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FROM THE COMMITTEE ON OPINIONS

NVL, INC., a Delaware Corporation and HOOMAN NISSANI, an Individual, d/b/a Hooman Automotive Group, Plaintiffs, vs. VOLVO CAR USA LLC, a Delaware Limited Liability Company, Defendant.	**SUPERIOR COURT OF NEW JERSEY** LAW DIVISION: BERGEN COUNTY Docket No. **BER-L-4341-18** Civil Action **OPINION**

Argued: September 23, 2022
Decided: October 17, 2022

HONORABLE ROBERT C. WILSON, J.S.C.

Christopher J. Sullivan, Esq. appearing on behalf of Plaintiffs NVL, Inc., a Delaware Corporation; Hooman Nissani, an Individual, d/b/a Hooman Automotive Group (from Nutter, McClennen & Fish LLP)

Paul Daly, Esq. appearing on behalf of Defendant Volvo Car USA LLC, a Delaware Limited Liability Company (from Hardin, Kundla, McKeon & Poletto Counsellors at Law)

FACTUAL BACKGROUND

THIS MATTER arises out of a dispute between Plaintiffs NVL, Inc., a Delaware Corporation; Hooman Nissani, an Individual, d/b/a Hooman Automotive Group (hereinafter collectively "Plaintiffs" or individually "Mr. Nissani") and Defendants Volvo Car USA LLC, a Delaware Limited Liability Company (hereinafter "Defendant") regarding letters of intent entered into between the parties in 2014 and 2016 (hereinafter the "2014 LOI," "2016 LOI," and collectively the "LOIs") and alleged breaches stemming therefrom.

Mr. Nissani is the president of Hooman Automotive Group, a trade name under which he onwed and operated various car dealerships in Southern California. Sometime in late 2013 or early 2014, Mr. Nissani was approached by Defendant with an offer to open a Volvo dealership in Long

Beach, California. In September 2014, the parties executed the 2014 LOI, which contained the steps that Mr. Nissani was required to take in order to be approved as an authorized Volvo dealer. In Spring 2016, Defendant asked Mr. Nissani to execute the 2016 LOI. A final and revised version of 2016 LOI was executed as of October 25, 2016. It is undisputed that the 2016 LOI superseded and replaced entirely the 2014 LOI. The 2016 LOI was drafted by Defendant's legal counsel and the dollar amounts and construction timelines included therein were negotiable. Certain additional terms, such as the standard form termination along with a covenant not to sue provision were included by Defendant's counsel.

The 2016 LOI required Plaintiffs to renovate and construct the approved facility location so that it accorded with the facility image and design requirements specified by Defendant. Further, it provided for a tight schedule within which Plaintiffs was required to meet several construction deadlines which he had previously failed to meet under the 2014 LOI. The various construction deadlines included in the 2016 LOI were extended multiple times in an attempt to allow Plaintiffs to comply.

In early 2017, the architectural plans submitted by Plaintiffs to Defendant needed major revisions, which occurred throughout the Spring months of 2017. Ultimately, Defendant elected to terminate the 2016 LOI by letter dated September 1, 2017, citing a pattern of failed deadlines.

Plaintiffs filed their Complaint against Defendant on June 12, 2018, and an Amended Complaint was filed on April 8, 2019. Before the Court is now a motion for Summary Judgment filed by Defendant. For the reasons stated herein, Defendant's motion for Summary Judgment is **GRANTED**.

SUMMARY JUDGMENT STANDARD

The New Jersey procedural rules state that a court shall grant summary judgment "if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment or order as a matter of law." R. 4:46-2(c). In Brill v. Guardian Life Insurance Co., 142 N.J. 520 (1995), the Supreme Court set forth a standard for courts to apply when determining whether a genuine issue of material fact exists that requires a case to proceed to trial. Justice Coleman, writing for the Court, explained that a motion for summary judgment under R. 4:46-2 requires essentially the same analysis as in the case of a directed verdict based on R. 4:37-2(b) or R. 4:40-1, or a judgment notwithstanding the verdict under R. 4:40-2. Id. at 535-536. If, after analyzing the evidence in the light most favorable to the non-moving party, the motion court determines that "there exists a single unavoidable resolution of the alleged dispute of fact, that issue should be considered insufficient to constitute a 'genuine' issue of material fact for purposes of R. 4:46-2." Id. at 540.

