APPENDIX

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APPENDIX 1

No. 21-16778

IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SODERHOLM SALES AND LEASING, INC.,
Plaintiff-Counter-Defendant-Appellee

v.

BYD MOTORS INC.,
Defendant-Counter-Claimant-Appellant.

On Appeal from the United States District Court
For Hawaii, Honolulu
D.C. No. 1:19-cv-00160-LEK-KJM

DEFENDANT-APPELLANT'S OPENING BRIEF

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(***Tables omitted in this appendix***)

DEFENDANT – APPELLANT'S OPENING BRIEF

I. INTRODUCTION

This appeal involves interpretation of the Hawaii Motor Vehicle Industry Licensing Act ("HMVILA"), Chapter 437 of the Hawaii Revised Statutes ("HRS"), and specifically HRS §437-58(g), which sets forth statutory damages recoverable by a dealer in the case of bad faith termination of its franchise.

Defendant - Appellant BYD MOTORS INC. nka BYD MOTORS LLC ("BYD") is a California-based manufacturer of rechargeable electric batteries and electric vehicles. Plaintiff - Appellee Soderholm Sales & Leasing Inc. ("SSLI") is a multi-line motor vehicle dealer in Hawaii. From 2016 to 2019, SSLI sold gas- and diesel-powered vehicles manufactured by seventeen different manufacturers-franchisors, realizing sales in the range between $8 million and $14 million, and total annual income in the range between $1.8 million and $2.4 million.

BYD and SSLI entered into a Sales and Service Agreement (the "SSA") effective December 1, 2016, for the purpose of sales of BYD's electrical buses and electrical vehicles in Hawaii. SSLI managed to sell only one BYD e6 SUV in 2017, for a mark-up of $1,500.00, and made no sales of BYD products in 2018 or 2019.

At the same time, SSLI incurred $300,220.18 in unreimbursed out of pocket costs associated with its franchise for BYD. These costs included four e6 SUVS and an electric forklift which SSLI purchased from BYD for a total of $235,125.00. SSLI did not resell these SUVs and the forklift. Instead, SSLI used them in its business and deducted depreciation of the SUVs in its federal tax returns.

On August 22, 2018, SSLI inquired about BYD's current pricing, but BYD failed to respond. On September 20, 2018, BYD sent SSLI a notice terminating the SSA on October 20, 2019. SSLI objected to the notice, stating that it failed to comply with statutory requirements. BYD rescinded its notice, stated that a new notice would be issued in the near future, and failed to respond to SSLI's further communications. On February 28, 2019, SSLI stopped attempting to exercise its rights under the SSA. On November 17, 2020, BYD issued a new notice terminating the SSA effective January 20, 2021. SSLI did not contest this termination, and the District Court did not find it to have been in bad faith.

The District Court concluded that BYD's first attempt to terminate the SSA on a less than the statutory 60-day notice was ineffective, and its failure to communicate with SSLI for 191 days from August 22, 2018 to February 28, 2019 constituted bad faith under the HMVILA. The District Court found that BYD's bad faith conduct did not cause any actual damages to SSLI. However, it awarded SSLI statutory damages under HRS §437-58(g), consisting of $1,259,065.00 for the going business value of SSLI's

dealership apportioned to the 191-day period of BYD's HMVILA violation, and $300,220.18 for SSLI's unreimbursed out-of-pocket costs incurred to enable SSLI to sell BYD products, plus prejudgment interest.

On this appeal, BYD contests only the award of statutory damages, and submits the District Court misinterpreted HRS §437-58(g), which 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.

This language creates and authorizes statutory damages only for an actual bad faith termination, not for an ineffective attempt at termination. As the actual termination was not found to be in bad faith, no statutory damages were authorized.

Assuming *arguendo* that statutory damages apply here, the District Court misinterpreted HRS §437-58(g) by calculating its award of damages for the going business value. The District Court apportioned the total annual income of SSLI's multi-line dealership for 2018 and 2019 to 191 days that BYD was in statutory

violation, notwithstanding that the entire income stream supporting this value was based on sales of gas- and diesel-powered vehicles for SSLI's other franchisors.

Under proper interpretation of HRS §437-58(g), only the income and going business value of the relevant franchise, i.e., SSLI's franchise for BYD, should have been considered, not the income and going business value of SSLI's other seventeen franchises. It is undisputed that SSLI's franchise for BYD made a profit of $1,500.00 on one single sale, while at the same time incurring $300,220.18 in unreimbursed costs. Therefore, its going business value was zero.

The District Court also misinterpreted HRS §437-58(g) by awarding SSLI the purchase price of the four SUVs and the forklift that SSLI had paid BYD. The District Court never determined the relevant statutory valuation dates and whether they should be based on the attempted or actual termination or a combination thereof, and SSLI presented no proof of the fair market value of the four BYD SUVs and the forklift as of any date. The District Court instead postulated, without any factual findings, that the purchase price SSLI paid for the four SUVs and the forklift was their fair market value within the meaning of HRS §437-58(g).

The award of the purchase price is contrary to the plain language of HRS §437-58(g), and disregards the undisputed evidence that SSLI had used and depreciated the four SUVs and the forklift. As the District Court failed to determine the valuation dates and SSLI failed to present any evidence of the fair

market value of the four SUVs and the forklift as of any date, the District Court's award of damages for these costs cannot stand. The amount of the remaining unreimbursed costs in the amount of $65,095.00 was undisputed.

Accordingly, the District Court's award of statutory damages was contrary to HRS §437-58(g), and should be reversed together with prejudgment interest, with instructions that SSLI take nothing for statutory damages.

II. STATEMENT OF JURISDICTION

1. The District Court had diversity jurisdiction over this action under 28 U.S.C. §1332(a)(1) because SSLI is a citizen of Hawaii, being a corporation incorporated and existing under the laws of the State of Hawaii, with its principal place of business in the State of Hawaii, BYD is a citizen of the States of Delaware and California, being a limited liability company organized and existing under the laws of the State of Delaware, with its principal place of business in the State of California, whose sole member a corporation incorporated and existing under the laws of the State of Delaware, with its principal place of business in California, and the amount in controversy exceeds $75,000.00, exclusive of interest and costs. 3- ER-407 (Notice of Removal), ¶¶ 5-8.

2. This Court has appellate jurisdiction under 28 U.S.C. §1291 from the final judgment (the "Judgment") of the District Court, 1-ER-2, filed on September 22, 2021.

3. The Judgment resolved all of SSLI's claims and BYD's counterclaims. *See* Findings of Fact and Conclusion of Law filed on September 22, 2021 ("FF&CL"), 1-ER-4, at 60. The only issue not resolved by the Judgment is the amount of attorneys' fees recoverable by SSLI. *Id.* at ¶48, 1-ER-59-60.

4. The Judgment was filed on September 22, 2021, 1-ER-2, and BYD filed its Notice of Appeal on October 21, 2021, 3-ER-373. The filing occurred 29 days from the entry of the Judgment and was therefore timely under Rule 4(a)(1)(A) of the Rules of Appellate Procedure.

III. STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

A. Issues Presented For Review

1. Whether the District Court erred as matter of Hawaii law by interpreting the words "upon the termination, discontinuation, cancellation, or failure to renew the franchise agreement by a manufacturer or distributor without good cause and good faith" in HRS §437-58(g) as including an attempted but ineffective termination, and awarding damages for such ineffective termination, where the District Court found that SSLI incurred no actual damages as a result of the attempted termination, and actual termination occurred long after SSLI ceased trying to exercise its rights under the SSA, was not objected to by SSLI, and the District Court did not find it to be in bad faith.

2. Whether the District Court erred as matter of Hawaii law by interpreting the words "the fair market value for the dealer's capital investment, which shall

include the going business value of the business … for the purpose of the franchise" in HRS §437-58(g) to mean the going business value of SSLI's entire multi-line dealership which included franchises for numerous unrelated franchisors, as opposed to the going business value of SSLI's franchise for BYD, the only franchisor liable to SSLI for damages under HRS §437-58(g).

3. Whether, the District Court erred as matter of Hawaii law by awarding damages for going business value of SSLI's franchise for BYD under HRS §437-58(g), where the franchise generated only losses because its costs greatly exceeded its sales revenues.

4. Whether the District Court erred as a matter of Hawaii law by interpreting the words "fair market value for the dealer's capital investment, which shall include … 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" in HRS §437-58 to mean the full purchase price of four vehicles and a forklift, where it was undisputed these were used by SSLI and depreciated, the District Court failed to determine the valuation dates, and SSLI failed to offer proof of fair market value as of any date.

5. These issues were raised by BYD throughout the action. *See* BYD Trial Brief, 3-ER-375 at 392-393 (no damages or going business value), 403 (out-of-pocket costs); BYD Closing Argument, 2-ER-102 at 135-136 (no damages or going business value), 152 (out of pocket costs); BYD Rebuttal to SSLI Closing Argument, 2-ER-73 at 95-98 (out of pocket costs); BYD Response

to SSLI's Supplemental Brief on Damages, 2-ER-63 at 65, 69 (no damages or going business value), 70-72 (out of pocket costs).

B. Pertinent Statutes

The full text of HRS §437-58 is reproduced in the Addendum to this brief.

C. Standard of Review

1. Findings of fact made after a bench trial are reviewed for clear error, and conclusions of law are reviewed *de novo*. *Oswalt v. Resolute Indus., Inc.*, 642 F.3d 856, 859 (9th Cir. 2011) ("*Oswalt*") citing *Havens v. FIT Polar Mist*, 996 F.2d 215, 217 (9th Cir. 1993).

2. Questions of statutory interpretation are reviewed *de novo*. *Idaho v. Coeur D'Alene Tribe*, 794 F.3d 1039, 1042 (9th Cir. 2015) citing *Schleining v. Thomas*, 642 F.3d 1242, 1246 (9th Cir. 2011).

3. A District Court's determination of state law is reviewed *de novo*, and no form of appellate deference is acceptable. *Rabkin v. Or. Health Scis. Univ.*, 350 F.3d 967, 970 (9h Cir. 2003), citing *Salve Regina Coll. v. Russell*, 499 U.S. 225, 231, 238 (1991).

4. Legal conclusion that damages are available is reviewed *de novo* and factual findings underlying the damages award are reviewed for clear error. *Oswalt*, 642 F.3d at 859, citing *Bergen v. F/V St. Patrick*, 816 F.2d 1345, 1350 (9th Cir. 1987).

IV. A CONCISE STATEMENT OF THE CASE

1. This action was tried by the District Court without a jury on January 19, 2021. Trial Transcript ("Trial Tr.") 2-ER-157 at 159.

2. Direct testimony was presented by declarations of the parties' representatives, R. Erik Soderholm ("Soderholm"), the Vice-President of SSLI, on behalf of SSLI, 2-ER-308, and Justin Scalzi ("Scalzi"), BYD Senior Director of Business Development on behalf of BYD, 2-ER-285, reports of the parties' experts' Thomas T. Ueno ("Ueno") for SSLI, 2-ER-263, and Kimo Todd ("Todd") for BYD, 2-ER-253, and by designated deposition testimony of other witnesses, which does not require direct references for the purposes of this appeal.

3. At trial, Soderholm, Scalzi and Todd, who appeared in person, were cross-examined. Trial Tr. 2-ER-157 160-184 (Soderholm), pp. 185-206 (Scalzi), 208-215 (Todd). BYD waived cross-examination of Ueno. *Id.* at 207, lines 8-25, 215, lines 21-25. Joint trial exhibits ("Tr. Ex.") 1-74, were admitted into evidence. *Id.* at 161, line 16 – 162, line 2.

4. On September 22, 2021, the District Court filed its FF&CL, which included the following findings ("FF") and conclusions ("CL"), 1-ER-4, that are relevant here and are not contested by BYD:

(a) SSLI is a motor vehicle dealer in Hawaii licensed under the HMVILA in all counties in the State of Hawaii. FF 1.d, *Id.* at 6-7.

(b) BYD manufacturers rechargeable electric batteries and electric vehicles. FF 2, *Id.* at 7.

(c) SSLI and BYD entered into a Sales and Service Agreement ("SSA") effective December 1, 2016. FF 3, *Id.* at 8.

(d) Under the SSA, SSLI had a non-exclusive right to buy BYD products for resale, and was responsible to promote and sell BYD's vehicles in the territory allotted to it under the SSA, which included Hawaii and certain Pacific Islands. FF 3.c & d, *Id.* at 8, CL 22, *Id.* at 46.

(e) SSLI incurred various expenses related to its efforts to sell BYD vehicles. FF 6.b, 6.c, 6.d, 6.f, 6.h, 6.i, *Id.* at 12-15

(f) SSLI purchased one BYD electric forklift for $37,125.00 on January 31, 2017, and used it in demonstrations for potential customers. FF 6.b, *Id.* at 12.

