

HELEN GRAHAM, on behalf of
herself and others similarly situated,

Plaintiff-Respondent-Cross
Appellant,

v.

PROGUARD WARRANTY PLUS,
Defendant,

-and-

DAYTONA AUTO SALES, INC.;
JOHN VELEZ; and JACKELINE
VELEZ,

Defendants/Third-Party Plaintiffs-
Appellants/Cross-Respondents

v.

INTEGEX SOLUTIONS, INC.,

Third-Party Defendant-Respondent

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1236-24

Civil Action

On Appeal From:

Superior Court of New Jersey Law Division
Bergen County
Docket No. BER-L-8438-21

Sat below:

Hon. Lina P. Corriston, J.S.C.

**REPLY BRIEF OF PLAINTIFF-RESPONDENT-CROSS APPELLANT
HELEN GRAHAM**

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PRELIMINARY STATEMENT

This case presents the question of whether the New Jersey Motor Vehicle Commission ("NJMVC" or the "Commission") may, via regulation, impose individual liability on owners and officers of motor vehicle dealerships, such as Defendant Jackeline Velez ("Mrs. Velez"), who is both an owner and the Secretary (an officer) of Defendant Daytona Auto Sales, Inc. ("Daytona"). Plaintiff seeks class certification against Defendant Mrs. Velez, individually, for violations of the Automotive Sales Practices Regulations and Consumer Fraud Act, pursuant to the regulatory provisions of N.J.A.C. § 13:21-15.7(c), which expressly provides that not only the dealership entity, but also its owners, partners, officers, directors, and holders of controlling interests, are individually responsible for any unlawful conduct or violations arising from the dealer's buying, selling, or dealing in motor vehicles.

The trial court granted class certification against Daytona and Defendant John Velez ("Mr. Velez") but denied class certification as to Mrs. Velez, and Plaintiff now seeks a limited reversal of portion of the decision denying certification as to Mr. Velez. Defendants do not dispute that the regulation's plain language encompasses Mrs. Velez and authorizes such liability. Instead, Defendants argue that the regulation exceeds the Commission's statutory authority. As demonstrated

below, Defendants’ arguments are both procedurally barred and substantively without merit.

First, Defendants failed to challenge the validity of N.J.A.C. § 13:21-15.7(c) before the trial court, and it is well-settled that appellate courts will not consider arguments not raised below unless they implicate jurisdiction or matters of great public interest—neither of which is present here. *Second*, the record demonstrates that Mrs. Velez is an officer of Daytona, not a “holder of controlling interest.” As Defendants do not dispute that the Commission is authorized to impose individual liability on officers of a corporation, the trial court should have granted certification as to Mrs. Velez. *Third*, even if Mrs. Velez were considered only a “holder of controlling interest,” Defendants’ arguments fall far short of the demanding standard required to invalidate a duly promulgated administrative regulation.

LEGAL ARGUMENT

I. CERTIFICATION SHOULD BE GRANTED AGAINST MRS. VELEZ AS AN OWNER AND OFFICE OF DAYTONA (DA31)

New Jersey courts have long recognized that regulations promulgated by administrative agencies pursuant to legislative delegation are entitled to a strong presumption of validity and reasonableness. Judicial intervention is warranted only in the rarest circumstances where the agency’s action is plainly inconsistent with its legislative mandate. *See N.J. Guild of Hearing Aid Dispensers v. Long*, 75 N.J. 544, 561 (1978); *In re Attorney Gen. Law Enf’t Directive Nos. 12 2020-5 & 2020-6*, 246

N.J. 462, 492 (2021). Defendants’ showing is insufficient to meet this high bar. Plaintiff’s opening papers outlined why class certification should be granted against Mrs. Velez—the regulations unambiguously make motor vehicle dealers, partners, officers, directors, and holders of controlling interests individually responsible for violations involved with the business of buying, selling, or dealing in motor vehicles. Defendants do not dispute that the regulations as written make Mrs. Velez, as an owner and officer of Daytona, liable for Daytona’s regulatory violations. Instead, Defendants’ sole argument is that the regulation improperly expands the definition of who can be liable for violations of motor vehicle regulations and statutes. As set forth below, Defendants’ arguments fail for three reasons.

