenging the conduct of Audi in establishing the new dealership and set forth corresponding indemnification procedures.

Audi's intimated assertion that it had no reason to anticipate Parktown's Complaint is suspect at best.

Contrary to Audi's self-serving narrative, the Commission found that Parktown's Complaint alleged "various instances of 'dishonest, impulsive and unpredictable conduct.'" Order, p. 3. There has been no argument by Audi or finding by the Commission that Parktown has not properly alleged a claim under § 825(1). *See* Opening Br. 5-16, 23. The sole issue before the Court is whether the Commission has jurisdiction to hear Parktown's Complaint, and thus Audi's version of the facts should be disregarded.

ARGUMENT

A. The Commission Failed To Correctly Apply The Rules Of Statutory Construction.

In its Brief, Parktown explained that the Commission misapplied (and even failed to apply at all) this Court's well-established rules of statutory construction. Although Audi agrees that the issue before this Court is one of statutory construction (Resp. Br. 9), it fails to correctly apply the rules of construction. Audi instead applies the rules of construction in reverse order; first looking at what Audi perceives as the intent of the General Assembly in enacting the MVFPA, and then using that perceived intent to eliminate or re-write the actual words of the statutory provisions. This approach has been condemned as improper. *See Wolff Shoe Co. v. Director of Revenue*, 762 S.W.2d 29 (Mo. banc 1988).

In *Wolff Shoe*, this Court reversed the Commission for failing to interpret a revenue statute in line with the plain and ordinary meaning of its words. The Court noted that “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.” *Id.* at 31-32. As in *Wolff Shoe*, the Commission here ignored the plain and ordinary meaning of the words of § 825(1), which provide a cause of action to a franchisee for its franchisor’s damaging “capricious, in bad faith, or unconscionable” conduct. Instead, the Commission grafted on to § 825(1) an exemption (nowhere found in the language) for such damaging conduct that happens to coincide with the establishment of a new dealership. Such an interpretation is improper, and as in *Wolff Shoe*, the Commission’s Decision should be reversed.

B. The Lack of Reported Cases Is A Red Herring.

Audi argues that the Commission correctly dismissed Parktown’s Complaint because there are no reported cases from Missouri or other states in which a dealer has “at least successfully” sued its franchisor for damaging “capricious, bad faith or unconscionable conduct.” Resp. Br. 15. Audi’s troll through the statutes and decisions of other states provides little insight to the central issue in this case: proper construction of *Missouri’s* MVFPA.

First, Audi’s “one size fits all” approach fails to acknowledge that these state statutory schemes vary widely, as evidenced when comparing the Missouri MVFPA with the Massachusetts enactment at issue in *American Honda Motor Co., Inc. v. Bernardi’s*,

Inc., 735 N.E.2d 348 (Mass. 2000). Indeed, Parktown’s Opening Brief discusses at length the *American Honda* decision, the differences between Missouri’s statutory scheme and the one enacted in Massachusetts, and the reasons why the *American Honda* case has no applicability in Missouri. Opening Br. 40-43. While Audi champions the *American Honda* case (Resp. Br. 16, 27), Audi refrained from engaging in any statutory construction analysis, choosing instead to simply ignore the distinctions discussed by Parktown in its Brief. This omission speaks volumes.²

Second, Audi attempts to brush aside the case of *Love Pontiac, Cadillac, Buick, GMC Truck, Inc. v. GMC*, 1999 U.S. LEXIS 3769 (4th Cir. 1999) from its discussed “body of law” regarding franchisee actions. Resp. Br. 15. The case is actually

² Audi’s citations to *Antwerpen Dodge, Ltd. v. Herb Gordon Auto World, Inc.*, 699 A.2d 1209 (Md. App. 1997) and *Heritage Oldsmobile-Imports v. Volkswagen of America, Inc.*, 264 F.Supp.2d 282 (D.Md. 2003) are misplaced. Resp. Br. 16, 27. *Antwerpen* involved the reversal of a preliminary injunction because the dealer failed to allege the element of “coercion”, which was required under the Maryland statute in which it proceeded. 699 A.2d at 1218-19. In *Heritage*, the plaintiff dealers proceeded under a Maryland statute that required “good faith” in acting under the “terms, provisions, or conditions of any franchise agreement,” and the Court found that plaintiffs failed to allege a cause of action under that statute. 264 F.Supp.2d at 288. Here, § 825(1) contains no such restrictions like those in Maryland, and it is not even suggested that Parktown failed to properly allege a claim under § 825(1).

demonstrative of an instance where an aggrieved dealer sued its manufacturer under a state statute prohibiting a manufacturer's "arbitrary, bad faith, or unconscionable actions" (similar to § 825(1) of the MVFPA) complaining of damage related to the establishment of a new dealership. The fact that Love Pontiac was ultimately unsuccessful on its claim is irrelevant to the issue before this Court. When the Commission dismissed Parktown's Complaint, it deprived Parktown of its right under the MVFPA to have its claim decided on the merits (the same right exercised by Love Pontiac in South Carolina).