RULE OF LAW AND DECISION

The 'Not to Sue' Provision of the 2016 LOI is Enforceable

As a general and longstanding matter, parties are afforded the liberty to bind themselves as they see fit. See Twin City Pipe Line Co. v. Harding Glass Co., 283 U.S. 353, 356 (1931); see also Chem. Bank v. Bailey, 296 N.J. Super. 515, 526-27 (App. Div.) (noting ability of parties to apportion risk of loss through contractual limitation of liabilities), certif. denied 150 N.J. 28 (1997). Waivers of liability are more commonly upheld in the commercial context. See Hy-Grade Oil Co. v. New Jersey Bank, 138 N.J. Super. 112, 116 (App. Div. 1975). In a commercial setting, "the judiciary will not undertake the writing of a different or better contract between the parties."

Swisscraft Novelty Co. v. Alad Realty Corp., 113 N.J. Super. 416, 421 (App. Div. 1971); see also Marini v. Ireland, 56 N.J. 130, 143 (1970); Kampf v. Franklin Life Ins. Co., 33 N.J. 36, 43 (1960); Washington Constr. Co., Inc. v. Spinella, 8 N.J. 212, 217 (1951). The scope and application of a waiver of liability depends on the particular circumstances of a case. Tannock v. New Jersey Bell Telephone Co., 212 N.J. Super. 506, 512 (Law Div. 1986), aff'd in part, rev'd in part, 223 N.J. Super. 1 (App. Div. 1988).

The Tannock court offered a two-pronged approach to determine whether a waiver of liability is unconscionable: (1) determining the relative bargaining power of the parties, i.e., whether the parties could actually negotiate regarding the waiver of liability provision; and (2) whether the challenged provision is substantively unreasonable. Tannock, 212 N.J. Super. at 513. In Tannock, the limitation of liability provision was deemed unenforceable due to the unequal bargaining power of the plaintiff, a professional photographer seeking to advertise his business in a telephone book, and the defendant, a telephone company which published advertisements in the telephone book. Id. at 513-15.

Here, Plaintiffs have claimed that the inclusion of the not to sue provision in the 2016 LOI is both procedurally and substantively unconscionable due to an alleged inequality in the bargaining power and status of the parties. Applying the Tannock test to the instant matter, the first prong requires a discussion of the balance of bargaining power between Mr. Nissani and Plaintiffs and the Defendant. While Defendant is a major automobile manufacturer, which certainly gave it some leverage over Plaintiffs, Mr. Nissani himself is a sophisticated businessman who has significant experience negotiating with automobile manufacturers in the course of opening dealerships. Specifically, Mr. Nissani owned and operated automobile dealerships for nearly 20 years in conjunction with several major automobile manufacturers of similar size and

prominence to Defendant.

Plaintiffs have pled no facts which have convinced the Court that a genuine dispute exists over whether there was a procedurally unconscionable disparity in bargaining power as the parties negotiated the LOIs and included the not to sue provision. Plaintiffs' case may be distinguished from the plaintiff in Tannock; here, Mr. Nissani was by all accounts experienced in the area of constructing and operating car dealerships, and the negotiation process which precedes this. Further, Mr. Nissani negotiated directly with Defendant's executives, whereas the plaintiff in Tannock was merely presented with a set of terms to which he was required to assent to. Additionally, Plaintiffs had an attorney review the 2016 LOI before it was executed. Thus, the negotiations which occurred between Plaintiffs and Defendant were not procedurally unconscionable.

The second prong of the Tannock test requires the Court to determine whether the inclusion of the not to sue provision is substantively unconscionable. In analyzing a contract for substantive unconscionability courts will simply look for a suggestion that the exchange of obligations was so one-sided that it shocks the court's conscience. Sitogum Holdings, Inc. v. Ropes, 352 N.J. Super. 555, 565 (Super. Ct. 2002). In Sitogum, the court conducted a thorough analysis of the factors of unconscionability as applied to the contract at issue in that case. The contract in Sitogum was an option contract for the sale of real property. The seller, Ropes, was an elderly woman who had unexpectedly lost her husband immediately prior to the sale—so the court considered her to be a person that was susceptible to an unfair transaction. Id. at 568. Specifically, the court took issue with the unsettling events leading up to the execution of a power of attorney, and the ultimate execution of the option contract for the sale of the land. In light of these questionable events, "[t]he court [was] satisfied that a sufficient degree of procedural unconscionability [was] present to

permit an examination into the substantive fairness of the contract." Id. at 571. The court next focused its substantive analysis on the contract price of $800,000, a figure that was allegedly discussed and considered by Mrs. Ropes' husband prior to his untimely death. Ibid. It was later revealed, however, that the property's true value was approximately double that amount. Thus, the court determined that the great disparity between the sale price and the market value of the property clearly "demonstrate[d] the substantive unconscionability of the option contract." Ibid.