(g) SSLI purchased one 2014 BYD e6 SUV from BYD for $49,500.00 on February 10, 2017, and Soderholm drove the vehicle to give BYD exposure in Hawaii. FF 6.c, *Id.* at 13.

(h) SSLI purchased four 2017 e6 SUVs from BYD for $49,500.00 each on August 21, 2017, of which it was only able to sell one to Kelvin Kohatsu of Hawaiian Electric some time before October 23, 2017. FF 6.f & 6.g, *Id.* at 14.

(i) Two of the SUVs are driven by SSLI managers. FF 6.f. *Id.*

(j) On August 22, 2018, SSLI requested current pricing information so it could purchase BYD's vehicles to sell, but BYD never responded to this inquiry. FF 13.a & b, *Id.* at 23-24.

(k) On September 20, 2018, BYD sent SSLI a letter notice stating BYD would terminate the SSA effective October 20, 2018. FF 16, *Id.* at 25.

(l) On October 2, 2018, SSLI wrote to BYD objecting to the notice of termination and arguing that it violated the HMVILA. FF 17 and FF 17.a-f *Id.* at 26-27.

(m) On October 18, 2018, BYD rescinded the notice of termination and advised SSLI that it would "reissue a new notice in the near future." FF 18 *Id.* at 27.

(n) After rescinding its Termination Letter, BYD failed to communicate with SSLI or respond to SSLI's communications. FF 19 and FF 19.a-e *Id.* at 27-29.

(o) BYD's attempt to terminate the SSA was not legally effective, and the SSA remained in effect. FF 25, *Id.* at 31, CL 19-21, *Id.* at 45-46.

(p) SSLI stopped attempting to exercise its right to buy BYD products for resale on February 28, 2019. CL 44.e(5), *Id.* at 58, CL 22 and fn. 8, *Id.* at 46.

(q) In the process of the 2019 Airport Division procurement, after the bids were opened on May 16, 2019, SSLI, which had submitted a bid on behalf of another manufacturer, argued to the Airport Division that BYD's direct bid, submitted without SSLI, was non-responsive, and was eventually awarded the bid FF 26 and FF 26.a-d, *Id.* at 31-.32.

(r) On November 17, 2020, BYD issued another notice of termination to SSLI, to which SSLI did not object, and which became effective on January 20, 2021. FF 23, FF 24, *Id.* at 30-31.

(s) BYD failed to act in good faith within the meaning of HRS §437-58 in relation to its attempt to terminate the SSA during the period from August 22, 2018 to February 28, 2019 by failing to provide the statutorily required 60-day notice of termination, and by failing to respond to SSLI's attempts to exercise its right under the SSA to purchase BYD's vehicles for resale. CL 17- 24, *Id.* at 43-47.

(t) SSLI is entitled to actual damages as to Count II of the First Amended Complaint related to BYD's unsuccessful attempt to terminate the SSA during the period from August 22, 2018 to February 28, 2019. CL 44, *Id.* at 53.

(u) SSLI failed to prove any actual damages incurred as a result of BYD's unsuccessful attempt to terminate the Agreement during the period from August 22, 2018 to February 28, 2019. CL 44.a, *Id.* at 53-54.

(v) The District Court rejected Ueno's valuation of SSLI's business as $8.3 million based on "the expected markups on future sales opportunities – known and yet to be developed" as speculative. CL 44.d(1), *Id.* at 55

(w) SSLI's Total Income for 2018 (as shown on line 6 of its federal tax return) for was $2,433,786.00. CL 44.d(2), *Id.* at 56, referring to Todd report, 2-ER- 253 at 258, which in turn referred to page SSL001212 of Ex. 8 to Soderholm deposition, Tr. Ex. 56, 2-ER-223 at 232.

(x) SSLI's Total Income for 2019 (as shown on "Gross Profit" line of its 2019 Income Statement) was $2,344,049.00. CL 44.d(3), 1-ER-4 at 56, referring to Tr. Ex. 57, 2-ER-233.

5. The District Court's FF&CL, 1-ER-4 include the following conclusions that are relevant here and are contested by BYD as being contrary to Hawaii law:

(a) SSLI is entitled to statutory damages under HRS §437-58(g) as to Count II of the First Amended Complaint related to BYD's unsuccessful attempt to terminate the SSA during the period from August 22, 2018 to February 28, 2019. CL 44, *Id.* at 53.

(b) The District Court concluded that the fair market value of the out of pocket cost component of SSLI's capital investment for the purpose of HRS §437-58(g) is $300,220.18, as shown in Ex. 2 to Ueno report 2-ER-263 at 275. CL 44.c, 1-ER-4 at 54.

(c) The District Court concluded that all amounts reflected in Ueno's Ex.2 reflect the fair market value of the investment SSLI made for purposes of the BYD franchise, and that no discounts for depreciation or otherwise are appropriate. CL 44.c(2) 1-ER-4 at 55

(d) The District Court concluded that SSLI's total income during 2018 and 2019 accurately measures the value of SSLI's business during the relevant period for the purposes of statutory damages under HRS §437-58(g). CL 44.d(2), *Id.* at 56

(e) The District Court determined statutory damages for the ongoing value of SSLI's business by dividing SSLI's total income for 2018 by 365 days to

derive daily income, and then multiplying this by 132 days that BYD was in statutory violation during 2018, and doing the same calculation for 2019, multiplying daily income by 59 days that BYD was in statutory violation during 2019, adding the two results, and arriving at $1,259,065.07. CL 44.d(4), *Id.* at 56

(f) The District Court calculated prejudgment interest on the amounts so determined. CL 44.e(4), (5) & (6), *Id.* at 58-59.

6. The undisputed evidence in the record, which was neither accepted nor rejected in the relevant part by the District Court in its FF&CL, but is relevant to the issue of statutory damages for the fair market value / ongoing value of SSLI's business, shows:

(a) SSLI is a multi-line motor vehicle dealership, representing seventeen manufacturers of motor vehicles in Hawaii and Pacific Islands. Soderholm direct testimony, 2-ER-308 at 310, ¶5.

(b) SSLI's sales for its other manufacturer-franchisors involved diesel and gas motor vehicles, not electric buses. *Id.* at 317-318, ¶20; Trial Tr., 2-ER-157 at 168, lines 6-9 (Soderholm) ("I do not sell heavy-duty electric buses to this day. I sell gas buses and diesel buses. That's what I sold before I represented BYD, that's what I sell now.")

(c) During the existence of the SSA, SSLI sold only one BYD SUV, for a profit of $1,500.00, and never sold a single BYD bus. Trial Tr. (Soderholm), 2-ER- 157 at p. 167, lines 14-25.

(d) SSLI's federal income tax returns for 2016-2018 and SSLI's income statement for 2019 show the following:

Year	Gross Receipts of sales	Total Income
2016	$8,590,363.00	$1,841,628.00
2017	$10,454,473.00	$2,009,886.00
2018	$14,019,898.00	$2,433,786.00
2019	$10,526,760.00	$2,344,049.00

Tr. Ex. 56, 2-ER-223 at 230-232, Tr. Ex. 57, 2-ER-233.

(e) Except for the gross income of $1,500.00 made on the sale of one BYD e6 SUV, SSLI made all of this income from sales of gas and diesel buses made by manufacturers unrelated to BYD. Trial Tr. (Soderholm) 2-ER-157 at 168. *See also* Soderholm direct testimony, 2-ER-308 at 317-318, ¶20, providing examples of the customers to which SSLI sold $4,300,000.00 worth of gas and diesel buses in 2018, and $5,080,000.00 worth of gas and diesel buses in 2019.

7. The undisputed evidence in the record which was neither accepted nor rejected in the relevant part by the District Court in its FF&CL, but is relevant to the issue of statutory damages for SSLI's out-ot-pocket costs, shows:

(a) SSLI incurred out-of-pocket costs in a total amount of $320,459.72 in promoting sales of BYD vehicles in Hawaii. Ueno Ex. 2, 2-ER-263 at 275.

(b) BYD reimbursed SSLI for $20,239.54 of SSLI's out-of-pocket costs, leaving the amount of $300,220.18 in unreimbursed out-of-pocket costs. *Id.*

(c) The unreimbursed out-of-pocket costs include costs of purchase of one BYD forklift for $37,125.00, one 2014 BYD e6 SUV for $49,500.00, and three 2017 BYD e6 SUVs for $148,500.00. *Id.* Basic arithmetic shows these costs amount to a total of $235,125.00. Basic arithmetic further shows that the difference between the total unreimbursed out-of-pocket costs of $300,220.28 and the cost of four SUVs and a forklift of $235,125.00, is $65,095.12.

(d) Upon purchasing the four BYD SUVs that SSLI did not sell, SSLI put them to use in its own business. Trial Tr., 2-ER-157 at 172, line 11 – 180, line 6 (Soderholm); Scalzi direct testimony, 2-ER-285 at 304, ¶71 ("Soderholm took the used e6 and immediately started using it as his personal vehicle"), ¶72 ("One of the vehicles was promptly damaged while being used in the ordinary course of SSLI's business. SSLI immediately gave the remaining e6s to the members of its staff, Bob the salesman and Nick the technician, for their work-related use.")

(e) SSLI's 2017 federal tax return depreciation schedules, show that one "BYD e6" was acquired on [illegible]/01/2017 and placed in service on 04/11/2017, "BYD e6 Bob" and "BYD e6 Nick" were acquired on 08/23/2017 and placed in service respectively on

09/06/2017 and 09/13/2017. Tr. Ex. 58, 2-ER-234 at 234- 240.

(f) SSLI's 2018 federal tax return depreciation schedules, in addition to the "BYD e6", "BYD e6 Bob" and "BYD e6 Nick" also show "BYD demo e6 CIN 1016488", which was acquired on 09/20/2018 and placed in service on the same date, 09/20/2018. *Id.* at 243-244.

(g) Soderholm admitted at trial that SSLI depreciated all four SUVs. Trial Tr., 2-ER-157 at 176, line 18 – 177, line 6, and 177, lines 13-21.

8. The District Court did not determine the valuation dates under HRS §437-58(g), i.e., "the effective date of the termination or one day prior to the date of the notice."

9. SSLI never presented any evidence of the fair market value of the four BYD e6 SUVs and the BYD forklift as of any date. The only evidence presented was that of the purchase price SSLI paid to BYD, which is undisputed.

10. The following evidence was also presented and Findings of Fact, 1-ER- 4, made by the District Court on the issue of whether BYD's products were competitive / marketable in Hawaii:

(a) One of the potential customers, Maki Kuroda of E'Noa, testified that the price of BYD's buses was too high. FF 12.g *Id.* at 22.

(b) The parties indeed had agreed that the prices were too high, and disagreed only as to the reason why

the price was too high. BYD claimed that SSLI was adding exorbitant margins, FF 8, FF 29.c *Id.* at 16-17, 35. SSLI claimed that BYD's products were not competitive to begin with. First Amended Complaint, Tr. Ex. 61, 2-TR-330 at 334, ¶12 "the BYD e6 SUV is not competitive in the U.S. market where similar range electric cars, such as the Chevy Bolt, sell for $35,000.00");336 ¶14 ("price was not TPT's only concern. In essence, BYD was not competitive.").

(c) The District Court found there was no evidence the potential customers would have purchased BYD products even at a lower price. FF 8, FF 29.d, 1-ER-4 at 17, 36.

11. The District Court did not find the actual termination of the SSA, effective January 20, 2021, to have been in bad faith.

V. SUMMARY OF ARGUMENT

1. The District Court erred as a matter of Hawaii law by awarding damages to SSLI for BYD's bad faith attempt to terminate the SSA which was rescinded and unsuccessful because: (a) HRS §437-58(g) provides statutory damages only for bad faith termination, not for an ineffective attempt at termination; (b) the District Court expressly found that SSLI incurred no actual damages as a result of BYD's unsuccessful attempt to terminate the SSA during the period from August 22, 2018 to February 28, 2019; and (c) the District Court did not find the actual termination, which occurred almost two years later, to be in bad faith.

2. The District Court erred as matter of Hawaii law in awarding damages to SSLI under HRS §437-58(g) in the amount of SSLI's total income for all of its franchises prorated for the period of violation, in a total amount of $1,259.065.07 plus prejudgment interest, when: (a) under the plain language of the statute, the only franchise relevant here was SSLI's franchise for BYD; (b) it is undisputed that for the entire duration of dealership, SSLI failed to sell BYD vehicles and earn any income from such sales except for one sale resulting in a profit of $1,500.00, while incurring unreimbursed costs in the amount of $300,220.28; (c) the District Court's Findings of Fact and undisputed evidence in the record show that the SSLI's franchise for BYD was worthless; and (d) the amount of statutory damages, under proper interpretation of the statute, is zero.