Third, Audi fails to acknowledge the practical commercial reality that a dealership's decision to sue its manufacturer (i.e., "bite the hand that feeds it") is not taken lightly. In fact, in the 28-year existence of the MVFPA, the number of reported cases brought under the act is in the single digits. Regardless, the bottom-line is that the proclivity of other Missouri dealers to exercise their rights under the MVFPA does not change the words of § 825(1) unequivocally providing a cause of action to Parktown for Audi's damaging "capricious, bad faith, or unconscionable" conduct.

C. Sections 817 And 825(1) Do Not Address The Same Subject Matter.

In its Brief, Audi asserts diametrically inconsistent positions regarding § 817 and § 825(1), claiming for one purpose that the two address the same subject matter, and when it suits Audi's devices for another purpose, it argues that the two sections involve entirely different subject matter.

In attempting to salvage the rationale of the Commission's Final Decision, Audi argues that § 817 and § 825(1) "purport to address the *same* subject matter" and therefore § 825(1) should "give way" to the more narrowly defined § 817. Resp. Br. 22 (emphasis

added); *see* Order, p. 7. Audi takes this stance because without the “same subject matter” foundation, Audi’s position (and the Commission’s Decision) cannot hold together.

The law is clear that before a court (or the Commission) can engage in the *Boyd/Moats* preemption analysis, it must *first* find that the two competing statutes address the *same* subject matter. *See Laughlin v. Forgrave*, 432 S.W.2d 308, 313 (Mo. banc 1968); *State ex rel. McKittrick v. Carolene Products Co.*, 144 S.W.2d 153, 155-56 (Mo. banc 1940). Thus, if § 817 and § 825(1) are found to in fact address *different* subject matters (as they do), then the Commission’s conclusion that § 817 should preempt Parktown’s Complaint under § 825(1) is incorrect and cannot stand.

The fundamental flaw in Audi’s assertion that § 817 and § 825(1) address the same subject matter is that it is refuted by the plain language of the MVFPA. The MVFPA, including § 825(1), was enacted in 1980. Section 817 was added to the MVFPA in 2001 to *expand* the protections *already in place* for franchisees. To accomplish this, § 817 created procedural hurdles for a franchisor to overcome before being allowed to place a new dealership particularly close to an existing dealer’s location (regardless of whether there was any bad faith or capricious conduct incident to the establishment of the dealership).³

³ Section 817 creates a statutory presumption of harm, and instills a prior notice and burden-shifting procedure that requires the franchisor to establish that it has “good cause” *before* opening a new franchise within the “relevant market area” of an existing franchisee. Further, the remedies available to a franchisee under § 817 and § 825(1) are

The procedural benefits bestowed by § 817 are in addition to the protections under § 825 that were already in effect. This is demonstrated by the fact that prior to 2001, there is no doubt Parktown could have brought its present Complaint against Audi under § 825(1). Audi apparently realized its peril in relying on the Commission’s *Boyd/Moats* analysis (as it has at every stage of this case).⁴ Audi now reverses course and, for the first time, proclaims that because § 825(1) and § 817 address completely *different* subject matter, § 825(1) was never intended to cover damaging “capricious, bad faith, or unconscionable” conduct that related to the establishment of a new automobile dealer. Resp. Br. 10-16.

Thus, on the one hand, Audi advances the argument that because § 817 and § 825(1) address the *same* subject matter, and § 817 does so more specifically and chronologically later than § 825(1), that § 817 preempts § 825(1) under *Boyd* and *Moats*.

also different, as 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, whereas a prevailing franchisee under § 825(1) or other section where prior notice is *not* required, must go to the circuit court to enforce the Commission’s Decision and obtain permanent injunctive relief. *See* §§ 822.2 and 835; Opening Br. 38-39.