A. Defendants’ Challenge to N.J.A.C. § 13:21-15.7(c) Is Procedurally Barred (Da31)

First, Defendants’ entire argument is one they failed to make below. In fact, Defendants did not contest *at all* either Mr. or Mrs. Velez’s liability under N.J.A.C. § 13:21-5.7(c), as asserted by Plaintiff in her Reply Brief in support of class certification, “Ms. Graham’s moving papers also outlined how both Velezes are individually liable under N.J.A.C. § 13:21-15.7(c), as they both owned the dealership. *Defendants do not contest this at all in their opposition.*” (Emphasis added). “It is a well-settled principle that our appellate courts will decline to consider questions or issues not properly presented to the trial court when an opportunity for such a presentation is available unless the questions so raised on appeal go to the

jurisdiction of the trial court or concern matters of great public interest.” *Nieder v. Royal Indem. Ins. Co.*, 62 N.J. 229, 234 (1973) (citation and internal quotation marks omitted); *Grillo v. State*, 469 N.J. Super. 267, 279 (App. Div. 2021) (declining to consider new argument raised for the first time on appeal); *Feliciano v. Faldetta*, 434 N.J. Super. 543, 547 (App. Div. 2014) (declining to consider the constitutionality of a Court Rule raised for the first time on appeal). Importantly, Defendants do not even *attempt* a showing that either the arguments they make “go to the jurisdiction of the trial court or concern matters of great public interest.” As Defendants failed to challenge N.J.A.C. § 13:21-5.7(c) below, this Court should decline to consider Defendants’ new arguments.¹

B. Mrs. Velez Is an Officer and Owner of Daytona and Is Properly Subject to Individual Liability (Da31)

Even if the Court were to reach the merits, Defendants’ challenge fails. Defendants’ opposition is based on the assertion that Mrs. Velez is a “holder of controlling interest” of Daytona. Defendants rely on this premise to then argue that, while the Legislature *did* anticipate that the Commission could impose individual liability on “natural persons . . . other persons in representative or official capacity, and members, officers, agents, employees, or other representatives of those hereinbefore enumerated,” the Legislature could not have anticipated the same with

¹ To the extent Defendants raise additional arguments attacking the Regulation or the Commission, those arguments should also be rejected for the same reason: Defendants failed to raise any such arguments below.

respect to “holders of controlling interests” as those subject to individual liability, because the term “holders of controlling interests” is not specifically enumerated in the enabling statute under N.J.S.A. § 39:10-2.² Curiously, Defendants do not cite a *single* part of the record where *anyone* claimed Mrs. Velez is a holder of controlling interest, because there is *nothing* in the record to even insinuate that she is a holder of a controlling interest. Conversely, the record demonstrates that Mrs. Velez is an Officer of Daytona. Mrs. Velez may also be a holder of a controlling interest in Daytona, but that position is not mutually exclusive to being an officer. Nor does it undermine the fact that Mrs. Velez is indisputably an officer of Daytona.

In their Answer to Plaintiff’s Complaint, Defendants *admitted* that Mrs. Velez is *both* a Secretary and an Owner of Daytona. *Compare* Da043 at ¶10 with Da065 at ¶10. As a Secretary of Daytona, Mrs. Velez is *also* an officer of Daytona. *See* N.J.S.A. § 14A:6-15 (“The officers of a corporation shall consist of...a secretary...and all other officers as may be prescribed by the bylaws.”); *Macysyn v. Hensler*, 329 N.J. Super. 476, 486 (App. Div. 2000) (recognizing a secretary as an officer of a corporation).

Defendants concede the Legislature specifically enumerated “officers” as a category of persons the Commission could impose personal liability. *See* Prb12

² As explained below, even if Mrs. Velez were deemed a shareholder with a “controlling interest,” the Commission did not exceed its authority by including her as an individual subject to liability

(recognizing that “person” under N.J.S.A. § 39:10-1 includes “officers”). Therefore, as an Officer of Daytona, Defendants can no longer dispute that she is properly subject to the Commission’s authority and therefore subject to the individual liability requirements established by the Commission.