3. The District Court erred as a matter of Hawaii law by awarding SSLI out of pocket costs for bad faith termination of a motor vehicle dealership under HRS §437-58 in the amount of $235,125.00, which was the price that SSLI paid to BYD for four BYD e6 SUVs and a forklift, when: (a) it is undisputed these were not new but had been used and depreciated by SSLI, (b) HRS §437-58(g) allows recovery of the fair market value of property used for the purposes of the franchise as of the effective date of the termination or one day prior to the date of the notice, but (c) the District Court failed to determine the applicable valuation dates; and (d) at trial, SSLI failed to offer proof of fair market value as of any date.

VI. ARGUMENT

A. The District Court Erred By Awarding Statutory Damages For BYD's Rescinded And Ineffective Attempt At Termination

The District Court erred as a matter of Hawaii law in awarding SSLI statutory damages under HRS § 437-58(g) for BYD's bad faith conduct during the period from August 22, 2018 to February 28, 2019 which did not result in termination of SSLI's franchise for BYD. As discussed below, such an award is not authorized by HRS § 437-58(g), and it is contradicted by the District Court's Findings of Fact. By its express terms, HRS § 437-58(g) provides damages only:

> upon the termination, discontinuation, cancellation, or failure to renew the franchise agreement by a manufacturer or distributor without good cause and good faith [.]

However, the District Court concluded that BYD's attempted termination in September 2018 which was rescinded in October 2018, was not effective under the HMVILA, because it failed to meet the statutory 60-day notice requirement under HRS §437-58(a). CL 19-21, 1-ER-4 at 45-46. HRS §437-58(a) provides in relevant part:

> (a) A manufacturer or distributor shall give written notice to the dealer and the board of the manufacturer's intent to terminate, discontinue, cancel, or fail to renew a franchise agreement at least sixty days before the effective date thereof, and state with specificity the grounds being

> relied upon for such discontinuation, cancellation, termination, or failure to renew[.]

(Certain exceptions to the 60-day requirement, which the District Court found were not applicable here, *see* CL 17, n. 7, *Id.* at 43, have been omitted.)

The District Court further unambiguously found that the franchise continued in effect until BYD issued its second notice of termination on November 17, 2020, which was uncontested and terminated the franchise effective January 20, 2021. FF 23, FF 24. *Id.* at 30-31.

Therefore, BYD's bad faith conduct between August 22, 2018 to February 28, 2019 could not provide a basis for statutory damages under HRS § 437-58(g) because there was no termination of the franchise. By the District Court's express findings and conclusions, the franchise was not terminated. FF 25, CL 19-21. *Id.* at 31, 45-46.

Moreover, BYD's actual termination effective January 20, 2021 could not provide a basis for statutory damages under HRS § 437-58(g) because it did not involve any bad faith. BYD issued its notice of termination on November 17, 2020, more than twenty months after SSLI ceased attempting to exercise its rights under the SSA, and provided the required 60-day notice. FF 23, FF 24. *Id.* at 30-31. The District Court expressly found that SSLI did not contest the notice, and that it terminated the franchise. *Id.* SSLI did not claim, and the District Court did not find, that this termination involved any bad faith by BYD. *Id.*

Accordingly, it follows from the District Court's unambiguous Findings of Fact and Conclusions of Law

regarding the attempted but ineffective termination, and the eventual effective termination, that SSLI was not entitled to statutory damages under HRS § 437-58(g) for either.

This does not mean that SSLI had no remedy for BYD's bad faith conduct found by the District Court. SSLI was still entitled to recover its actual damages. However, the District Court concluded that:

> Although given the opportunity to identify evidence in the record establishing the actual damages that Soderholm incurred as a result of BYD's unsuccessful attempt to terminate the Agreement during the period from August 22, 2018 to February 28, 2019, [SSLI] failed to do so.

CL 44.a. Indeed, there is no such evidence in the record.

As the District found that SSLI did not incur any actual damages caused by BYD's bad faith conduct related to the ineffective attempt at termination, and HRS §437-58(g) does not provide statutory damages for an ineffective attempt at termination, the District Court's award of damages is contrary to Hawaii law and should be reversed in its entirety.

B. The District Court Erred By Awarding Damages Under HRS § 437- 58(g) For The Going Value Of SSLI's Entire Dealership For Franchisors Unrelated To BYD

1. The District Court's calculation of going value of SSLI's business

The District Court concluded that because "BYD violated MVILA only from the period from August 22, 2018 to February 28, 2019 … under [HRS] § 437-58(g), [SSLI] is only entitled to recover the going value of its business during that period." CL 44.d. *Id.* at 55. The District Court calculated SSLI's statutory damages under HRS §437- 58(g) for the ongoing value of SSLI's business by: (a) dividing SSLI's total income for 2018 of $2,433,786.00 by 365 days to derive daily income of $6,667.91, and then multiplying this by 132 days that BYD was in statutory violation during 2018 to arrive at $880,164.12; (b) dividing SSLI's total income for 2019 of $2,344,049.00 by 365 days to derive daily income of $6,422.05, and then multiplying this by 59 days that BYD was in statutory violation during 2019, to arrive at $378,900.95; and (c) adding the two results, arriving at $1,259,065.07. CL 44.d(4). *Id.* at 56.

As discussed below, assuming *arguendo* that HRS §437-58(g) treats an attempted but ineffective termination the same as an actual termination, damages for going business value under this section should have been based on the income or the going business value of SSLI's franchise for BYD, not SSLI's entire business for its seventeen other franchisors, but SSLI's franchise for BYD was worthless.

2. <u>The District Court should have considered only the income and value of SSLI's franchise for BYD in determining statutory damages</u>

HRS §437-58(g) allows a dealer, in the case of termination of the franchise agreement without good cause and good faith, to recover (emphasis added):

> 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.

The District Court's interpretation of HRS §437-58(g) disregards the express language of the statute which limit recovery of capital investment to that made "for the purpose of the franchise." The statute refers to the dealer's capital investment for the purpose of the specific franchise where the franchisor committed a bad faith HMVILA violation, not to the dealer's capital investment for the purpose of other franchises that the dealer may hold for other unrelated franchisors.

In this case it is undisputed that SSLI represents seventeen manufacturers of motor vehicles in Hawaii and Pacific Islands. Soderholm direct testimony, 2-ER-308 at 310, ¶5. The only relevant franchise here is SSLI's franchise for BYD, not the franchises for SSLI's seventeen other franchisors.

The District Court nevertheless stated that "the testimony of BYD's expert witness [Todd], which is based upon Soderholm's total income during specific years, accurately measures the value of Soderholm's business during the relevant period." CL. 44.d(2), 1-ER-4 at 56 This is true as far as it goes, but Todd neither said nor implied that this total income measures the value of SSLI's franchise for BYD.

It is undisputed that SSLI's total income for 2018 and 2019 was respectively $2,433,786.00, as shown in SSLI's 2018 federal income tax return, Tr. Ex. 56, 2-ER-223 at 232, and reflected in Todd's direct testimony, 2-ER-253 at 258, and $2,344,049.00, as shown on "Gross Profit" line of SSLI's 2019 Income Statement, Tr. Ex. 57, 2-ER-233.

However, Todd never suggested in his testimony that SSLI's total income for 2018 represented the fair market value or the going business value of SSLI's franchise for BYD in that year. To the contrary, Todd stated that:

> Soderholm sold only one BYD 6 SUV and commission was $1,500. This means practically all of Soderholm's revenue came from its other lines of business.

2-ER-253 at 258, fn.12.

Todd's testimony directly contradicts to the District Court's conclusion in CL 44(d)(2), 1-ER-4 at 56 that SSLI's total income from all of its franchises represented the value of its franchise for BYD, which purports to rely on Todd's testimony. Moreover, in his testimony, Todd was addressing Ueno's testimony that

SSLI lost $2 million per year in lost margins on hypothetical BYD sales and noted that:

> [I]n 2017 and 2018, when [SSLI] was supposedly spending a lot of time marketing BYD without making any sales, [SSLI's] gross receipts and total income substantially increased. This strongly indicates that Mr. Ueno's postulate of any lost margins in 2017 and 2018, let alone lost margins of $2,000,000+, is at odds with reality, and certainly does not meet the required reasonable certainty standards applicable to economic analysis.

2-ER-243 at 258 (Footnote 12, quoted above, omitted.) Indeed, the District Court rejected Ueno's testimony as speculative. CL 44.d(1), 1-ER-4 at 55.

The District Court's interpretation of §437-58(g) as allowing an award based on the going business value of the entire multi-line dealership does not make policy sense or common sense. The "damages" the District Court awarded to SSLI are the actual income that SSLI had made from sales for its other franchisors unrelated to BYD. In fact, as SSLI's tax returns show, during 2018-2019 SSLI was making seven-figure profits on these franchises while making no sales for BYD at all:

Year	Gross Receipts of sales	Total Income
2016	$8,590,363.00	$1,841,628.00
2017	$10,454,473.00	$2,009,886.00
2018	$14,019,898.00	$2,433,786.00
2019	$10,526,760.00	$2,344,049.00

Tr. Ex. No. 56, 2-ER-223 at 230 - 232, Tr. Ex. 57, 2-ER-233.

There is no legal basis for the Court's damage award ordering BYD to pay again to SSLI the same profits that SSLI had earned from sales for its seventeen other franchisors, and no legitimate policy is served by such an irrational award.[1]

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[1] This is not to say that, in the case of termination of one franchise in a multi-line dealership, the overall profit trend can never be considered. However, such inquiry applies only to estimation of unknown future income, not to apportionment of known past income, which is what the District Court was doing here. In a case where lost future income is at issue, the dealer must first show that the terminated franchise was profitable by itself. Once this has been proved, the court may consider, based on the profit trend in other lines, whether the profit in the terminated line would likely have increased or decreased along the same trend. *See, e.g., Martin Motor Sales, Inc. v. Saab-Scania of America, Inc.*, 425 F.Supp. 1047, 1058 (S.D.N.Y. 1978), aff'd 595 F.2d 1209 (2d Cir. 1979). Conversely, this inquiry is moot if the terminated line was not profitable to begin with. *Id*. at 1055-1058 (finding that the dealer had no gross profits from sales of new or used vehicles because its costs exceeded the sales revenues, and considering only

3. The income and going business value of SSLI's franchise for BYD was zero

The District Court never suggested, let alone found, that, but for BYD's bad faith attempt at termination, SSLI would have made any income from its franchise for BYD. To the contrary, the District Court found and concluded that SSLI failed to prove any actual damages caused by BYD's bad faith conduct between August 22, 2018 and February 28, 2019. CL44.a, 1-ER-4 at 53-54.

As to statutory damages under HRS §437-58(g), the District Court rejected Ueno's method of determining the going value of SSLI's business based on "the expected markups on future sales opportunities - known and yet to be developed" as speculative. CL. 44.d(1), *Id.* at 55. In this regard, it is undisputed that during its franchise for BYD, SSLI was only able to sell one e6 SUV at a negligible margin of $1,500.00 in 2017. FF 6.f, *Id.* at 14, Trial Tr. (Soderholm), 2-ER-157 at 167, lines 14-25.

One of the potential customers, Maki Kuroda of E'Noa, testified that the price of a BYD's bus was too high. FF 12.g. 1-ER-4 at 22. The parties indeed had agreed that the prices were too high, and disagreed only as to the reason why the price was too high. BYD claimed that SSLI was adding exorbitant margins, FF 8, FF 29.c, *Id.* at 16-17, 35. SSLI claimed that BYD's

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the proven profits from parts sales in further analysis). In this case SSLI's franchise for BYD was hopelessly unprofitable and therefore the overall profit trend of SSLI's entire dealership for all of its franchisors would have been irrelevant also for determination of the future lost income.

products were not competitive to begin with. Tr. Ex. 61, 2-ER-330 at 334, ¶12 "the BYD e6 SUV is not competitive in the U.S. market where similar range electric cars, such as the Chevy Bolt, sell for $35,000.00"); 336, ¶14 ("price was not TPT's only concern. In essence, BYD was not competitive."). The District Court found there was no evidence the potential customers would have purchased BYD products even at a lower price. FF 8, FF 29.d, 1-ER-4 at 16-17, 36.

These findings and conclusions by the District Court and the discussed evidence in the record do not leave room for any conclusion other than that the fair market value / going value of the SSLI's franchise for BYD, which made only one sale at a $1,500.00 markup while incurring $300,220.18 in unreimbursed costs, as shown in Ex. 2 to Ueno report (2-ER-263 at 275), was zero. *See, e.g., De Filippo v. Ford Motor Co.*, 516 F.2d 1313, 1323-24 (3d Cir. 1975) (a motor vehicle franchise that was generating losses because its costs exceeded sales revenues had a value of zero for the purpose of damages under the Dealers' Day in Court Act).

