No. _____

In The
Supreme Court of the United States

BYD MOTORS INC.,

Petitioner,

vs.

SODERHOLM SALES AND LEASING, INC.,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Memorandum disposition, where the majority of the split appellate panel affirmed the district court's appealed decision without having conducted a *de novo* review of the district court's interpretation of the Hawaii statute at issue, conflicts with *Salve Regina College v. Russell*, 499 U.S. 225, 111 S. Ct. 1217, 113 L. Ed. 2d 190 (1991).

CORPORATE DISCLOSURE STATEMENT

Petitioner BYD MOTORS INC., now known as BYD MOTORS LLC, is a wholly owned subsidiary of BYD Company Limited, which is a publicly held company.

RELATED CASES

* *Soderholm Sales And Leasing, Inc. v. BYD Motors Inc*., Civ. No. 19000160 LEK-KJM, United States District Court for the District of Hawaii, Findings of Fact And Conclusions Of Law entered September 22, 2021.

* *Soderholm Sales And Leasing, Inc. v. BYD Motors Inc*., Civ. No. 19000160 LEK-KJM, United States District Court for the District of Hawaii, Judgment entered September 22, 2021.

* *Soderholm Sales And Leasing, Inc. v. BYD Motors Inc*., No. 21-16778, United States Court of Appeals for the Ninth Circuit, Memorandum Disposition entered November 10, 2022.

* *Soderholm Sales And Leasing, Inc. v. BYD Motors Inc*., No. 21-16778, United States Court of Appeals for the Ninth Circuit, Order denying Petition for Panel Rehearing and Petition for Rehearing En Banc entered December 22, 2022.

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TABLE OF AUTHORITIES

OPINIONS BELOW

The unpublished Memorandum disposition of the court of appeals is reported at 2022 U.S. App. LEXIS 31228 and 2022 WL 16847543, and reprinted at Appendix ("App.") 1–8. Findings and Conclusions of the district court are reported at 2021 U.S. Dist. LEXIS 180738 and 2021 WL 4313608, and reprinted at App. 9–65.

JURISDICTION

The judgment of the court of appeals was entered on November 10, 2022. App. 1. The court of appeals filed its denial of Petitioner's request for rehearing and rehearing *en banc* on December 22, 2022. App. 66. The Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Section 437-58(g) of the Hawaii Revised Statutes ("HRS") provides that:

> (g) In addition to the other compensation set forth in this section, upon the termination, discontinuation, cancellation, or failure to renew the franchise agreement by a manufacturer or distributor without good cause and good faith; or as a result of the discontinuation of a line make, the manufacturer or distributor shall compensate the dealer at the

> fair market value for the dealer's capital investment, which shall include the going business value of the business, goodwill, property, and improvement owned or leased by the dealer for the purpose of the franchise as of the effective date of the termination or one day prior to the date of the notice, whichever is greater.

INTRODUCTION

The appeal below to the Court of Appeals for the Ninth Circuit involved solely the interpretation of Section 437-58(g) of the Hawaii Revised Statutes (HRS § 437-58(g)). In direct contravention of *Salve Regina College v. Russell*, 499 U.S. 225, 111 S. Ct. 1217, 113 L. Ed. 2d 190 (1991) ("*Salve Regina*"), the majority of the split appellate panel affirmed the judgment of the district court for the District of Hawaii without conducting a *de novo* review of the district court's interpretation of the Hawaii statutory issues presented, which was required by *Salve Regina*. Instead, the majority of the appellate panel deferred to the district court's interpretation of HRS § 437-58(g), notwithstanding that the district court's interpretation was contrary to the plain language of the statute. The Memorandum disposition reduces *Salve Regina* to a dead letter, and returns to the earlier practice of appellate rubberstamping of the state law determinations by district courts.

STATEMENT OF THE CASE

This matter involves claims by Respondent SODERHOLM SALES AND LEASING, INC. ("SSLI"), a motor vehicle distributor, against Petitioner BYD MOTORS INC. ("BYD"), a manufacturer, for statutory damages under the Hawaii Motor Vehicle Industry Licensing Act. None of the findings or conclusions of the district court regarding liability were contested. BYD's appeal raised only issues of statutory interpretation regarding the district court's award of statutory damages under HRS § 437-58(g), i.e., the district court's power, under the existing wording of the statute, to issue the award it issued.