Here, unlike in Sitogum, the 2016 LOI does not contain substantive terms that are so one-sided so as to shock the Court's conscience. Liability waivers are commonly included in contracts between sophisticated parties, as was the case in the instant matter. Further, as discussed above and unlike the defendant in Sitogum, Mr. Nissani is not in the class of persons who may be reasonably identified as susceptible to an unfair transaction. The Plaintiffs and Defendant engaged in negotiation and mutually assented to all terms included in the final version of the 2016 LOI. Additionally, it is noteworthy that Mr. Nissani agreed to the allegedly unconscionable terms on two different occasions.

Moreover, the waiver of liability in the 2016 LOI is conspicuously located on page 11 of the 13-page document and is labeled as the "Covenant not to sue." This is easily contrasted from Tannock, where the offeror included the unconscionable term in small font which was barely visible to the human eye. Tannock, 212 N.J. Super. at 514. As such, the Court concludes that it is a valid and enforceable liability waiver.

Thus, Summary Judgment is granted as to Counts 1, 2, 5, and 7 of the Plaintiff's Amended Complaint.

Plaintiffs Cannot Bring Consumer Fraud Act Claims Against Defendant

Plaintiffs incorrectly argue that the Consumer Fraud Act (hereinafter "CFA") applies to the

instant matter because the proposed Volvo dealership at the heart of this dispute constitutes merchandise which was to be offered to the public at large. Plaintiffs' argument fails as it has no basis in the record or existing caselaw.

New Jersey courts have ruled that "the public," as used in the statutory definition of "merchandise," refers to "the public at large." Princeton Healthcare Sys. v. Netsmart N.Y., Inc., 422 N.J. Super. 467, 473 (App. Div. 2011). It is the "character of the transaction, not the identity of the purchaser, which determines whether the CFA is applicable. Finderine Mgt. Co. v. Barrett, 402 N.J. Super. 546, 570 (App. Div. 2008).

Plaintiffs rely on the cases Kavky v. Herbalife Intern. of Am., 359 N.J. Super. 497 (App. Div. 2003) and Morgan v. Air Brook Limousine, 211 N.J. Super. 84 (Super. Ct. 1986), to support the position that a Volvo dealership falls within the definition of "merchandise" under the CFA. However, upon a closer examination of those cases, this argument fails, as those cases reach the same conclusion as the court did in Princeton, supra, that is, "merchandise," as defined under the CFA, is only protected when the "objects, wares, goals [or] commodities" are being offered to "[the public at large.]" Princeton Healthcare Sys., supra, 422 N.J. Super. at 473.

The court in Kavky held that "franchises and distributorships come within the [CFA]'s definition of merchandise… when they are not covered by the Franchise Practices Act and are [offered to the general public.]" Kavky, supra, 359 N.J. Super. at 501; see also, Morgan, supra, 211 N.J. Super. at 98 ("Although the term 'franchise' is not included within § 1(c)'s definition of 'merchandise,' it is subsumed within the terms 'commodities,' 'services,' or 'anything offered, directly or indirectly to the [public for sale.]'") Plaintiffs also cite to All the Way Towing, LLC v. Bucks Cty. Int'l, Inc., 236 N.J. 431 (2019), in further support of the proposition that a Volvo dealership constitutes merchandise. As stated by Plaintiffs, the Court in All the Way Towing

found that the customization of the tow truck with rig at issue did not remove the product from the CFA's definition of merchandise. Id. at 448. However, a close review of the factors applied by the court in All the Way Towing clearly shows that that case is completely distinguishable from the instant matter. Those factors were:

> "(1) the complexity of the transaction, taking into account any negotiation, bidding, or request for proposals process; (2) the identity and sophistication of the parties, which includes whether the parties received legal or expert assistance in the development or execution of the transaction; (3) the nature of the relationship between the parties and whether there was any relevant underlying understanding or prior transactions between the parties; and, as previously noted, (4) the public availability of the subject merchandise."