Therefore, the District Court erred as a matter of Hawaii law and misconstrued and misapplied §437-58(g) by basing its statutory damage award on the income / going business value of SSLI dealership for all of its franchisors, as opposed to only BYD. Upon proper interpretation of §437-58(g), and the District Court's findings of facts and undisputed evidence in the record, the fair market value / going value of SSLI's franchise for BYD was zero.

The judgment in favor of SSLI for fair market value / going value of its dealership for BYD should therefore be reversed with instructions that SSLI take nothing on account of such damages.

C. The District Court Erred By Awarding Damages Under HRS § 437-58(g) For The Purchase Price Of The Four BYD e6 SUVs And The Forklift

1. The District Court's determination of SSLI's recoverable costs

The District Court concluded that the fair market value of SSLI's capital investment (recoverable costs) for the purpose of HRS §437-58(g) is $300,220.18, as shown in Ex. 2 to Ueno report (2-ER-263 at 275). CL 44.c, 1-ER-4 at 54.

Of this amount, $235,125.00 reflects total price which SSLI paid to BYD to purchase one BYD electrical forklift for $37,125.00, one 2014 BYD e6 SUV for $49,500.00, and three 2017 BYD e6 SUVs for $148,500.00. *Id.* BYD does not contest the remaining amount of $65,095.12 that the District Court awarded for SSLI's unreimbursed out of pocket costs.

The District Court concluded that all amounts reflected in Ueno's Ex.2 reflect the fair market value of the investment SSLI made for purposes of the BYD franchise, and that no discounts for depreciation or otherwise are appropriate. CL 44.c(2). *Id.* at 55. This conclusion is contrary to the plain language of the statute, which does not allow recovery of purchase price under the undisputed facts present here.

2. <u>The relevant HMVILA provisions</u>

The HMVILA has two provisions allowing a dealer in the case of termination to recover its investment into vehicles and equipment. The first provision, HRS §437-58(f), allows a dealer in the case of any termination of the franchise agreement to recover, *inter alia*:

> all new, undamaged, and unsold vehicle inventory of the current model year and one model year prior acquired from the manufacturer or distributor or from another same line make dealer in the ordinary course of business prior to the effective date of termination or non-renewal; provided that the vehicle has less than five hundred miles registered on the odometer. The purchase price shall be the dealer's net acquisition cost.

Accordingly, SSLI could have recovered the purchase price of the four SUVs under §437-58(f) if they were ***new*** and ***with less than 500 miles on the odometer***. This however undisputedly was not the case. SSLI made no claim that the SUVs were new at the time of BYD's statutory violation, and it did not present any proof of mileage.

The second provision, HRS §437-58(g), which is the one the District Court invoked and purported to apply in its Conclusions of Law, allows a dealer, in the case of termination of the franchise agreement without good cause and good faith, to recover:

> 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.

As previously discussed in Section **VI.A** of this brief, this provision applies only in the case of an actual bad faith termination, which did not occur here. Assuming *arguendo* that HRS §437-58(g) applies, it plainly does not allow SSLI to recover the acquisition cost of the SUVs and the forklift SSLI purchased from BYD. It allows only recovery of the fair market value as of the greater of the two valuation dates specified in the statute. However, the District Court never determined the applicable valuation dates (i.e., whether these dates were to be based on the first, rescinded termination or the second, effective termination, or a combination thereof), and SSLI never presented any proof of fair market value of the SUVs or the forklift as of any date.

3. Purchase price of the four e6 SUVs and the forklift is not their fair market value after they had been used and depreciated

The District Court concluded, without any factual findings, that "the amounts reflected in Mr. Ueno's Exhibit 2 reflect the fair market value of the investment Soderholm made for purposes of the BYD franchise." CL 44(c)(2), 1-ER-4 at 55. The amounts reflected in Ueno's Exhibit 2 were purchase prices for the four SUVs and the forklift. 2-ER-263 at 275. The District Court's conclusion therefore comes down to

postulating that the purchase price of new vehicles reflects their fair market value after they had been used. This postulate is contrary to the plain language of the statute. It is also contrary to common knowledge that the price of used vehicles is generally substantially lower than their price when new.

The Hawaii Legislature expressly limited a terminated dealer's right to recover the purchase price of vehicles it acquired for the purpose of the franchise in HRS §437-58(f) to new vehicles with less than 500 miles on the odometer. If the Legislature intended to allow recovery of the purchase price in HRS §437-58(g) in cases involving bad faith upon less restrictive terms, it would have said so. Instead, HRS §437-58(g) does not mention purchase price at all, but instead allows only recovery of fair market value on the day before the day of the notice of termination, or on the effective date of termination. The language of the statute is clear and unambiguous.

The District Court's conclusion that the purchase price SSLI paid for the four SUVs and the forklift represents their fair market value for the purposes of HRS §437-58(g) is not based on any finding of fact. Instead, this conclusion is contradicted by the existing Findings of Fact and by the undisputed evidence in the record. The relevant Findings of Fact are:

FF 6.b, 1-ER-4 at 12, finding that SSLI purchased the forklift on January 31, 2017, and used it in demonstrations for potential customers.

FF 6.c, *Id.* at 13, finding that SSLI purchased one 2014 BYD e6 SUV on February 10, 2017, and

Soderholm drove the vehicle to give BYD exposure in Hawaii.

FF 6.f, *Id.* at 14, finding that SSLI purchased four 2017 e6 SUVs on August 21, 2017, of which it was only able to sell one, and two of these SUVs are driven by SSLI managers.

In sum, by the District Court's Findings of Fact, the four SUVs and the forklift were used for at least a year before August 22, 2018, when BYD's bad faith conduct commenced, CL 24, and before September 20, 2018, when BYD gave the first, later rescinded, notice of termination, FF16, 18, *Id.* at 25, 27. Again, it is common knowledge that used vehicles are worth less than new vehicles, and the District Court made no factual findings to the contrary.

That the value of the SUVs was depreciated by their use is evidenced by the fact that SSLI took a depreciation deduction for these SUVs in its federal tax returns. The returns show the following:

The Vehicle	Acquisition date	Placed in Use
"BYD e6"	illegible/01/ 2017	04/01/2017
"BYD e6 Bob"	08/23/2017	09/06/2017
"BYD e6 Nick"	08/23/2017	09/13/2017

"BYD demo e6 CIN 106488 09/20/2018 09/20/2018

Tr. Ex. 58, 2-ER-234 at 234-244

Soderholm admitted that SSLI took a depreciation deduction for these vehicles. Trial Tr., 2-ER-157 at 176 line 18 – 177, line 5, and 177, lines 13-21. The acquisition dates in the depreciation schedules differ somewhat from those the District Court determined in the FF 6.b, 6.c and 6.f, 1-ER-4 at 12-14, which the District Court accepted verbatim from Soderholm's direct testimony, 2-ER-308 at 318-320, ¶¶21, 22, 26, but Soderholm testified on cross-examination that he did not know of any reason why the SSLI's tax returns would have been incorrect or fraudulent. Trial Tr., 2-ER-157 at 177, lines 20-22, 179, lines 23-25.

The District Court did not find the depreciation schedules to be inaccurate or fraudulent as to the fact of depreciation. Rather, the District Court concluded that "The issue of whether Soderholm's recovery of $300,220.18 ultimately has tax consequence does not affect the award" of statutory damages." CL 44.(c)(20, 1-ER-4 at 55. That the tax consequences do not affect the award is correct, but entirely irrelevant to the relevance of depreciations schedules for the purposes of HRS §437- 58(g). Depreciation schedules in SSLI's tax returns are relevant to confirm that the SUVs were used and depreciated. This is to say that, by the HRS §437-58(g) valuation dates, notwithstanding whether these dates are measured by the first or the second termination, the fair market value of the SUVs and the

forklift was no longer what SSLI had paid for them when they were new.

Scalzi's testimony also stands undisputed on the record that, in addition to the two SUVs driven by SSLI's managers, Soderholm used one as his personal vehicle, and the fourth SUV was damaged shortly after it was purchased. Scalzi direct testimony, 2-ER-285 at 304, ¶¶ 71-72. Soderholm admitted on cross-examination that he was driving one SUV. Trial Tr. (Soderholm), 2-ER-157 at 177 line 23 – 178, line 6. SSLI offered no evidence of the condition of any of the four SUVs as of any date.

In sum, the District Court clearly erred, as a matter of Hawaii law, by holding that the purchase price SSLI had paid for the four SUVs and the forklift represented their fair market value at the §437-58(g) valuation dates a year or more after they had been put to use, without having determined the applicable statutory valuation dates, and without any factual findings or evidence of the condition and actual market value of these SUVs and the forklift as of any date. As a result, even assuming, *arguendo*, that HRS §437-58(g) applies in the case of an ineffective attempt at termination, the award of the contested out-of-pocket costs of $235,125.00 should be reversed, the judgment reduced to the undisputed amount of $65,095.12 in SSLI's recoverable costs, and the pre-judgment interest adjusted accordingly.

VII. CONCLUSION

The appealed Judgment should be reversed, with instruction that a judgment be entered whereby SSLI

takes nothing for statutory damages under HRS §437-58(g), or alternatively that SSLI takes only the undisputed amount of $65,095.12 in its recoverable costs, and the award of prejudgment interest should be reversed in its entirety, or alternatively, adjusted accordingly.

DATED: Honolulu, Hawaii, January 31, 2022.

/s/ Christian K. Adams
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(*** Certificates omitted in this appendix***)

ADDENDUM

ADDENDUM NO.	DESCRIPTION
1	Haw. Rev. Stat. § 437-58

ADDENDUM "1"

[§437-58] Cancellation or failure to renew franchise agreement. (a) A manufacturer or distributor shall give written notice to the dealer and the board of the manufacturer's intent to terminate, discontinue, cancel, or fail to renew a franchise agreement at least sixty days before the effective date thereof, and state with specificity the grounds being relied upon for such discontinuation, cancellation,

termination, or failure to renew; provided that the manufacturer or distributor may provide the notice fifteen days before the effective date of termination, discontinuation, cancellation, or nonrenewal in the following circumstances:

(1) The dealer has filed a voluntary petition in bankruptcy or has had an involuntary petition in bankruptcy filed against it which has not been discharged within thirty days after the filing, there has been a closeout or sale of a substantial part of the dealer's assets related to the business, or there has been a commencement of dissolution or liquidation of the dealer;

(2) The dealer has failed to operate in the normal course of business for seven consecutive days or has otherwise abandoned the business;

(3) The dealer has pleaded guilty to or has been convicted of a felony affecting the relationship between the dealer and the manufacturer or distributor;

(4) The dealer has engaged in conduct that is injurious or detrimental to the dealer's customers or to the public welfare;

(5) There has been a change, without the prior written approval of the manufacturer or distributor, in the location of the dealer's principal place of business under the dealership agreement; or

(6) Misrepresentation or fraud upon the manufacturer by the dealer.

(b) A dealer who receives notice of intent to terminate, discontinue, cancel, or fail to renew may, within the sixty-day notice period, file a petition in the manner prescribed in section 437-51 for a determination of whether such action is taken in good faith and supported by good cause. The manufacturer or distributor shall have the burden of proof that such action is taken in good faith and supported by good cause.

(c) If the manufacturer's or distributor's notice of intent to terminate, discontinue, cancel, or fail to renew is based upon the dealer's alleged failure to comply with sales or service performance obligations, the dealer shall first be provided with notice of the alleged sales or service deficiencies and afforded at least one hundred eighty days to correct any alleged failure before the manufacturer or distributor may send its notice of intent to terminate, discontinue, cancel, or fail to renew. Good cause shall not be deemed to exist if a dealer substantially complies with the manufacturer's or distributor's reasonable performance provisions within the one hundred eighty-day cure period, or if the failure to demonstrate substantial compliance was due to factors that were beyond the control of the dealer.

(d) Good cause shall not exist absent a breach of a material and substantial term of the franchise agreement. The existence of one or more circumstances enumerated in subsection (a)(1) through (6) above shall be presumed to be good cause, and the dealer shall

have the burden of proof to show that the action was not taken in good faith and supported by good cause.

(e) Except in the circumstances enumerated in subsection (a)(1) through (6) above, the franchise agreement shall remain in effect until a final judgment is entered after all appeals are exhausted, and during that time the dealer shall retain all rights and remedies pursuant to the franchise agreement, including the right to sell or transfer the franchise.