Relevant findings and conclusions of the district court and undisputed evidence in the record can be summarized as follows. At the end of 2016, BYD, which manufactures electric buses, entered into a franchise agreement with SSLI, a licensed motor vehicle dealer, for sale of BYD's electric buses in Hawaii. Finding of Fact ("FF") 3, App. 13. At that time, SSLI had ongoing franchises for 17 unrelated gas and diesel bus manufacturers, and was realizing sales of $8 million and total income of $1.8 million. 2-ER-310, ¶5, 317–318, ¶20, 2-ER-168, lines 6.9 (Soderholm direct and trial testimony); Tr. Ex. 56, 2-ER-223 at 230–232.

During the life of the franchise, SSLI never managed to sell a single BYD bus. 2-ER-157 at p. 167, lines 14–25. It only sold one BYD SUV, essentially at cost, realizing $1,500 gross revenue, and it incurred unreimbursed costs in excess of $300,000. *Id*.

On August 22, 2018, BYD issued a notice of termination of the franchise, FF 16, App. 29–30, to which SSLI objected, FF 17 and FF 17.a-f, App. 30–31, and BYD rescinded the notice. FF 18, App. 31–32. However, after rescission, BYD did not respond to SSLI's inquiries about potential sales. FF 19 and FF 19.a-e, App. 32–33. The district court held that BYD's attempt to terminate and its subsequent failure to respond to SSLI's sales inquiries, were made in bad faith. Conclusion of Law ("CL") 17-24, App. 47–51. In turn, SSLI stopped attempting to exercise its right to buy BYD products for resale and thus terminated the franchise by February 28, 2019. CL 44.e(5), App. 62, CL 22 and fn. 8, App. 50. The district court found that BYD's bad faith conduct started on August 22, 2018 and ended on February 28, 2019. CL 17-24, App. 47–51.

The district court further found that BYD's attempt to terminate the franchise in 2018 was not legally effective and the franchise agreement remained in effect. FF 25, App. 35, CL 19-21, App. 49–50. On November 17, 2020, BYD issued another notice of termination to which SSLI did not object, and which the district court found became effective on January 20, 2021. FF 23, FF 24, App. 34–35. The district court found expressly:

> 24. Because the 9/20/18 Termination Letter was rescinded by BYD and Soderholm never terminated the Agreement, the Agreement remained in effect until January 20, 2021, the effective date of the 11/17/20 Termination Letter.

FF 24, App. 35.

The district court made no finding of bad faith as to the actual termination in 2021. FF 23, FF 24, App. 34–35.

SSLI failed to prove any actual damages arising from BYD's bad faith conduct. CL 44 and 44a, App. 57–58. Accordingly, the district court awarded only statutory damages under HRS § 437-58(g).

The district court awarded SSLI statutory damages of approximately $1.3 million under HRS § 437-58(g) for its capital investment in the franchise. CL 44.d(4), App. 60. The district court rejected the valuation of SSLI's franchise for BYD by SSLI's expert, Ueno, as speculative. CL 44.d(1), App. 59. Instead, the district court calculated this amount by taking SSLI's total income from its 17 other franchises in 2018 and 2019 and apportioning it to the seven months, from August 22, 2018 until February 28, 2019, during which the Court found BYD to have acted in bad faith. CL 44.d(2) and 44.d(4), App. 60.

The district court also awarded SSLI approximately $300,000 under HRS § 437-58(g) for the purchase price of 4 SUVs and a forklift which SSLI purchased from BYD and used in its business. CL 44.c, App. 58–59, referring to 2-ER-275 (Ueno) (showing "SSL Out Of Pocket Expenses Related to BYD"), CL 44.c(2), App. 59. It was undisputed, and the district court found, that SSLI purchased these items between January and August 2017 and used them in its business, FF 6.b, c, App. 17–18, FF 6.f, g, h, App. 19–20, as evidenced by trial testimony Trial Tr., 2-ER-172, line

11–180, line 6 (Soderholm); 2-ER-304, ¶71-72 (Scalzi direct). and SSLI having depreciated the SUVs on its tax returns. Tr. Ex. 58, 2-ER-234–240, 243–244; Trial Tr., 2-ER-157 at 176, lines 18–177, line 6, and 177, lines 13–21 (Soderholm).

BYD appealed the award of statutory damages on the basis that the HRS § 437-58(g) did not authorize the award made by the district court. HRS § 437-58(g) provides that:

> upon the termination, discontinuation, cancellation, or failure to renew the franchise agreement by a manufacturer or distributor without good cause and good faith . . . the manufacturer or distributor shall compensate the dealer at the fair market value for the dealer's capital investment, which shall include the going business value of the business, goodwill, property, and improvement owned or leased by the dealer for the purpose of the franchise as of the effective date of the termination or one day prior to the date of the notice, whichever is greater.