⁴ Even in Audi’s Application for Transfer filed in this Court on September 17, 2008, Audi harshly criticized the court of appeals’ conclusion that these sections addressed “different subject matters.” Application for Transfer, p. 7.

Resp. Br. 22-28. On the other hand — to avoid the inevitable conclusion reached by the court of appeals that § 817 was enacted as an additional benefit for franchisees in addition to the protections already in place in § 825(1) (not to replace or supplant § 825(1)) — Audi now argues that the sections involve completely *different* subject matter. Resp. Br. 10-16.

Taking its new position to an even more extreme level, Audi now contends that the subject matter of these sections are *so different* that when § 825(1) was enacted in 1980, the General Assembly specifically intended — twenty years *before* the enactment of § 817 — that § 825(1) would not cover damaging “capricious, bad faith, or unconscionable” conduct that related to the establishment of a new dealer.⁵ Audi’s newly-found position is flawed because nowhere in the plain language of § 825(1) is there any suggestion that damaging “capricious, bad faith, or unconscionable” related to the establishment of a new dealership is to be exempted.⁶ Embedded in the

⁵ Of course, by now conceding (indeed, arguing) that § 817 and § 825(1) address completely *different* subject matter (Resp. Br. 11-16), Audi necessarily also concedes that *Boyd* and *Moats* are inapplicable here, and the Commission’s reliance on *Boyd* and *Moats* was incorrect.

⁶ Audi does not dispute that § 825(1) actually contains language 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. Opening Br. 28; *see Wolff Shoe*, 762 S.W.2d at 32 (“Further, we

Commission’s Decision is the suggestion that an implicit “trade-off” took place with the enactment of § 817, in which the already-existing protections of § 825(1) were given up by franchisees in exchange for the additional protections in § 817. But there was no such “trade-off,” as this interpretation would run afoul of the protective purpose behind the MVFPA.

To avoid this problem, Audi denies that the Commission’s Decision writes out the protections under § 825(1), stating that “§ 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 *protest rights* that are already governed by a specific statute.” Resp. Br. 24-25 (emphasis added). But this is not, and never was, Parktown’s position. Parktown agrees that § 825(1) cannot be used to create “protest rights” (i.e., prior notice, burden shifting, etc.). In addition, Parktown has never suggested that the § 825(1) should be viewed “myopically” (Resp. Br. 25), but rather it should be read in conjunction with the entire MVFPA. *See* Opening Br. 24-28.

Audi next acknowledges “currency” gained with the court of appeals, again misstating Parktown’s position as asserting “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

recognize the rule of statutory construction that ‘the express mention of one thing implies the exclusion of another.’”).

by another (§ 407.825(1))) – hence no conflict.” Resp. Br. 25. Of course, Parktown’s “curious argument” appears nowhere in Parktown’s Brief — because Parktown never made it. Parktown has consistently asserted that § 825(1) does not address “add-point protests” at all, but rather concerns itself with “franchisor v. franchisee *conduct*” and provides a remedy, *without limitation*, for the damaging “capricious, bad faith or unconscionable” conduct of a dealer regardless of the circumstances of that conduct.

Audi argues that there are “obvious conflicts” between § 817 and § 825(1), but only musters up “one such conflict,” that the “creation of a franchisee right to protest 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.” Resp. Br. 26. Audi’s argument misses the point for a number of reasons.

First, Audi relies on an historical sleight of hand, reversing the chronology of the MVFPA. The rights under § 825(1) were in existence for over twenty years before § 817 was added. Section 825(1) was not overlaid on § 817, but vice-versa. Second, once again, Parktown has never argued that it should be accorded any of the protections added by § 817 or allowed to “protest” the establishment of a new dealership outside its relevant market area. Parktown agrees that § 825(1) cannot be used to create § 817 “protest rights” (i.e., prior notice, burden shifting, etc.).

Audi also turns the wording and the intent of § 817 on its head, claiming that § 817 “limits the protest rights of existing dealers in other significant respects,” and

arguing that Parktown’s Complaint under § 825(1) would provide for *less* restrictive “protest” rights outside the six mile RMA than those under § 817. Resp. Br. 26. But, contrary to Audi’s implication, § 817 was not enacted as a “limitation” or “restriction” on dealers’ rights, but rather was an enhancement providing procedural benefits to a dealer who wants to challenge the proposed establishment of a new dealership (without having to prove capricious conduct by the manufacturer or resulting damage). Furthermore, § 825(1) does not create “protest rights” at all, but rather provides a remedy for damaging “capricious, bad faith or unconscionable” conduct. Audi’s claim of “conflict” is contrived.