(f) Upon the termination, discontinuation, cancellation, or failure to renew the franchise agreement by the manufacturer or distributor, the manufacturer or distributor shall compensate the dealer for all new, unused, and undamaged parts listed in the current parts catalog and still in the original, resalable merchandising packages and in unbroken lots; provided that for sheet metal, a comparable substitute may be used. Prices shall be those in effect at the time the manufacturer or distributor receives the parts, less applicable allowances; the fair market value of all undamaged, unmodified special tools, equipment, and signage required by the manufacturer or distributor and acquired by the dealer within the three years prior to the termination; all new, undamaged, and unsold vehicle inventory of the current model year and one model year prior acquired from the manufacturer or distributor or from another same line make dealer in the ordinary course of business prior to the effective date of termination or nonrenewal; provided that the vehicle has less than five hundred miles registered on the odometer. The purchase price shall be the dealer's net acquisition cost.

The compensation shall be paid to the dealer no later than ninety days from the date of the franchise termination, discontinuation, cancellation, or failure to renew.

(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. The compensation shall be paid to the dealer no later than ninety days from the date of the franchise termination, discontinuation, cancellation, or failure to renew.

(h) As used in this section, "good faith" means the duty of each party to any franchise agreement to fully comply with that agreement, and to act in a fair and equitable manner towards each other. [L 2010, c 164, pt of §2]

APPENDIX 2

No. 21-16778

IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SODERHOLM SALES AND LEASING, INC.,
Plaintiff-Counter-Defendant-Appellee

v.

BYD MOTORS INC.,
Defendant-Counter-Claimant-Appellant.

On Appeal from the United States District Court
For Hawaii, Honolulu
D.C. No. 1:19-cv-00160-LEK-KJM

DEFENDANT-APPELLANT'S RESPONSE AND REPLY BRIEF

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(***Tables omitted in this appendix***)

DEFENDANT-APPELLANT'S RESPONSE AND REPLY BRIEF

Defendant-Appellant BYD MOTORS INC. nka BYD MOTORS LLC ("BYD") hereby submits its Response and Reply Brief. For the ease of reference, BYD will follow the order in which Plaintiff-Appellee SODERHOLM SALES AND LEASING, INC. ("SSLI") set forth its arguments in its Responding And Opening Cross-Appeal Brief.

I. PERTINENT STATUTES

HRS §437-28.5(b) provides:

> Notwithstanding the terms, provisions, or conditions of any dealer or distributor agreement, franchise, or waiver and notwithstanding any other legal or administrative remedies available, any person who is licensed under this chapter and whose business or property is injured by a violation of section 437-28(a)(21) or part II may bring a civil action in a court of competent jurisdiction in the State to enjoin further violations and to recover any damages together with the costs of the suit. Laws of the State of Hawaii shall apply to any action initiated under this subsection.

II. BYD'S REPLY TO SSLI'S RESPONSE

A. The District Court Erred In Awarding Statutory Damages Under HRS §437-58(g)

In its Opening Brief, BYD argues that HRS §437-58(g) authorizes an award of statutory damages only for an actual bad faith termination, not for an ineffective attempt at termination. The District Court specifically found that the attempted termination, for which it awarded statutory damages under HRS §437-58(g), was not effective, 1-ER-4 (Findings of Fact and Conclusions of Law, "FF&CC") at 31 (FF 25) and 45-46 (CL 19-21), while the actual termination was not in bad faith and was not contested by SSLI. *Id*. at 30-31 (FF 23, 24). Accordingly, BYD submits that the award of statutory damages under HRS §437-58(g) was contrary to the law.

In its Response, SSLI contends that statutory damages were properly awarded because HRS §437-58(g) provides such damages in the case of "***discontinuation***," which SSLI contends means any interruption of a dealer's ability to exercise its rights under the franchise. This contention has no support in the text of the statute.

HRS §437-58(g) provides for statutory damages (emphasis added):

> 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 word "discontinuation" is used twice in this section, first in the context of "the termination, ***discontinuation***, cancellation, or failure to renew the franchise agreement," and second in the context of "the ***discontinuation*** of a line make." Plainly the second reference is not the operative one here. SSLI never claimed, and the District Court never found, that any relevant BYD line make was discontinued. At issue here is the meaning of the first use of the word "discontinuation."

SSLI's contention takes the first "discontinuation" out of its context, which plainly refers to "the termination, discontinuation, or failure to renew ***the franchise agreement***" (emphasis added). This disregards and violates the rules of statutory construction required by Hawaii law. "Discontinuation" is not a defined term in the HMVILA. Assuming, *arguendo*, that the first "discontinuation" is ambiguous as to what is being discontinued,[1] HRS §1-15, in the relevant part, provides how such ambiguity is to be resolved:

> Where the words of a law are ambiguous:
>
> (1) The meaning of the ambiguous words may be sought by examining the context, with which the ambiguous words, phrases, and sentences may

[1] "[A] statute is ambiguous if it is capable of being understood by reasonably well-informed people in two or more different senses." *Fratinardo v. Employees' Ret. Sys.*, 129 Haw. 107, 113, 295 P.3d 977, 983 (Haw.App. 2013), citing *Estate of Roxas v. Marcos*, 121 Hawai'i 59, 68, 214 P.3d 598, 607 (Haw. 2009).

> be compared, in order to ascertain their true meaning.

The Supreme Court of Hawaii has interpreted this section to include the application of the canon of *noscitur a sociis*, which is "Freely translated as 'words of a feather flock together,' that is, the meaning of a word is to be judged by the company it keeps." *Kamalu v. ParEn, Inc.*, 110 Haw. 269, 278 n. 10, 132 P.3d 378, 387 n. 10 (2006), citing *Coon v. City & County of Honolulu*, 98 Hawai'i 233, 256, 47 P.3d 348, 371 (2002).

In this particular context, the word "discontinuation" appears together with "termination," "cancellation," and "failure to renew" "the franchise agreement." These words plainly refer to events that ***end*** the ***franchise agreement***, and not events that interfere with dealer's exercise of its rights under the agreement.

This is clear from the introductory subsection of HRS §437-58, subjection (a), which states in the relevant part (emphasis added):

> §437-58 Cancellation or failure to renew franchise agreement. (a) A manufacturer or distributor shall give written notice to the dealer and the board of the manufacturer's intent to ***terminate, discontinue, cancel, or fail to renew a franchise agreement*** at least sixty days before the effective date thereof, and state with specificity the grounds being relied upon for such discontinuation, cancellation, termination, or failure to renew; provided that the manufacturer or distributor may provide the

> notice fifteen days before the effective date of ***termination, discontinuation, cancellation, or non-renewal*** in the following circumstances:

These words, including "discontinuation," plainly refer to termination, discontinuation, cancellation of a franchise agreement, *i.e.*, events ending the franchise agreement, not to interruptions of performance of a continuing agreement. An interpretation of "discontinuance" in this context as an interruption of performance of a continuing franchise agreement would not make sense. The same is true in the case of subsection (f), which defines compensation that a dealer is entitled to in the case of any termination, etc., of the dealership agreement, *i.e.*, including good faith terminations. The subsection states in the relevant part (emphasis added):

> (f) Upon the ***termination, discontinuation, cancellation, or failure to renew the franchise agreement*** by the manufacturer or distributor, the manufacturer or distributor shall compensate the dealer … [.]

It stands to reason that when the same phrase is used in subsection (g), namely: "upon the termination, discontinuation, cancellation, or failure to renew the franchise agreement," the same meaning is intended. This indeed is another rule of statutory construction in Hawaii which SSLI's contention disregards:

> "[w]here the meaning of a word is unclear in one part of a statute but clear in another part, the clear meaning can be imparted to the unclear usage on the assumption that it means the same

> thing throughout the statute." *Kam v. Noh*, 70 Haw. 321, 325, 770 P.2d 414, 416 (1989). This means that, "[i]n the absence of an express intention to the contrary, words or phrases used in two or more sections of a statute are presumed to be used in the same sense throughout." *Id.* at 325-26, 770 P.2d at 417 (quoting *Gaspro, Ltd. v. Comm'n of Labor & Indus. Relations*, 46 Haw. 164, 172, 377 P.2d 932, 936 (1962)) (internal quotation marks omitted).

Castro v. Melchor, 142 Haw. 1, 27, 414 P.3d 53, 79 (Haw. 2018) (additional citations omitted). *See also* HRS §1-16 ("Laws in pari materia, or upon the same subject matter, shall be construed with reference to each other. What is clear in one statute may be called in aid to explain what is doubtful in another"). Indeed, when the word "discontinuation" was used in a different context in the second mention within HRS §437-58(g), it was expressly qualified to say "the discontinuation of a line make." This avoided confusion as to the use of the same word in two different contexts.[2]

Moreover, SSLI had never previously claimed a "discontinuation" meaning something different from

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[2] SSLI quotes Merriam Webster dictionary, which defines "discontinuation," in one branch, by reference to termination. SSLI's Brief at 24. This does not help SSLI's argument. Instead, it supports construing termination, discontinuation, cancellation and failure to renew the franchise agreement as having a mutually consistent meaning, referring to events that end the franchise agreement.

"termination" of the Agreement, and the District Court expressly based and limited its conclusion of BYD's liability to its conduct related to the attempted termination of the Agreement.

SSLI's First Amended Complaint, Count I, alleges "Cancellation of Agreement in Violation of HRS §431-1 et seq.", 2-ER-330 at 332, and ¶22 describes BYD' conduct as "the attempted termination" of the Franchise Agreement. *Id*. at 339-340. Likewise, in Count II, ¶26 refers to "BYD's attempt to terminate the Agreement," *Id*. at 340-341, and ¶28 seeks damages under HRS §437-58(g) for "failure to renew the franchise agreement." *Id*. at 341-342. Specifically, ¶28 states:

> 28. H.R.S. §437-58(g) provides that ***upon the failure to renew the franchise agreement without good cause or good faith*** the manufacturer shall compensate the dealer at the fair market value for the dealer's capital investment which shall include the going value of the business, goodwill, property, and improvement owned or leased by the dealer for the purpose of the franchise. H.R.S. §437- 28.5 provides that any licensee whose business or property is injured in violation of Part II of the Chapter…may bring a civil action to enjoin further violations and to recover any damages together with attorneys' fees and costs of suit.

Id. at 341-342 (emphasis added).

In its Findings and Conclusions, the District Court stated specifically that it "FINDS in favor of [SSLI] as

to its claim that BYD acted [sic] bad faith in connection with BYD's 2018 attempt to terminate their agreement[.]" 1-ER-4 at 5 (FF & CC preamble). The District Court expressly held that: "To the extent that [SSLI] argues BYD engaged in bad faith conduct unrelated to the attempted termination of the Agreement, [SSLI's] argument is rejected." *Id*. at 44-45 (CL 18).

SSLI cannot now retroactively redefine its claims and the District Court's Findings and Conclusions. The District Court tried SSLI's claim of BYD's bad faith attempt to terminate the Agreement, and found in favor of SSLI on this specific issue, while rejecting any other basis for BYD's liability. For the award of statutory damages under HRS §437-58(g) to stand, the statute would have to authorize such damages in a situation where a dealership agreement was not ended in bad faith. However, HRS §437-58(g) provides statutory damages only for bad faith conduct which ends the franchise agreement, which, undisputedly, was not the case here.

Importantly, statutory damages under HRS §437-58(g) are not a dealer's exclusive remedy for bad faith violations of its dealership agreement. As SSLI alleged in ¶28 of its First Amended Complaint, 2-ER-341-342, the HMVILA, HRS §437-28.5 "provides that any licensee whose business or property is injured in violation of Part II of the Chapter … may bring a civil action to … recover any damages together with attorneys' fees and costs of suit." Indeed, HRS §437-28.5(b) provides as follows (emphasis added):

> Notwithstanding the terms, provisions, or conditions of any dealer or distributor agreement, franchise, or waiver and notwithstanding any other legal or administrative remedies available, any person who is licensed under this chapter and whose business or property is injured by a violation of section 437-28(a)(21) or part II ***may bring a civil action in a court of competent jurisdiction in the State*** to enjoin further violations and ***to recover any damages together with the costs of the suit. Laws of the State of Hawaii shall apply*** to any action initiated under this subsection.

Reading HRS §437-58 together with §437-28.5(b), it is clear that HRS §437- 58 provides statutorily defined remedies to a dealer for termination of a franchise agreement, while HRS §437-28.5(b) provides common law damages under the laws of Hawaii for any breaches of HMVILA, including breaches which do not result in termination of a franchise agreement.

The District Court understood the statute the same way, and allowed SSLI to prove any and all of its ***actual*** damages caused by BYD's bad faith conduct determined by the District Court, all of which stopped short of actual termination of the Agreement, *i.e.*, BYD's attempted but ineffective bad faith termination, and BYD's failure, for several months, to respond to SSLI's inquiries. *See* FF 20, 1-ER- 4 at 29 ("[SSLI] asserts BYD's failure to communicate with Soderholm precluded it from purchasing and reselling BYD vehicles") and FF 25, *id*. at 31 ("By no later than

August 22, 2018 … BYD stopped providing [SSLI] with the information and resources necessary for [SSLI] to sell BYD products") and CL 44, *id*. at 53 ("[SSLI] is entitled to damages as to Count II, *i.e*., ***actual and statutory damages*** related to BYD's ***unsuccessful*** attempt to terminate the Agreement during the period from August 22, 2018 to February 28, 2019.") (Emphasis added).