C. The Commission’s Regulation is Consistent with Legislative Intent and Case Law (Da31)

Even if Mrs. Velez were considered a “holder of controlling interest” of Daytona, Defendants’ challenge fails. The Legislature delegated broad discretion to the NJMVC to enact rules “that supplement, but do not conflict with” the motor vehicle statute. *See Allstars Auto. Grp., Inc. v. N.J. Motor Vehicle Com’n*, 234 N.J. 150, 159 (2018). To that end, “administrative regulations must be accorded a presumption of reasonableness”, *N.J. Guild of Hearing Aid Dispensers v. Long*, 75 N.J. at 561, and “our Supreme Court has repeatedly stated that an ultra vires finding is disfavored.” *Last Chance Dev. P’ship v. Kean*, 232 N.J. Super. 115, 127 (App. Div. 1989). Furthermore, “any party challenging a regulation must prove its invalidity.” *Caporusso v. N.J. Dep’t of Health & Senior Servs.*, 434 N.J. Super. 88, 112 (App. Div. 2014) (citing *League of Municipalities v. Department of Community Affairs*, 158 N.J. 211, 222 (1999)). Even still, “[j]udicial intervention is limited to ‘those rare circumstances in which it is clear that the agency action is inconsistent with its mandate.’” *In re Attorney Gen. Law Enft Directive Nos. 2020-5 & 2020-6*,

246 N.J. at 492 (quoting *In re Petition for Rulemaking*, 117 N.J. 311, 325, 566 A.2d 1154 (1989)). Defendants fall well short of meeting this heightened burden.

Here, Defendants do not dispute that the Commission is authorized to regulate motor vehicle dealerships and their owners. Nor do Defendants dispute that the Commission is authorized to pass regulations imposing individual liability on those operating motor vehicle dealerships for compliance with all the requirements of the statutes and rules governing the business of buying, selling or dealing in motor vehicles, including the ASP Regulations. *See* N.J.A.C. § 13:21-15.7(c). Instead, Defendants contend that while the Commission *was* authorized to impose individual liability on “natural persons, firms or copartnerships, corporations, associations, . . . or other persons in representative or official capacity, and members officers, agents, employees, or other representatives of those hereinbefore enumerated”, Drb12, the Commission’s imposition of individual liability on “holders of controlling interest” was a violation of its authority. In reaching this conclusion, Defendants lean heavily on the canon of statutory construction, *unius est exclusion alterius* - the expression of one thing suggests the exclusion of another”. (Drb13-14). Defendants miss the mark.

This Court has recognized “[t]he maxim should not be applied arbitrarily”, *IL.C. v. Bd. of Review, Dep't of Labor*, 439 N.J. Super. 581, 599 (App. Div. 2015), but instead, should only be employed “with great caution”. *Masel v. Paramus*

Borough Council, 180 N.J. Super. 32, 41 (App. Div. 1981). “The implication must be clear and compelling, a necessary consequence, not a conjectural or purely theoretical concept.” *Gangemi v. Berry*, 25 N.J. 1, 11 (1957). This canon should only be applied “when the Legislature creates an exhaustive list” and should not be applied when a list is inclusive. *Borough of E. Rutherford v. E. Rutherford PBA Local 275*, 213 N.J. 190, 215 (2013).

Defendants’ entire argument rests on the premise that because the definition of “person” under N.J.S.A. § 39:10-1 does not specifically enumerate “shareholders, stockholders, or people with an ownership interest in a motor vehicle” the Commission improperly attached liability to the same. Yet in the same token, Defendants concede that the Legislature contemplated the scope of “persons” covered under the statute to not only include the corporation but to “*include[]* natural persons or other persons in representative or official capacity, and members officers, agents, employees, or other representatives of those hereinbefore enumerated.” N.J.S.A. § 39:10-1 (emphasis added). The use of the word “include” reveals that the list of those who can be defined as “persons” is not exhaustive. *See Sanchez v. Fitness Factory Edgewater, LLC*, 242 N.J. 252, 264 (2020) (“noting that include has a broader meaning than comprise and that including or includes implies that there is more than what is listed”); *see also Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 577, 114 S. Ct. 1164, 127 L. Ed. 2d 500 (1994) (noting that the statute at issue

used the term "including" so as "to indicate the 'illustrative and not limitative' function of the examples given"); *State v. Lisa*, 391 N.J. Super. 556, 568 (App. Div. 2007) ("Our courts have consistently held that the use of the term 'include' signifies enlargement rather than limitation."); *Black's Law Dictionary* 912 (11th ed. 2019) ("The participle including typically indicates a partial list"); *New Oxford American Dictionary* 879 (3d ed. 2010) (noting that "[i]nclude has a broader meaning than comprise" and that "including or includes implies that there is more than what is listed). Thus, the illustrative rather than exhaustive list of examples of "persons" under N.J.S.A. § 39:10-1 does not erase the unqualified inclusion of "holders of controlling interests" as promulgated by the Commission. It therefore cannot be said that the Legislature *intended* to exclude "holders of controlling interests" when it promulgated a non-exhaustive statutory definition.