D. The Plain Language Of § 407.822 Establishes The Availability Of An Administrative Hearing For An Alleged Violation Of § 407.825(1).

Audi contorts and twists the MVFPA to conjure up the novel argument that an alleged violation of § 825(1) is not subject to administrative review under § 822. The deficiencies with Audi’s argument are many, most importantly that it would require the Court to ignore entire subsections of § 822 and other parts of the MVFPA to achieve an interpretation that is completely at odds with the MVFPA’s purpose to provide statutory protections to local Missouri automobile dealers.

Audi asserts that § 822 creates two separate “remedial” subsections (§ 822.1 and § 822.3) that operate independently of each other. According to Audi, § 822.1 is “(solely) is meant for the purpose of administratively challenging a dealership establishment under § 407.817,” while § 822.3 only applies to complaints brought under MVFPA sections where a specific “good cause” determination is identified. Resp. Br.

20. Audi argues that neither of these subsections of § 822 provides for an administrative hearing for Parktown’s Complaint brought under § 825(1).

With respect to § 822.1, Audi would have the Court ignore the plain language that “*Any party seeking relief pursuant to the provisions of sections 407.810 to 407.835*” may file an application for a hearing with the administrative hearing, in favor of an interpretation that § 822.1 was intended only to apply to complaints brought under § 817. Of course, the General Assembly could have specified this limitation Or could it? In fact, § 822.1 was enacted in 1997 — four years *before* § 817. House Bill 516 (1997). Thus, for Audi’s interpretation to have any plausibility, one must conclude that the General Assembly enacted § 822.1 in 1997 to apply only to complaints brought under a then non-existent subsection. In fact, when the General Assembly enacted § 817 in 2001, it also slightly amended the pre-existing § 822.1, but chose not to limit this subsection to actions involving § 817. House Bill 575 (2001). Audi’s suggested prescient forecasting of legislative intent is baseless.

Audi latches on to the phrase in § 822.1 that a party may file an application for a hearing “within the time periods specified in this section” and points out that there are no time limitations in § 822 with respect to the filing of complaints under § 825(1). The problem with Audi’s argument is that the time periods for filing a § 817 action are also *not* found in § 822. Thus, under Audi’s interpretation, § 822.1 does not apply to § 817 or § 825(1), or any other section of the MVFPA not temporally limited by § 822. This

completely undermines Audi's position that § 822.1 is the exclusive remedial subsection for § 817 actions.⁷

The correct (and indeed only reasonable) interpretation of § 822 is that it creates one administrative proceeding for all alleged violations of the MVFPA. Subsection 1 outlines the basic procedures to be followed by the parties and the Commission upon the filing of an application for hearing. Subsection 3 defines who "shall be entitled to file an application for hearing." Of course, all applications for hearing are subject to the requirements of § 822, including the procedural requirements found in subsection 1. The § 822.1 language stating that an application for hearing must be filed "within the time periods specified in this section" means what it says: that if an application for hearing is filed, it cannot be filed outside any time limitation specified in § 822. Parktown's Complaint does not violate this procedural requirement.

⁷ Audi argues in passing (Resp. Br. 21-23, n. 14) that because the automatic stay language appears only in § 822.1, that it cannot apply to Parktown's complaint brought under § 822.3. Of course, if Audi's interpretation is to govern, then the other procedural requirements set forth in § 822.1 (i.e., compliance with chapter 536, service of application on all parties, setting of a hearing date, etc.) would apply *only* to § 817 actions. Accordingly, for all other actions brought before the Commission, there would be no procedural requirements at all. This makes no sense, especially in light of the fact that §§ 822.1 and 825 predate § 817.

The other half of Audi's argument is based upon Audi's assertion that Parktown's Complaint cannot be brought under § 822.3 because there is no "good cause" determination to be made by the Commission. Resp. Br. 19-20. This argument is without merit. As Parktown outlined in its Opening Brief at 24-28 (and unrefuted by Audi), § 822.3 sets forth two types of aggrieved franchisees who "shall be entitled to file an application for a hearing." The first category of aggrieved franchisees are those who have received "*notice*" from a franchisor pursuant to §§ 407.810 through 407.835. The second category of aggrieved franchisees under are those, such as Parktown, who bring actions where *no notice* is required.