As only SSLI's claims of alleged HMVILA violations were tried, HRS §437- 28.5 is the only basis for the District Court allowing SSLI to pursue its alleged damages for BYD's conduct that did not amount to termination of the Agreement. SSLI's claims for constructive fraud and constructive trust, Counts V and VII of the First Amended Complaint, were dismissed with prejudice. *See* CL 30, fn. 5, 1-ER-4 at 37. SSLI does not contest these dismissals on this appeal.

However, as the District Court expressly found, SSLI failed to prove any actual damages caused by BYD's conduct, including its failure to respond to SSLI's inquiries, which SSLI is now recharacterizing as "discontinuance" of BYD's support for SSLI's sales efforts.

> Although given the opportunity to identify evidence in the record establishing the actual damages that [SSLI] incurred as a result of BYD's unsuccessful attempt to terminate the Agreement during the period from August 22, 2018 to February 28, 2019, [SSLI] failed to do so. This Court therefore concludes that [SSLI] has

> not carried its burden of proof as to actual damages.

CL 44.a, 1-ER-4 at 53-54. SSLI does not contest the finding of no actual damages on this appeal.

In sum, HRS §437-58(g) provides for statutory damages in the case of bad faith conduct which actually ends the dealer's franchise agreement. It does not provide statutory damages for an interruption of a dealer's ability to exercise its rights under an ongoing franchise. This claim is covered by HRS §437-28.5, which does not provide statutory damages. SSLI failed to prove -- in fact, did not even try to prove, its actual damages at trial caused by BYD's failure to respond. The District Court unambiguously found that SSLI's Agreement with BYD was not ended by BYD's bad faith conduct. Accordingly, the award of statutory damages to SSLI under HRS §437-58(g) was in error and should be reversed.

B. The District Court Erred By Awarding Damages Under HRS § 437-58(g) For The Going Value Of SSLI's Entire Dealership For Franchisors Unrelated To BYD

In its Opening Brief, BYD argues that: (1) HRS §437-58(g) allows a dealer to recover as statutory damages its capital investment for the purpose of the franchise which was terminated in bad faith, not its investment into other, unrelated franchises; and (2) SSLI's franchise for BYD, which never sold a single bus and made only one sale resulting in $1,500.00 mark-up, Trial Tr. (Soderholm), 2-ER-157 at p. 167, lines 14-25, while incurring $300,220.18 in

unreimbursed costs, Ueno Ex. 2, 2-ER-263 at 275, had no value. The operative wording of HRS §437-58(g) relevant here is as follows:

> 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

The issue here is one of statutory interpretation, *i.e.*, whether HRS §437-58(g) allows an award of statutory damages based on the going value of a dealer's other franchises unrelated to the franchise that was terminated in bad faith. SSLI attempts to deflect this issue by arguing that the District Court's finding of statutory damages was based on the amount of SSLI's income established by the testimony of BYD's own expert, Mr. Todd, and is protected by the "clearly erroneous" standard. However, this is a circular argument.

The District Court relied on Mr. Todd's testimony that total income of SSLI's entire business, including the seventeen other franchises unrelated to BYD for 2018 and 2019 was respectively $2,433,786.00 and $2,344,049.00 as shown in SSLI's 2018 federal income tax return and 2019 Income Statement. CL 44.d(2), 1-ER-56. These facts are undisputed. Mr. Todd however made it clear that "practically all of [SSLI's] revenue came from its other lines of business," 2-ER-253 at 258,

fn.12. He never stated that this income represented the value of SSLI's franchise for BYD. The District Court's use of Mr. Todd's testimony to determine the value of SSLI's capital investment begs the question whether HRS §437-58(g) allows an award of statutory damages based on the income of the dealer's other franchises unrelated to the terminated franchise.

The statute plainly contemplates awarding the dealer the fair market value of its capital investment in the terminated franchise, not the dealer's capital investment in an unrelated, unaffected continuing franchise. SSLI fails to articulate any cogent reason why HRS §437-58(g) should be construed to authorize the award of its actually earned income from ongoing gas and diesel bus franchises as "damages" for BYD's wrongful termination of the entirely unrelated franchise for electric buses. Such construction does not have support in the text of the statute, logic or common sense.

The damages the statute addresses are those, if any, that a dealer incurred because of the wrongful termination of its franchise. Interpreting HRS §437-58(g) as allowing a dealer to receive again the income it had actually earned from its ongoing franchises as "damages" for a wrongful termination of another, unrelated franchise is manifestly absurd.

It is a rule of statutory construction in Hawaii that: "Every construction which leads to an absurdity shall be rejected." HRS §1-15. *See Sierra Club v. Hawai'i Tourism Auth.*, 100 Haw. 242, 269, 549 P.3d 877, 904 (Haw. 2002) ("Departure from a literal interpretation of a statute is therefore justified if it produces 'an

absurd and unjust result and the literal construction in the particular action is clearly inconsistent with the purposes and policies of the act'") quoting *Pacific Ins. Co. v. Oregon Auto. Ins. Co.*, 53 Haw. 208, 211, 490 P.2d 899, 901 (1989).

This means that even if HRS §437-58(g) could be read as literally saying that the statutory damages include "the going business value of the business," as meaning SSLI's entire business including all franchises unrelated to the terminated franchise, such literal reading would have to be rejected as absurd. Hawaii law does not favor windfalls, and construing a statute in a manner that creates a windfall would bring about an unconscionable and inequitable result. *Jou v. Dai-Tokyo Royal State Ins. Co.*, 116 Haw. 159, 167, 479 (Haw. 2007), citing *United States v. Allstate Ins. Co.*, 69 Haw. 290, 300, 740 P.2d 550, 556 (Haw. 1987) (additional citation omitted).

As noted in BYD's Opening Brief at p. 27, fn.1, the overall profit trend of a dealership may be considered under proper circumstances to determine likely future profits of one franchise in a multi-line dealership. However, here SSLI presented no evidence showing that sales of BYD's electric buses could ever have turned profit, let alone become as profitable as its sales of all other manufacturers' gas and diesel buses together. To the contrary, it is undisputed that SSLI never managed to sell a single BYD bus. Trial Tr. (Soderholm), 2-ER-157 at p. 167, lines 14-25. SSLI alleged and testified that BYD's products were not competitive, Tr. Ex. 61, ¶12 "the BYD e6 SUV is not competitive in the U.S. market where similar range

electric cars, such as the Chevy Bolt, sell for $35,000.00"); ¶14 ("price was not TPT's only concern. In essence, BYD was not competitive."), and the District Court found there was no evidence the potential customers would have purchased BYD products even at a lower price. FF 8, FF 29.d.

C. The District Court Erred As A Matter Of Law By Finding That SSLI's Franchise For BYD Had More Than Zero Value

SSLI failed to respond to case law under the federal Dealer's Day in Court Act, 15 U.S.C. §1221 *et seq*., cited by BYD in its Opening Brief to the effect that franchises and product lines that generate losses have no value, *i.e*., *De Filippo v. Ford Motor Co*., 516 F.2d 1313, 1323-24 (3d Cir. 1975) (a motor vehicle franchise that was generating losses because its costs exceeded sales revenues had a value of zero for the purpose of damages under the Dealers' Day in Court Act); *Martin Motor Sales, Inc. v. Saab-Scania of America, Inc.,* 425 F.Supp. 1047, 1055-58 (S.D.N.Y. 1978), aff'd 595 F.2d 1209 (2d Cir. 1979) (finding that the dealer had no gross profits from sales of new or used vehicles because its costs exceeded the sales revenues, and considering only the proven profits from parts sales in further analysis).

It is a matter of common sense and of federal law under the Dealer's Day in Court Act, which has similar intent and purpose as the HMVILA, that a franchise that generates losses has a fair market value of zero. No one will buy a business that consistently generates losses. This is particularly true if the business generates losses because it is not competitive with

other existing businesses. In sum, the District Court erred as a matter of law when it awarded statutory damage under HRS §437-58(g) for wrongful termination of SSLI's franchise for BYD which had no value.

D. The District Court Erred As A Matter Of Law By Awarding SSLI the Purchase Price Of The Four SUVs And The Forklift

In its Opening Brief, BYD argues that the District Court erred as a matter of law when it awarded SSLI full purchase price of four SUVs and a forklift because: (1) HRS §437-58(f) allows for such recovery only in the case of new vehicles with less than 500 miles on the odometer, which undisputedly was not the case here; and (2) HRS §437-58(g), which the District Court purported to apply, allows only recovery of the fair market value as of as of the effective date of the termination or one day prior to the date of the notice, whichever is greater, and SSLI failed to offer any proof of such market value.

SSLI responds to BYD's straightforward statutory analysis with blatant obfuscation. SSLI first argues that HRS §437-58(f) is not applicable to a bad faith termination. This is not true. By its express language, HRS §437-58(f) defines compensation to which a dealer is entitled "Upon the termination, discontinuation, cancellation, or failure to renew the franchise agreement by the manufacturer or distributor," *i.e.*, upon any termination, in good or bad faith.

Importantly, HRS §437-58(f) is the only HMVILA provision which allows for recovery of "the dealer's net acquisition cost" of inventory acquired by dealer for the purchase of the terminated franchise. However, it expressly limits such recovery to "new" vehicles that have "less than five hundred miles registered on the odometer." It is undisputed that this is not the case here.

In turn, HRS §437-58(g) by its own express language, provides ***additional*** compensation in cases of bad faith termination (emphasis added):

> "***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 …"

As HRS §437-58(f) is the only HMVILA provision which allows for recovery of "the dealer's net acquisition cost", BYD's reliance on this statutory provision is not misplaced. HRS §437-58(g), which provides for ***additional*** recovery in cases of bad faith termination, does not allow recovery of "the dealer's net acquisition cost." Instead, it allows recovery of fair market value as of one of the two statutory valuation dates. It is undisputed that SSLI never presented proof of fair market value of the SUVs and the forklift as of any date.

SSLI here entirely disregards the plain and unambiguous language of the statute, and instead waves two red herrings. SSLI first attempts to recast BYD's argument based on the statutory language as a "depreciation argument." This is disingenuous. BYD introduced SSLI's depreciation schedules to prove that the four SUVs were placed in service by SSLI and therefore were not "new" at the statutory valuation dates, and as a result, their fair market value, more likely than not, was less than SSLI's net acquisition cost. *See* Tr. Ex. 58, 2-ER-234 at 234-240 (one SUV was placed in service on April 11, 2017, two respectively on September 6 and 13, 2017), *Id*. at 243-244 (the fourth SUV was placed in service on September 20, 2018). In turn, this meant that HRS §437-58(f) did not apply and SSLI could not meet its burden of proof under HRS §437-58(g) without proving actual market value of the SUVs and the forklift on the statutory valuation dates.

BYD's expert, Mr. Todd, testified that the four SUVs and the forklift were depreciated through their use by SSLI in its business which was beneficial to SSLI, and that SSLI failed to account for the value of this beneficial use. 2 ER-253 at 259. ("The Ueno report is absent of any discussion as to how he has factored in the benefit [SSLI] has received by using the above items.") Mr. Todd was not arguing tax law but pointing out that the four SUVs and the forklift were used and not new and that SSLI could not recover its net acquisition cost of the SUVs and the forklift after they had been beneficially used by SSLI in its business.

SSLI's second red herring is the distinction between common law compensatory damages and damages

under the rescissory damages doctrine. SSLI cites case law dealing with shareholder challenges to corporate merger or acquisition stating that compensatory damages are determined at the time of the transaction, while rescissory damages are determined as of a point in time after the transaction. SSLI then argues that because compensatory damages are determined at the time of the transaction, the language of HRS §437-58(g) (emphasis added):

> ***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***

should be taken to mean the price paid when each item of property was purchased.

This argument is preposterous. SSLI has not claimed or proved any actual damages under common law.[3] SSLI has tried only its claim for statutory

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[3] Had SSLI made a common law claim for rescission of the Agreement, SSLI could not have recovered the acquisition price either. Instead, SSLI's damages would have been reduced by the value of its beneficial use of the SUVs and the forklift:

> Plaintiffs' acceptance of the benefits conferred from owning, renting and using their units after June 9, 2010 cannot be ignored and must be taken into account in the measure of Plaintiffs' damages.

Green v. Kanazawa, 2018 U.S. Dist. LEXIS 84514, 2018 WL

damages under HRS §437-58(g). The measure of SSLI damages on this claim is defined by the statute and determined by proper construction of the statute.