On its appeal, BYD argued, *inter alia*, that:

(1) HRS § 437-58(g) provides expressly that the manufacturer "shall compensate the dealer at the fair market value for the dealer's capital investment, which shall include the going business value of the business, goodwill, property, and improvement owned or leased by the dealer for the purpose of the franchise ***as of the effective date of the termination or one day prior to the date of the notice, whichever is***

greater." However, the district court never conducted valuation on either of the statutory dates, and never made any finding as to the date of valuation. BYD Opening Brief on Appeal at 32. Instead, the district court awarded SSLI its actual income from its unrelated other franchises during the period of BYD's bad faith, unrelated to any termination. *Id*. at 24, 27. This award plainly is not authorized by the statute. *Id*.

(2) HRS § 437-58(g) does not provide for an award of the purchase price of the dealer's equipment or inventory. Again, the statute allows only an award of fair market value on one of the two statutory valuation dates. *Id*. at 32. The district court's award of purchase price of the SUVs and forklift was contrary to the plain language of the statute. *Id*.

(3) HRS § 437-58(g) by its own express terms applies only upon "***the termination, discontinuation, cancellation, or failure to renew the franchise agreement by a manufacturer or distributor without good cause and good faith***." and the district court had expressly found and concluded that BYD's attempt to terminate the franchise in 2018 was not legally effective and the franchise remained in effect until it was terminated without objection in 2021. Therefore, a bad faith termination that was required to trigger statutory damages never happened by the express finding and conclusion of the district court. *Id*. at 7.

(4) HRS § 437-58(g) specifies compensation "***for the dealer's capital investment . . . for the purpose***

of the franchise," not dealer's other unrelated franchises. Nowhere does it authorize award of a value of a dealer's multiple successful franchise for termination of a losing, worthless franchise. *Id*. at 32.

As previously mentioned, the district court did not conduct the valuation on either of the statutory valuation dates "***as of the effective date of the termination or one day prior to the date of the notice***." Instead, the district court disregarded this plain language of the statute and fashioned its own remedy, not authorized by the statute.

In its Memorandum disposition, the majority of the split appellate panel held that:

1. The district court did not err in awarding damages under HRS § 437-58(g), because it reasonably concluded that BYD discontinued the franchise agreement when it ceased all communications with SSLI. App. 3.

2. HRS § 437-58(g) does not define "ongoing business value" and it was not illogical or implausible for the district court to calculate SSLI's ongoing business value based on its total income from all franchises. App. 5.

3. The district court did not err in awarding damages based on the acquisition costs of four BYD vehicles and a forklift under HRS § 437-58(g) because these vehicles and the forklift were purchased for the purpose of the franchise. App. 5.

The panel majority's Memorandum disposition did not explain how the majority determined that the district court reasonably concluded that BYD discontinued the franchise agreement, App. 3, when in fact the district court expressly found to the contrary. FF 24, App. 35.

The Memorandum disposition likewise did not address at all the main point of BYD's appeal, i.e., that HRS § 437-58(g) requires valuation of the franchise and the inventory for the purpose of statutory damages "***as of the effective date of the termination or one day prior to the date of the notice***," but the district court undisputedly never determined the valuation date and never conducted valuation as of either of the two statutory valuation dates.

BYD raised the failure of the panel majority to conduct a de novo review of the district court's determinations of state law and comply with *Salve Regina* in its Petition For Rehearing And Rehearing *En Banc*. App. 67–79, *passim*. The non-compliance with *Salve Regina* was BYD's only stated basis for reconsideration.

REASONS FOR GRANTING THE PETITION

The Memorandum disposition plainly violates the rule of *Salve Regina*. The panel majority disregarded, without any explanation, the same key statutory language that the district court had disregarded, namely that a valuation for the purpose of statutory damages

must be done "***as of the effective date of the termination or one day prior to the date of the notice***." Disregarding the same key language of HRS § 437-58(g) raised by BYD on its appeal that the district court had disregarded below was not a "*de novo* review" as required by *Salve Regina*.

> In Hawaii, it is the:
>
> > cardinal rule of statutory construction that a statute ought upon the whole be so constructed that, if it can be prevented, no clause, sentence or word shall be superfluous, void, or insignificant.