Audi argues that § 822.3 only applies to those subsections of the MVFPA where a "good cause" determination is specifically referenced in the subsection, citing as examples Mo. Rev. Stat. § 407.825(5), (7), (14) and § 407.826.1(1)(a). Resp. Br. 20. Each of these cited subsections specifically references a "good cause" determination, and subsections (5), (7), and (14) of § 825 — like § 817 — set forth specific factors the Commission (or the circuit court) is to consider in determining whether "good cause" exists. According to Audi, because § 825(1) has no specified "good cause" requirement, Parktown's Complaint cannot be brought before the Commission under § 822.3. If Audi's interpretation were to be adopted, however, there would be no administrative hearing available to a franchisee asserting a violation of *any* of the remaining 15 subsections of § 825 because those sections have no specified "good cause" requirement.

Audi's interpretation also fails because § 825(6) (regarding a manufacturer's "preventing by contract or otherwise any motor vehicle franchisee from challenging the

capital structure of the franchisee’s franchise”) does not contain a specific “good cause” requirement, yet clearly violations of § 825(6) are actionable (and an administrative hearing is available) under § 822. Section § 825(6) is specifically referenced in § 822.4 as a “notice” subsection, and § 822.7 (in discussing the burden of proof) specifically states that an administrative hearing is available for actions where notice is required under § 822.4.⁸

Indeed, if Audi’s interpretation were to govern, then the second half of § 822.3 regarding “non-notice” actions would be rendered surplusage and completely meaningless, along with the burden shifting provisions of § 822.7 (“*In all other actions, the franchisee shall have the burden of proof.*”). This interpretation would be inappropriate because “[a]n entire clause of the statute should not be relegated to the

⁸ Footnote 13 of Audi’s Brief notes the anomaly of § 822.4’s reference to “subdivisions (5), (6), (7) and (14) of subsection 1 of section 407.825” despite there currently being no subsection 1 of § 825 containing those subdivisions. Prior to 2001, § 825 was divided into two subsections, with subsection 1 containing subdivisions (1) through (16) in substantially similar form as the current subsections of § 825. *See* House Bill 516 (1997). With the 2001 amendment to the MVFPA, subsection 2 of § 825 was eliminated, and thus *subdivisions* (1) through (16) of subsection 1 became *subsections* (1) through (16) along with two new subsections (17) and (18). *See* House Bill 575 (2001). The General Assembly inadvertently neglected to amend the previously existing § 822.4 and .5 to reflect this change in the organization of § 825.

status of excess verbiage.” *See Schoemehl v. Treasurer of State*, 217 S.W.3d 900, 902 (Mo. banc 2007).

Further, the plain language of § 822.2 draws a distinction between “notice” actions and “non-notice” actions and the interplay with the “good cause” requirement, stating:

The administrative hearing commission shall issue a final decision or order, in proceedings arising pursuant to the provisions of sections 407.810 to 407.835, within ninety days from the conclusion of the hearing. *In any proceeding initiated pursuant to sections 407.810 to 407.835 involving a matter requiring a franchisor to show **good cause** for any intended action being protested by a franchisee*, the franchisor shall refrain from taking the protested action if, after a hearing on the matter before the administrative hearing commission, the administrative hearing commission determines that good cause does not exist for the franchisor to take such action.

(Emphasis added).

The first sentence of this excerpt states that the Commission shall issue its final decision or order “in proceedings arising pursuant to the provisions of section 407.810 to 407.835” within ninety days. The next sentence is specifically limited only to those proceedings “involving a matter requiring a franchisor to show good cause for any intended action being protested by a franchisee.” There would be no reason for the legislature to attach the limiting language of the second sentence if a “good cause” “notice” proceeding was the only administrative proceeding contemplated by § 822.

In sum, the meaning of § 822.3 can easily be derived from the plain meaning of its words: All franchisees are entitled to an administrative hearing if they (1) have received notice from a manufacturer under the MVFPA, or (2) have been aggrieved by an act or proposed act of a manufacturer described in the MVFPA. The purpose of the hearing is to determine whether the manufacturer had good cause for its acts or proposed acts. Accordingly, if Parktown can establish before the Commission in a hearing on the merits that Audi acted capriciously, in bad faith, or unconscionably in its dealings with Parktown and that Audi's conduct caused damage to Parktown, then Audi will *by definition* have acted without good cause and Parktown will prevail (a finding that a manufacturer has engaged in "unlawful practices" under § 825 is tantamount to a finding of no good cause).