The language of the HMVILA: "***the fair market value … as of the effective date of the termination or one day prior to the date of the notice, whichever is greater***" is clear, unambiguous, and set forth in simple terms. In Hawaii, "Courts will presume that the words in a statute were used to express their meaning in common usage." *Gillan v. Gov't Emples. Ins. Co.*, 119 Haw. 109, 116, 194 P.3d 1071, 1078 (Haw. 2008) quoting *Bishop Trust Co. v. Burns*, 46 Haw. 375, 399, 381 P.2d 687, 701 (Haw. 1963); *see also* HRS §1-14 ("Words have usual meaning. The words of a law are generally to be understood in their most known and usual signification, without attending so much to the literal and strictly grammatical construction of the words as to their general or popular use or meaning.")

There is nothing in HRS §437-58(g) or anywhere else in the HMVILA that would suggest that "the fair market value … on the effective date of the termination or one day prior to the date of the notice" is supposed to mean the dealer's net acquisition cost. To the contrary, the statute means precisely what it says.

In sum, HRS §437-58(g) in plain English required SSLI to prove the fair market value of the SUVs and

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2306987, Civil No. 16-00054 LEK-KSC; Civil No. 16-00055 LEK-KSC (D.Haw. May 21, 2018), at *9 (dealing with damages available in rescission of a condominium purchase contract).

the forklift on either of the statutory valuation dates.[4] For reasons only known to SSLI, SSLI chose not to make such proof. This is all there is to it: ***SSLI declined and failed to make the proof required of it by the statute***. The District Court erred as a matter of law by awarding damages to SSLI contrary to the plain language of the controlling statute, and its award of damages for the four SUVs and the forklift should be reversed.

III. BYD'S RESPONSE TO SSLI'S CROSS-APPEAL

A. SSLI's Arguments That The District Court Misapplied HRS §437-58(g) Highlights The Error In The District Court's Award Of Statutory Damages

On its Cross-Appeal, SSLI argues that the District Court erred by limiting the period for which it calculated statutory damages under HRS §437-58(g) to February 28, 2019, and that the period should extend to the actual termination of the Agreement on January 20, 2021. As discussed in Section **I.A** of this Brief, BYD agrees that the District Court erred in its award of statutory damages under HRS §437-58(g), but for a different reason, namely that HRS §437-58(g) provides statutory damages only for an actual termination in

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[4] Under Hawaii law, fair market value of used vehicles can be determined by reference to their "year, make, model, condition, equipment, and mileage" and actual sales prices for such vehicles and/or Kelly Bluebook values. *See, e.g., United Truck Rental Equip. Leasing v. Kleenco Corp.*, 84 Haw. 86, 93-94, 929 P.2d 99, 106-107 (Haw.App. 1996).

bad faith, and not for an attempted but ineffective termination or any other bad faith conduct that does not effect termination.

Indeed, there is nothing in HRS §437-58(g) that authorizes an award of prorated total income of a dealership, including income from its franchises unrelated to the one in question, for the time during which bad faith conduct which does ***not*** effect termination persists. Instead, HRS §437-58(g) authorizes the award of fair market value of the franchise on one of the two statutory valuation dates, *i.e.*, the effective date of the termination or one day prior to the date of the notice, whichever is greater. This statutory formula plainly assumes and requires a bad faith termination of the franchise agreement to have occurred. As, undisputedly, no bad faith termination had occurred in this case, no damages could properly be awarded under HRS §437-58(g).

The District Court concluded that the attempted termination by itself is a moot issue because it was effectively rescinded. CL 12, 1-ER-4 at 42. SSLI does not contest this conclusion. The District Court further concluded that the Agreement remained in effect, notwithstanding the attempted, and rescinded, termination. CL 21, *id.* at 46. The District Court also found that BYD eventually terminated the Agreement effective January 20, 2021, and that SSLI did not challenge this termination. FF 23-24, *id.* at 30-31. The District Court made no finding that the effective termination involved any bad faith.

Accordingly, on these undisputed and unchallenged findings and conclusions by the District Court, HRS §437-58(g) had no application.

In contrast, as alleged in ¶28 of SSLI's First Amended Complaint (Joint Tr. Exh. 61), 2-ER-330 at 341-342, HRS §437-28.5 allows a dealer to recover "any damages" for HMVILA violations. SSLI was able to prove two statutory violations by BYD, *i.e.*, BYD's failure to provide the required 60-day notice of termination, CL 19-20, 1-ER-4 at 45, and BYD's failure to respond to SSLI's inquiries following the rescission of the notice of termination because of its continuing intent to terminate the Agreement, CL 21-22, *id.* at 46, and that these actions by BYD were made in bad faith, CL 23-24, *id.* at 46-47. However, SSLI failed to prove that it incurred any actual damages as a result of these violations:

> Although given the opportunity to identify evidence in the record establishing the actual damages that [SSLI] incurred as a result of BYD's unsuccessful attempt to terminate the Agreement during the period from August 22, 2018, to February 28, 2019, [SSLI] failed to do so. This Court therefore concludes that Soderholm has not carried its burden of proof as to actual damages.

CL 44.a., *id.* at 53-54.

SSLI's argument here is another attempt to obfuscate and finesse its failure of proof at trial as to its damages. CL 44.a., *id.* at 53-54, is a plain and unambiguous finding that SSLI failed to prove that it

had incurred any actual damages as a result of the attempted termination and BYD's subsequent failure to respond to SSLI's inquiries. SSLI has not contested this finding.

Because of its failure to prove actual damages under HRS §437-28.5, SSLI is trying to recast its claim for damages as one under HRS §437-58(g). However, this is precluded by the District Court's specific and unchallenged finding that

> Based on the parties' correspondence, it was clear that, even after the 10/18/18 Rescission Email, BYD wanted to terminate the Agreement, but there was a dispute between the parties about the details of the termination … ***The Agreement remained in effect,*** and Soderholm retained all of its rights thereunder until the dispute was resolved.

CL 21 (emphasis added), *id.* at 46.

In sum, BYD agrees that the District Court erred in its damage award under HRS §437-58(g), although for reasons different than those advanced by SSLI. The dispositive issue is that, under the proper construction, HRS §437-58(g) has no application to SSLI's claim because a bad faith termination did not occur. Instead, SSLI had a claim under HRS §437-28.5 for damages for bad faith conduct in the absence of an actual bad faith termination, ***but SSLI failed to prove that it incurred any damages*** caused by such conduct. This, again, is all there is to it, and the rest is SSLI's obfuscation.

B. SSLI's Remaining Arguments On Statutory Damages Are Moot And Contrary To The Evidence In The Record

In its Cross-Appeal, SSLI argues that the District Court erred in finding that SSLI ceased attempting to exercise its rights under the Agreement by February 28, 2019, and that District Court erred by shifting the burden of proof on damages to SSLI. In light of the foregoing discussion in Section **III.A** of this brief, these issues are moot. However, SSLI's arguments also manifestly lack merit.

1. The District Court's finding that SSLI ceased attempting to exercise its rights under the Agreement is amply supported by the record

SSLI's argument that the District Court clearly erred by finding that SSLI ceased trying to exercise its rights under the Agreement by February 28, 2019, when it filed the instant action, lacks merit.

The District Court's finding is amply supported by the record. The District Court relied on trial testimony of Erik Soderholm, SSLI's principal, to the effect that, by the time SSLI filed this action, SSLI had stopped trying to perform under the Agreement and went on with its core business of selling gas and diesel powered buses. CL 22, 1-ER-4 at 46, n.8 ("This Court has included the filing of this action as the last date when [SSLI] attempted to exercise its right to buy BYD products, based on Erik Soderholm's testimony.")

Mr. Soderholm's relevant testimony on cross-examination was as follows:

> Q Now, by 2019, you testified that you were no longer spending time marketing BYD, correct?
>
> A Yes.
>
> Q In fact, since that time period, September/October of 2018, you've been actively competing with BYD, correct?
>
> A That's not correct. I do not sell heavy-duty electric buses to this day. I sell gas buses and diesel buses. That's what I sold before I represented BYD, that's what I sell now. Those are not competitive buses to BYD.
>
> I have the right to survive as a company in Hawaii and that's what I am. I'm a local company surviving in Hawaii. And so in 2019 and 2020, I went back to my normal business and we've actually done very well despite COVID and despite everything else. We've done okay because I've concentrated on selling gas and diesel buses.

2-ER-168 (Trial Transcript), lines 1-15.

Before that, in ¶20 of his direct testimony, 2-ER-317-318, Mr. Soderholm listed some of the sales of gas and diesel buses during the same 2019-2020 period after the attempted termination, which by simple arithmetic add to more than $26 million, or specifically $26,051,000.00.

Moreover, the District Court found that on May 16, 2019, Hawaii Airports Division opened bids for Wiki Wiki buses. FF 26.a, 1-ER-4 at 31-32. In that procurement SSLI submitted a bid for diesel buses, and BYD submitted a bid for electric buses. *Id*. Mr. Soderholm argued to the Airports division that BYD's bid should be rejected because it was submitted without a dealer. FF 26.c, *id*. at 32. Eventually BYD's bid was disqualified and SSLI won the bid. FF 26.d, f, *id*. at 32- 33.

While the District Court found that SSLI was not competing with BYD in this instance "because [SSLI's] bid was for diesel buses [and] BYD's bid was for electric buses", FF 26.g, *id*. at 33, the undisputed fact remains that at point in time, starting with preparation of the bid, SSLI was not acting as BYD's dealer under the Agreement. Moreover, by asking the Airports Division that BYD's bid be disqualified, notwithstanding whether this request caused the disqualification or not, SSLI was not "actively and effectively promoting … the purchase and use of new BYD Vehicles" as required by the Agreement. FF 3(d), 1-ER-4 at 5-6.

Therefore, in light of Mr. Soderholm's testimony that he stopped marketing BYD products "by 2019," that in 2019 and 2020 SSLI focused on its core business of selling gas and diesel powered buses, and that by May 2019 SSLI was bidding for other manufacturers on the same projects where BYD was bidding, and was publicly taking positions adverse to BYD, the District Court did not clearly err in finding that SSLI ceased its attempts to exercise its rights under the Agreement by February 28, 2019. The District Court could reasonably

infer from Mr. Soderholm's testimony and SSLI's subsequent conduct that by early 2019 SSLI had made a business decision to stop wasting further time and effort on the money-losing BYD franchise and focus on its profitable core business of selling gas and diesel powered buses.

2. <u>SSLI'S argument that the District Court erroneously shifted the burden of proof on damages to SSLI has no merit</u>

SSLI's argument that the District Court erroneously shifted the burden of proof of damages to SSLI likewise has no merit. Under common law, "The burden of proving damages is always upon the plaintiff," *Santiago v. Tanaka*, 134 Haw. 179; 339 P.3d 533, 2014 Haw. App. LEXIS 541 at *25 (Haw.App. Nov. 28, 2014), quoting *Malani v. Clapp*, 56 Haw. 507, 517, 542 P.2d 1265, 1271 (Haw. 1975). Neither HRS §437-28.5 nor §437-58(g) provide otherwise.

As previously mentioned, HRS §437-58(g) is not applicable here because it is limited to an actual bad faith termination. However, assuming *arguendo* that HRS §437-58(g) did apply, it required SSLI to prove the fair market value of the terminated franchise on either of the statutory valuation dates. And as discussed in Section **II.C** of this Brief, the value of SSLI's franchise for BYD was zero, because it is undisputed that this franchise generated only losses and no profits. This is yet another attempt of SSLI to obfuscate and finesse its failure of proof of damages at trial.

C. The District Court Did Not Err In Rejecting Mr. Ueno's Valuation Of SSLI's Franchise For BYD

SSLI attempts to portray the District Court's rejection of its expert, Thomas Ueno's valuation of SSLI's franchise for BYD as an erroneous resolution of a credibility contest between two accounting experts. This argument is curious because it is black letter law that factfinder credibility assessments are afforded deference. *Anderson v. Bessemer City*, 470 U.S. 564, 573 (1985) ("*Anderson*"). "Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous." *United States v. Mercado-Moreno*, 869 F.3d 942, 959 (9th Cir. 2017) (quoting *Anderson*, 470 U.S. at 574).

In any event, this was not a "he said, she said" situation where a court or a jury must decide who is telling the truth in the absence of other evidence. Mr. Ueno's opinion had a glaring objective flaw in that it was based on SSLI's fanciful assumption that it would realize $2 million in annual markups for five years, which has no support in the record. In his direct testimony Ueno stated:

> The value of the dealership is the expected markups on future sales opportunities — known and yet to be developed. Management estimates it would earn markups of about $2 million a year. (This estimate appears reasonable when compared with the expected commissions from known sales opportunities being developed of $4,393,000 which were expected to be earned over a two year period.)