Wright v. Home Depot U.S.A., 111 Haw. 401, 410, 142 P.3d 265, 274 (Haw. 2006) ("*Wright*") citing *In re City & County of Honolulu Corp. Counsel*, 54 Haw. 356, 373, 507 P.2d 169, 178, 54 Haw. 412 (1973).

Salve Regina required the majority of the Panel to at least: (1) review HRS § 437-58(g) in its entirety; and (2) explain how the district court's failure to conduct the valuation on the "***effective date of termination***," or "***one day prior to the date of notice***," did not render the express statutory requirement of valuation on either of these dates "***superfluous, void, or insignificant***." The majority plainly did neither.

There can be no meaningful discussion, let alone a "*de novo* review" of the district court's ruling awarding damages under HRS § 437-58(g), without addressing this statutory language. The majority asserted that:

> Consistent with its determination that Soderholm was only entitled to damages for the period of the bad faith discontinuation, the district court divided the total yearly income for each year into average daily income and multiplied that by the number of bad faith days in each year to calculate the damages.

App. 4.

This assertion merely recites what the district court had done, without beginning to explain how it squares with the statutory requirement of valuation either on the "***effective date of termination***," or "***one day prior to the date of notice***."

Moreover, the majority's assertion that:

> the district court reasonably concluded that BYD discontinued the franchise agreement when it ceased all communications with Soderholm.

App. 2, failed to explain how this "reasonable conclusion," which was never made by the district court, can be reconciled with district court's express finding that BYD's attempt to terminate the franchise in 2018 was not legally effective and the franchise agreement remained in effect:

> 24. Because the 9/20/18 Termination Letter was rescinded by BYD and Soderholm never terminated the Agreement, the Agreement remained in effect until January 20, 2021, the effective date of the 11/17/20 Termination Letter.

FF 24, App. 35.

Not only did the majority turn the district court's finding of fact on its head, but under the plain language of HRS § 437-58(g), without an effective termination in bad faith, there can be no "***effective date of termination***," and with a rescinded and legally void notice of termination, there is no "***one day prior to the date of notice***" either. No matter how the panel majority chose to interpret FF 24, it was still required by *Salve Regina* to explain how ignoring the existing valuation date language of the HRS § 437-58(g) did not make this language "***superfluous, void, or insignificant***."

As to the district court's award of statutory damages for the ongoing value of the terminated franchise based on SSLI's actual income from its seventeen other unrelated franchises, neither the district court not the majority of the appellate panel ever explained how this award is authorized by HRS § 437-58(g). The statute authorizes the award of "going business value of the business, goodwill, property, and improvement owned or leased by the dealer for the purpose of ***the*** franchise" (emphasis added). At the very least, *Salve Regina* required the appellate panel to explain how this language can be interpreted to mean the entire business income of the dealer, including that of all of its unrelated franchises. To merely state that such an award was not illogical or implausible, without reference to the actual statutory language, as the panel majority did, was not a *de novo* review.

The dissenting judge noted that while the majority attempted to recast its ruling as affirming the

district court's finding of fact, the district court had rejected the factual valuation by SSLI's expert, and instead ruled solely as a matter of Hawaii law. App. 7–8. The panel majority refused to review this ruling of law.

Moreover, the panel majority's comment that the term "ongoing business value" is not defined in the statute, App. 5, is beside the point. The issue here was ***which*** franchise was required to be valuated under HRS § 437-58(g), not ***how*** this value was to be determined.

Finally, it is undisputed that SSLI chose never to present any evidence of the fair market value of the SUVs and the forklift on any date. Accordingly, as the dissenting judge noted, there was no statutory basis for award of damages under HRS § 437-58(g). App. 8. The panel majority failed to explain, as required by *Salve Regina*, how disregarding the plain language of HRS § 437-58(g) authorizing an award of ***fair market value*** on one of the two valuation dates did not make this statutory language "***superfluous, void, or insignificant***."

The panel majority's rubber-stamping of the district court's ruling awarding statutory damages under HRS § 437-58(g), while studiously avoiding interpreting the actual language of the statute, came no closer to complying with *Salve Regina* than the language from a court of appeals quoted in *Salve Regina* to the effect that "The district court's interpretation of the applicable [state] law is certainly not deficient in analysis

and is reasonable." *Id*. at 236, 111 S. Ct. 1224, 113 L. Ed. 2d at 201. Vague generalities provided by the majority of the appellate panel, unsupported by the record and contrary to the district court's own findings and conclusions, and unrelated to the actual language of HRS § 437-58(g), do not constitute conclusions following from a *de novo* review. *Id*.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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