Further support that the Commission's promulgation does not conflict with N.J.S.A. § 39:10-1 can be found by our Supreme Court in *Allen v. V&A Bros.* There, the Supreme Court considered whether individuals who have an ownership interest in, or who are employed by, a corporation can be individually liable for CFA violations. The Court held:

Focusing first on the statute's definition of person, N.J.S.A. 56:8-1(d), there can be no doubt that the CFA broadly contemplates imposition of individual liability. That definition not only begins with a reference to natural persons, but also identifies numerous other categories into which an individual might fall, including individuals who are acting through or on behalf of corporations and other business entities. *Ibid.* The very breadth of the definition itself lends

strong support to the proposition that, at least in theory, the CFA permits the imposition of individual liability upon one whose acts are part of a violation by a corporation.

208 N.J. 114, 130 (2011). N.J.S.A. § 39:10-1 is remarkably similar. Like the definition of “person” under the CFA, “Used Motor Vehicle Dealers” begins with a reference to “natural persons”. Also like the CFA, “persons” under N.J.S.A. § 39:10-1 is then broadly defined into “numerous other categories into which an individual might fall, including individuals who are acting through or on behalf of corporations and other business entities”. *Allen*, 208 N.J. at 130; *c.f.* N.J.S.A § 39:10-1 (Defining persons to include “natural persons, firms or copartnerships, corporations, associations, or other artificial bodies, receivers, trustees, common law or statutory assignees, executors, administrators, sheriffs, constables, marshals, or other persons in representative or official capacity, and members, officers, agents, employees, or other representatives of those hereinbefore enumerated.’) As the *Allen* Court recognized, “the very breadth of the definition itself lends strong support to the proposition that, at least in theory, the CFA permits the imposition of individual liability upon one whose acts are part of a violation by a corporation.” *Allen*, 208 N.J. at 130. The same analysis applies here. The very breadth of the Legislature’s definition of both “Used Motor Vehicle Dealer” and “person” lends strong support to the proposition that the Legislature did not intend its list to be exclusive and contemplated it could include those with controlling interests.

Not so fast, Defendants argue, claiming that Mrs. Velez’s liability “is especially egregious because shareholders are generally protected from liability for the actions of the corporation”. (Drb13). Defendants’ reliance on the general principle that shareholders are insulated from corporate liability for CFA violations is misplaced. As the New Jersey Supreme Court made clear in *Allen*, “nothing in the CFA or the relevant precedents suggests that in the absence of veil-piercing the individual employee or officer will be shielded from liability for the CFA violation he or she has committed.” 208 N.J. at 133. The Court further recognized that “[t]he principals may be broadly liable, for they are the ones who set the policies that the employees may be merely carrying out.” *Id.* at 134.

This principle is echoed by the Commission, which has stated that “partners, officers, directors, and holders of controlling interests...have a responsibility to supervise the activities of the dealership so as to ensure that it is in compliance with the applicable law,” and that this “responsibility is non-delegable.” 38 N.J.R. 1324(a). This aligns precisely with the Supreme Court’s recognition that “principals...are the ones who set the policies.” *Allen*, 208 N.J. at 134.

Defendants’ position also contradicts the well-settled principle that a holder of a controlling interest “has the power to dictate to the minority the manner in which the corporation is run.” *Brenner v. Berkowitz*, 134 N.J. 488, 505 (1993); *see also In re Ex'rs of Koretzky*, 8 N.J. 506, 526 (1951) (“where a fiduciary holds sufficient

shares to control actually or substantially the conduct of the corporation he is under a duty to exercise that control”); *State v. Kuehnle*, 85 N.J.L. 220, 225 (1913) (“That the owner of a controlling interest in a corporation may often be as much concerned in its contracts as if they were his own, is obvious”).

Thus, Mrs. Velez cannot possess a controlling interest in Daytona and simultaneously absolve herself of liability when Daytona implements unlawful policies and procedures. To hold otherwise would contradict the recognized authority and responsibility placed on holders of a controlling interest.

Where, as here, Mrs. Velez was a part-owner and officer of an automobile dealership that implemented policies and procedures violating the CFA, the trial court erred in declining to grant class certification as to her.

CONCLUSION

For the foregoing reasons, Plaintiff respectfully requests that the Court uphold the validity of the Commission’s regulations, reverse the trial court’s denial of class certification as to Mrs. Velez, and grant such other relief as the Court deems just and proper.

Respectfully submitted,

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Dated: September 3, 2025