Admittedly, Parktown's burden in proceeding under § 825(1) is much higher than if Parktown were proceeding with an "add-point" protest under § 817 (i.e., no prior notice, no burden shift, must prove damages). Nevertheless, § 822 clearly provides the right to an administrative hearing for Parktown and the Commission erred in dismissing Parktown's Complaint.

E. There Is Nothing "Absurd" In The General Assembly's Provision Of A Remedy For A Local Missouri Dealer That Is Damaged By The "Capricious, Bad Faith or Unconscionable" Conduct Of An International Automobile Manufacturer.

Audi attempts to hijack § 817 for its own use, stating (without citation) that § 817 "specifically evidences a legislative intent to protect consumers, dealers, *and*

manufacturers.” Resp. Br. 29 (emphasis added). Audi would have the Court infer from the language of § 817 that manufacturers like Audi accepted, if not encouraged, the enactment of § 817 and its severe limitations on a manufacturer’s ability to place a dealership within six (or ten) miles of an existing dealership. Of course, of the seven factors to be considered by a court (or the Commission) under § 817.6, *not one* concerns the manufacturer.

Indeed, there is no indication from any source (save Audi) that the enactment of § 817 was meant to benefit manufacturers to the detriment of franchisees by demolishing the 20-year-old protections previously afforded franchisees in § 825(1). Audi suggests (again, without citation) that holding otherwise would “obfuscate the protections afforded by § 407.817 to consumers, existing dealers, *prospective dealers*,⁹ *and manufacturers.”* Resp. Br. 30 (emphasis added). This is simply wishful embroidery on fabric of § 817. “Prospective dealers and manufacturers” (e.g., Bommarito and Audi) are simply tag-ons in Audi’s attempt to claim for itself the protections of § 817.¹⁰

⁹ The MVFPA offers no protection to prospective dealers. *See Ackerman Buick, Inc. v. General Motors Corp.*, 66 S.W.3d 51, 62-63 (Mo. App. E.D. 2001).

¹⁰ Audi also states that “[t]hese consequences are directly in play under the facts of this action as the challenged dealership (Bommarito) is currently open for business.” Resp. Br. 30. Audi notes that Parktown received written notice of Audi’s intent to open a dealership with Bommarito on March 20, 2007 (*see* Resp. Br. 6), and there is no question that Parktown filed its Complaint *three days later*. L.F. 1. At the time of filing,

Audi’s further contention that a proceeding under § 825(1) would not be subject to any geographical limitations, Resp. Br. 29, fails to acknowledge the differences between § 817 and § 825(1). Significantly, in order to succeed under § 825(1), a dealership must prove that it has been *damaged* and that the conduct was “capricious, in bad faith or unconscionable” (neither of which is required under § 817). As the General Assembly recognized in § 817, the further away the new dealer is from the existing dealership, the more attenuated the likelihood for damage — hence the legislature determined that the presumption of damage and procedural protections of § 817 should *cease* at the six/ten mile limit.

The geographic sphere of injury under § 825(1), on the other hand, is constrained by the damage requirement itself, which imposes inherent limitations on all § 825(1)

Bommarito was not “open for business.” Only after the Commission’s dismissal of Parktown’s Complaint did Bommarito “open for business.” Audi’s (and Bommarito’s) decision to thereafter proceed at their own risk (while appellate proceedings were pending) is no basis for affirming the Commission’s Decision. *See, e.g., F.T.C. v. Whole Foods Market, Inc.*, 548 F.3d 1028, 1033-34 (D.C.Cir. 2008) (rejecting argument that reversal of the lower court would require impermissible unscrambling of the eggs of a merger that was “*fait accompli*” by the time the case reached the appellate court.). Indeed, if Audi’s position were correct, a party successful at the trial court level in defending a claim for injunction would be able to moot appellate relief by simply thereafter consummating the complained of transaction — an absurd result.

actions, including those that relate to new dealership establishments. While a manufacturer might engage in all sorts of “bad faith” and nefarious conduct at various locations across the state, a dealer has no § 825(1) cause of action for such conduct unless it is occurs *in close enough proximity to actually damage* the dealer. That sphere of damage is certainly apparent here, as Parktown is located only 10 miles down the street (Manchester Road) from the Bommarito dealership and Parktown’s assigned area of dealer responsibility includes the same St. Louis West County area where Bommarito now sits and plunders Parktown’s customer base. L.F. 10.