2-ER-263 at 269 (footnote omitted).

It is undisputed that SSLI realized total margins of $1,500.00 over the life of its dealership BYD, and never sold a single BYD bus, 2-ER-157 at 167, lines 14-25, while incurring $300,220.18 in unreimbursed costs, 2-ER-263 at 275 (Ueno Ex. 2). SSLI's ***track record*** during the period of 2017-2018 while SSLI was actively trying to sell BYD products is that of effectively ***no sales, and no profits at all***.

As a federal Court of Appeals noted, "Lost future profits could hardly be demonstrated by an entity that never made profits to lose." *Eleven Line, Inc. v. North Texas State Soccer Ass'n, Inc.*, 213 F.3d 198, 208 (5th Cir. 2000) ("*Eleven Line*"). Hawaii law likewise notes difficulties with proof of future profits in a new or unestablished business, and requires some rational standard in such proof as opposed to speculation or hope. *Kam Ctr. Specialty Corp. v. LWC IV Corp.*, 2007 Haw. LEXIS 283 (Haw. Sep. 27, 2007) at *70-73, citing *Chung v. Kaonohi Ctr. Co.*, 62 Haw. 594, 606, 618 P.2d 283, 291 (1980); *see also Hawaiian Airlines, Inc. v. Mesa Air Group, Inc. (In re Hawaiian Airlines, Inc.)*, 2007 Bankr. LEXIS 4450 (Bankr. D.Haw. Oct. 30, 2007) ("Haw. Air.") at *16 (A substantial uncertainty as to both the "fact" and "amount" of future damages prevents a recovery of such damages)*; In re Sandwich Islands Distilling Corp.*, 2009 Bankr. LEXIS 3692 (Bankr. D.Haw. Nov. 12, 2009) at *13-14 (claim of lost profits not based on track record was speculative); *In re Z3 Sports Acad. LLC*, 2017 Bankr. LEXIS 450 (D.Haw. Bankr., Feb. 16, 2017) at *13 (proof of future profits failed where it never rose above a level of sheer hope).

Faced with a track record of no sales and no profits, Mr. Ueno attempted to justify SSLI's "estimate" of $2 million in annual markups by reference to a list of "known sales opportunities" which SSLI supplied. 2-ER-265 at 269, 272-273 (Ueno Ex. 1), and FER-2 (J. Ex. 52) (email dated November 19, 2019 by SSLI's counsel, forwarding to Mr. Ueno Mr. Soderholm's email of November 17, 2019). As it can readily be seen, in his Ex. 1 (2-ER-269 at 272-273), Mr. Ueno almost verbatim recited the information Mr. Soderholm provided in FER-2.

As discussed in detail below, all except one of those "known sales opportunities" provided by SSLI to Mr. Ueno were in the past and did not in fact materialize. They could support SSLI's estimate only if SSLI was able to prove that these sales opportunities did not materialize because of BYD's bad faith. However, SSLI failed to so prove at trial, and failed to prove that a realistic sales opportunity existed in any of these situations. The remaining known opportunity was, at that time, in the future, and did not happen either. The District Court concluded that Mr. Ueno's valuation was "unnecessarily speculative." CL 44.d(1), 1-ER-4 at 55.

The specific alleged "known sales opportunities" and the District Court's findings rejecting or contradicting SSLI's factual contentions are as follows:

1. <u>2018 Wiki Wiki Bid</u>

SSLI contended, and advised Mr. Ueno, and Mr. Ueno assumed, that SSLI would have realized immediate markup of $286,000 with additional markup of $1,144,000 over five years but for BYD refusing to

allow SSLI to bid on the 2018 Airport Wiki Wiki procurement as the only bidder. 2-ER-322 (Soderholm Dir. T., ¶31), FER-2, item 1), 2-ER-273 (Ueno Ex. 1) (top un-numbered item). However, the District Court found that SSLI failed to rebut BYD's testimony that BYD decided not to proceed with the 2018 airport bid because of its concerns about costs, the Airport's reduction of units to be procured from eight to two, and its ability to meet the production deadline. FF 7.a, b, 1-ER-4 at 16. SSLI failed to prove that a realistic sales opportunity had existed to begin with, and it was reasonable for the District Court to consider any projected profits from it to be speculative.

2. <u>2019 Wiki Wiki Bid</u>

SSLI contended, and Mr. Ueno assumed, that SSLI would have realized $900,000 in immediate markup plus $900,000 in additional markup based on contract options had BYD allowed SSLI to bid on its behalf on the 2019 Airport Wiki Wiki procurement. FER-2-3, item 2); 2-ER-273 (Ueno Ex. 1), items 1 & 1a. The District Court found that BYD submitted a direct bid for electric buses while SSLI submitted a bid for a manufacturer of diesel buses. FF 26.a, 1-ER-4 at 31-32.

The District Court found that the terms of the 2019 Wiki Wiki procurement provided that the lowest responsive bid for electric buses would be awarded the contract, regardless of any bids submitted for diesel buses. FF 26.b, g, *id*. at 32-33. However, BYD's bid was disqualified as being non-responsive, and SSLI won the bid for the diesel bus. FF 26.a, c, d, *id*.

This transaction cannot be considered a lost sales opportunity for SSLI because, as the District Court found, there was no evidence why BYD's bid was found non-responsive. FF 26.f, *id*. at 33. SSLI failed to prove that it could have won this sale as BYD's dealer, *i.e*., that a realistic sales opportunity existed for BYD's electric bus, and it was reasonable for the District Court to consider any projected profits from it to be speculative.

3. E'Noa Tours

SSLI contended that BYD made a sale directly to E'Noa, bypassing SSLI, on which SSLI would have made a markup of $293,193, and Mr. Ueno so assumed. FER-3, item 4); 2-ER-273 (Ueno Ex. 1), item 4, 2-ER-323-324 (Soderholm Dir. T.), ¶¶32-33.

However, the District Court found that the alleged sale to E'Noa did not happen, that E'Noa considered BYD prices to be too high and took advantage of BYD's demonstration for the purpose of negotiating with other vendors. FF 12.g, i, j, m. 1-ER-4 at 22-23. SSLI failed to prove that a realistic sales opportunity existed and it was reasonable for the District Court to consider any projected profits from it to be speculative.

4. Travel Plaza Transportation / Japan Travel Bureau

SSLI contended, and Mr. Ueno assumed, that but for some fault of BYD, SSLI would have made $300,000 in markup on a failed sale to TPT. FER-3, item 5; 2-ER-273 (Ueno Ex. 1), item 5. SSLI presented no evidence at trial that this was a realistic sales opportunity. In fact, in its First Amended Complaint ¶14 (last two

sentences), 2-ER-335-336, SSLI alleged that this sale failed because BYD was not competitive at any price.

The Court indeed found that the sale to TPT did not happen, and that there was no evidence it would have happened even at a lower price. FF 8, 1-ER-4 at 16- 17. SSLI failed to prove that a realistic sales opportunity existed, and it was reasonable for the District Court to consider any projected profits from it to be speculative.

5. Counties of Maui and Hawaii

SSLI contended, and Mr. Ueno assumed, that but for some fault of BYD, SSLI would have made $200,000 in markup on each of the failed sales to the Counties of Maui and Hawaii. FER-3, items 6) and 7); 2-ER-273 (Ueno Ex. 1), items 6 & 7.

The District Court expressly addressed only BYD's claim that BYD lost profits on prospective sale to the County of Maui because, as BYD asserted, the County would not deal with Mr. Soderholm, and to the County of Hawaii, because, as BYD asserted, SSLI's quote was too high. FF 29.b, c, 1-ER-4 at 35. The Court found there was no evidence the County of Maui would have bought buses from BYD if Mr. Soderholm had not been involved, or that the County of Hawaii would have purchased two buses from BYD if the buses had been offered a lower price. FF 29.d, 1-ER-4 at 36. SSLI presented no evidence that either County would have bought BYD buses from SSLI at the price quoted by SSLI or at a lower price. In sum, SSLI failed to prove that realistic sales opportunities existed and it was reasonable for the District Court to consider any projected profits from such to be speculative.

6. 2021 Airport Procurement

SSLI contended, and Mr. Ueno assumed, that SSLI would realize margins of $3,400,000 on the then future 2021 Airport procurement. FER-3, item 3), 2-ER-273-274 (Ueno Ex. 1), items 6 & 7. SSLI presented no evidence at trial to show this future procurement was a realistic sales opportunity.

Plainly, Mr. Ueno could not rationally use a conjecture as to what might happen in the future to establish SSLI's past track record or determine whether SSLI's estimates about the track record it could have developed in the past but for BYD's fault were reasonable. Moreover, SSLI failed to show at trial that the then future 2021 Airport would by itself be a realistic sales opportunity for BYD buses. It was reasonable for the District Court to consider any projected profits from this future opportunity to be speculative.

7. Mr. Ueno's testimony as a whole was speculative

The admissibility of Mr. Ueno's testimony, in its entirety, was at best doubtful given that it rested on assumptions not connected to the facts in the record.

> Nothing in either *Daubert* or the Federal Rules of Evidence requires a district court to admit opinion evidence that is connected to existing data only by the *ipse dixit* of the expert. A trial court may exclude evidence when it finds that there is simply too great an analytical gap between the data and the opinion proffered.

Domingo v. T.K., 289 F.3d 600, 607 (9th Cir. 2002), citing *General Electric v. Joiner*, 522 U.S. 136, 146 (1997).

> In order to be admissible, an "expert opinion must be supported by an adequate basis in relevant facts or data." *Stratosphere*, 66 F. Supp. 2d at 1188 … *McGlinchy v. Shell Chemical Co.*, 845 F.2d 802, 807 (9th Cir. 1988) (upholding district court's exclusion of conclusions in expert report with only "scant basis" in the record)). […]
>
> Other courts have generally held that an expert's opinion "should be excluded when it is based on assumptions which are speculative and are not supported by the record." *Blake v. Bell's Trucking, Inc.*, 168 F. Supp. 2d 529, 532 (D. Md. 2001). *See also Coleman v. Dydula*, 139 F.Supp.2d 388, 390 (W.D.N.Y. 2001) (finding expert testimony reliable where it has "a traceable, analytical basis in objective fact"); *Rogers v. Ford Motor Co.*, 952 36 F.Supp. 606, 615 (N.D. Ind. 1997) (holding that in deciding whether to admit expert testimony, district court must rule out subjective belief or unsupported speculation); *Collier v. Varco-Pruden Bldgs.*, 911 F. Supp. 189, 192 (D.S.C. 1995) (holding expert's opinion should be [*13] excluded when it is based on assumptions which are speculative and not supported by the record); *Guillory v. Domtar Indus., Inc.*, 95 F.3d 1320, 1331 (5th Cir. 1996) (holding court properly excluded expert testimony not based on facts in the record, but

> based on altered facts and speculation designed to bolster one party's position); *Damon v. Sun Co.*, 87 F.3d 1467, 1474 (1st Cir. 1996) (holding expert should not be permitted to give an opinion that is based on conjecture or speculation from an insufficient evidentiary foundation); *Fedorczyk v. Carribean Cruise Lines*, Ltd., 82 F.3d 69, 75 (3d Cir. 1996) (if expert opinion is based on speculation or conjecture, it may be stricken); *Casas Office Machs., Inc. v. Mita Copystar America*, Inc., 42 F.3d 668, 681 (1st Cir. 1994) (holding district court may exclude expert testimony where it finds that the testimony has no foundation or rests on obviously incorrect assumptions or speculative evidence)[.]

Morrison v. Quest Diagnostics Inc., 2016 U.S. Dist. LEXIS 82518 (D.Nev. June 22, 2016) at 12-13.

However, the District Court was not required to strike Mr. Ueno's testimony. *See, e.g.*, *Sphere Drake Ins., PLC v. Trisko*, 226 F.3d 951 (8th Cir. 2000) (attacks on foundation of expert's opinion go to weight rather than admissibility). The District Court instead concluded that Mr. Ueno's testimony had no weight because it was "unnecessarily speculative." CL 44.d(1), 1-ER-4 at 55. Based on the proof, or more precisely, SSLI's complete failure at trial to prove the facts it asked Mr. Ueno to assume, the District Court was amply justified in rejecting Mr. Ueno's valuation.

IV. CONCLUSION

The appealed Judgment should be reversed, with instruction that a judgment be entered whereby SSLI takes nothing for statutory damages under HRS §437-58(g), or alternatively that SSLI takes only the undisputed amount of $65,095.12 in its recoverable costs, and the award of prejudgment interest should be reversed in its entirety, or alternatively, adjusted accordingly.

DATED: Honolulu, Hawaii, April 1, 2022.

/s/ Christian K. Adams
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(*** Certificates omitted in this appendix***)