Audi next argues there is a 30-day “statute of limitations” period under § 817, and thus it would be “absurd” to allow Parktown’s Complaint under § 825(1) where there is no similar “statute of limitations.” Resp. Br. 29-30. Audi overlooks that the 30-day day provision itself is triggered only upon the manufacture’s giving of the required notice under § 817 (before taking the proposed action). The *primary* benefit (i.e., the added procedural protections) triggered by § 817’s notice provision is afforded to *franchisees*; the 30-day time frame for responding is merely *a limitation on the benefit itself* — it is not an independent benefit given to manufacturers. Additionally, franchisees are entitled to the prior notice of a manufacturer’s intent to award a new franchise regardless of any capricious or otherwise damaging conduct related to the opening of the new franchise, as those factors are nowhere considered under § 817. In contrast, dealerships seeking a remedy for a manufacturer’s damaging capricious, bad faith, or unconscionable conduct are not entitled to notice of the conduct, and of course it would make no sense to require

such notice. Naturally, there is no 30-day time limit “to respond” to a non-existent notice. There is nothing “absurd” about the statutory framework that exists.

Audi’s argument also ignores the commercial reality that car dealers with multimillion dollar investments do not go about whimsically suing their manufacturers. And contrary to Audi’s assertion, Resp. Br. 30, when the damage perceived by a dealer is sufficient to warrant action, the dealer is highly unlikely to be financially masochistic and “stand by indefinitely” to incur even more damages before filing.¹¹ Indeed, here Parktown filed its Complaint only three days after Audi’s so-called “notice letter.” Resp. Br. 6.

In conclusion, there is nothing “absurd” in allowing a dealership to challenge the damaging “capricious, bad faith or unconscionable” conduct of a manufacturer, regardless of its context or where it is occurs. It would be absurd, however, to judicially write out these long standing protections simply because the damaging conduct relates to the establishment of a new dealership. There is no basis from which such *carte blanche* immunity can be inferred.

¹¹ The economic incentive is strongly the opposite, and the administrative remedies under § 822 (including a temporary stay) provide protection from such accumulation of injury.

F. The General Assembly’s Decision To Provide A Remedy For Franchisees Who Are Damaged By A Manufacturer’s “Capricious, In Bad Faith, Or Unconscionable” Conduct Does Not Burden Interstate Commerce Or Otherwise Conflict With The United States Constitution.

For its second point, Audi argues that allowing Parktown to challenge Audi’s conduct under § 825(1) would violate the dormant commerce clause and Audi’s due process rights under the United States Constitution. The Court should analyze Audi’s arguments under the guidelines set forth in *Hammerschmidt v. Boone County*, 877 S.W.2d 98, 102 (Mo. banc 1994) (“[A]n act of the legislature approved by the governor carries with it a strong presumption of constitutionality. This Court will resolve doubts in favor of the procedural and substantive validity of an act of the legislature. . . . Therefore, this Court interprets procedural limitations liberally and will uphold the constitutionality of a statute against such an attack unless the act *clearly* and *undoubtedly* violates the constitutional limitation.”) (Emphasis added).

Parktown’s attempt to seek relief under § 825(1) is not a violation of Audi’s due process rights. The Court in *New Motor Vehicle Board of California v. Orrin W. Fox*, 439 U.S. 96 (1978) specifically upheld a state’s authority to “to subordinate the franchise rights of automobile manufacturers to the conflicting rights of their franchisees where necessary to prevent unfair or oppressive trade practices” and held that a state legislature could “delay [a manufacturer’s] exercise of the right to grant or undertake a . . . dealership and the right to move one’s business facilities from one location to another

without providing a prior individualized trial-type hearing.” 439 U.S. at 107-08. The Court concluded that a manufacturer’s rights instead “are protected in the only way that they can be in a complex society, by their power, immediate or remote, over those who make the rule.” *Id.*; *see also General Motors Corp. v. Motor Vehicle Review Board*, 862 N.E.2d 209 (Ill. 2007) (rejecting due process challenge to Illinois’ automobile franchise protection act).

There is nothing in *Fox* or its progeny (*see* Resp. Br. 33, n. 16) to suggest that a brief automatic stay under §§ 822 and 825(1) would be unconstitutional, while the identical stay under §§ 822 and 817 would survive constitutional scrutiny (as Audi reservedly concedes in its Brief at 33-34). Both stays are issued § 822 and last for a short period of time until a hearing on the merits is completed, and are thus of the same “temporary nature” that Audi concedes satisfied the United States Supreme Court in *Fox*.¹² And, in any event, as applied here Audi’s argument is especially hollow. By Audi’s own admission, Parktown sought relief only *three days* after Audi sent written notice, far less than the admittedly valid thirty days under § 817. Resp. Br. 6.

¹² Moreover, § 822 provides significant temporal limits, requiring that upon the filing of the action, the Commission “shall enter an order fixing a date, time and place for a hearing on the record,” § 822.1, and that the Commission “shall issue a final decision or order in proceedings arising pursuant to the provisions of section 407.810 to 407.835, ***within ninety days*** from the conclusion of the hearing.” § 822.2 (emphasis added).

As to the “legislatively-determined relevant market area,” *Fox* involved an RMA statute. Again, § 825(1) is not an RMA statute, and in light of its conduct-based proscriptions (in contrast to § 817) it would make no sense to set geographic “mileage limits” for such things as capricious and bad faith behavior. Rather, the geographic limitation is found in the damage requirement of § 825(1), as discussed above.

Finally, as the Court in *Fox* held, the fact that the dealership decides when to seek the protection of the MVFPA does not amount to an unconstitutional delegation of state power and does not produce a due process violation. *Id.* at 108-09.

Audi also asserts that Parktown’s Complaint creates “statewide add-point protest rights” in violation of the dormant Commerce Clause of the United States Constitution, citing to *Yamaha Motor Corp. v. Jim’s Motorcycle, Inc.*, 401 F.3d 560 (4th Cir. 2005). In *Yamaha*, the Fourth Circuit struck down a Virginia statute that allowed motorcycle franchisees to challenge the establishment of a new same-line motorcycle dealership *anywhere in Virginia*.

Fortunately, the Court need not engage in a complex dormant Commerce Clause balancing test in order to address Audi’s contention. Audi’s argument suffers from a fundamental flaw, namely that § 825(1) in fact does not create “statewide add-point protest rights,” and Parktown has never made that suggestion. Rather, § 817 is the section that creates “protest rights” and it is limited to a relevant market area. Parktown has never suggested that Audi cannot establish a dealership outside Parktown’s § 817 relevant market area. But if, in connection with establishing this new dealership, Audi

engages in “capricious, bad faith, or unconscionable” conduct that damages Parktown, then Parktown has a statutory remedy under § 825(1).

Even if viewed in Audi’s asserted context of “add-point protest rights,” § 825(1) rights are certainly not “statewide.” The damage requirement of § 825(1) constrains its geographic sphere of enforcement and is effectively a legislatively-determined restriction on that geographic reach.

The Missouri General Assembly is presumed to have enacted the MVFPA in a manner that satisfies constitutional concerns, *Hammerschmidt*, 877 S.W.2d at 102, and the United States Supreme Court has specifically authorized such statutory restrictions on manufacturers. *Fox*, 439 U.S. at 107-08. If Audi does not like the General Assembly’s “rule” that it cannot engage in “capricious, bad faith and unconscionable” conduct that damages Parktown, then its remedy is to seek to have the General Assembly abrogate that “rule” which has been the law in Missouri for the last 28 years. *See id.*

CONCLUSION

The Commission’s interpretation of the MVFPA is erroneous and not authorized by law because it failed to properly apply the rules of statutory construction set forth by this Court. Because the plain language of the MVFPA provisions in question are unambiguous and not conflicting, the inquiry should have ended there. The Commission was without authority to “write in” an exemption in § 825(1). Instead, the Commission was required to interpret the statute according to its plain and ordinary meaning, in which § 825(1) and § 822 clearly provide an administrative hearing on Parktown’s Complaint. Even if the MVFPA were ambiguous (which it is not), or § 817 and § 825(1) addressed

the same subject matter and were in conflict (which they do not and 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 did not even attempt to harmonize the statutes, but instead eviscerated the protections of § 825 that were meant to benefit local franchisees. Section 817 was never intended to create *carte blanche* immunity for a manufacturer which engages in damaging capricious or bad faith conduct simply because its conduct involves a new dealer point located more than six miles from the injured franchisee. For the foregoing reasons, and those discussed in Parktown’s Opening Brief, 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 7,523 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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