Id., at 447-48.

After applying the All the Way factors to the instant matter, the Court concludes that the CFA does not apply. The transaction between Mr. Nissani and Defendant was not a consumer transaction; this is evident from the record. Further, Mr. Nissani's experience and pedigree in the construction and operation of automobile dealerships indicates that he is a sophisticated party with significant experience executing agreements such as the LOIs. Further, the history of the parties and their relationship indicates that Mr. Nissani was not regarded as a consumer but as a business partner and proprietor.

Lastly, the business opportunity offered to Mr. Nissani by Defendant, to construct and operate a Volvo dealership, is not the type of business opportunity or purchase which is publicly available. Persons or entities who are approached to construct and operate automobile dealerships possess relevant qualifications and experience; such an opportunity is not widely available to inexperienced members of the public. As stated by Defendant in its papers, Mr. Nissani was chosen due to his experience and unique skillset, which led Defendant to believe that Mr. Nissani could successfully operate a Volvo dealership.

As such, the application of the All the Way factors to the 2016 LOI clearly indicates that the subject transaction is not covered by the CFA. As such, the Court is required to grant Defendant's motion for Summary Judgment as to Count 3 of Plaintiff's Amended Complaint.

Plaintiffs Cannot Bring an Unjust Enrichment Claim Under This Signed Agreement

To establish unjust enrichment, a plaintiff must show that the defendant received a benefit and would be unjustly enriched if they retained the benefit. VRG Corp. v. GKN Realty Corp., 135 N.J. 539, 554 (1993). Plaintiffs, in its papers, stated that it was clear based upon the record that Defendant was unjustly enriched by its wrongful termination of the 2016 LOI. The Court sees no such evidence of unjust enrichment in the record; Plaintiffs clearly understood the risks and rights provided by the written LOI.

While Plaintiffs did pay all costs and expenses for the prospective dealership which did not come to fruition, Defendant derived no unjust benefit from these expenses. No Volvo dealership opened in the Long Beach, California region due to the funds expended by Plaintiffs. Additionally, Plaintiff has argued that Defendant derived a benefit by reallocating approximately $2 million from Plaintiffs' project to the Findlay project following the termination of the 2016 LOI. This argument ultimately fails; Defendant is a major automaker which frequently engages in large-scale transactions. Its reallocation of $2 million initially earmarked for Plaintiffs' project cannot be considered unjust enrichment, it is simply Defendant adjusting its revenue based upon a change in circumstances. Defendant is well within its rights to allocate its own funds how it sees fit; for this reason, Plaintiff's claim for unjust enrichment must fail.

As such, the Court must grant Defendant's motion for Summary Judgment as to Count 6 of the Plaintiff's Amended Complaint.

Lost Profits Cannot be Recovered in the Instant Matter

The Supreme Court of New Jersey has now changed the law regarding lost profits, as it previously held that there was a per se ban on lost profits for a new business. Schwartz v. Mena, 2022 N.J. LEXIS 675 (Aug.17, 2022). However, even under the new requirements for an award of new profits, Plaintiff's evidence is insufficient under Schwartz; Plaintiffs have failed to show lost profits with any reasonable degree of certainty.

In particular, Schwartz reiterates the general rule under New Jersey law that "[l]ost profits may be recoverable [only] if they can be established with a 'reasonable degree of certainty,'" but "[a]nticipated profits that are remote, uncertain or speculative . . . are not recoverable." Schwartz, supra, at 31, (quoting Passaic Valley Sewerage Com'rs v. St. Paul Fire and Marine Ins. Co., 206 N.J. 596, 609-10 (2011); see also Perth Amboy Iron Works, Inc. v. Am. Home Assurance Co., 226 N.J. Super. 200, 224 (App. Div. 1988).

The only evidence Plaintiff has proffered regarding lost profits is the net opinion of Dr. Kreuter (hereinafter the "Report"), which is insufficient for the following reasons. The Report states that Plaintiffs suffered economic damages in the amount of $7.1 million. This amount greatly exceeds Defendant's estimations of lost profits plus goodwill based upon its own experience with Volvo dealerships; Defendant's number fell somewhere in the range of $1.5 million to $2 million. The figures used in the Report were calculated by Dr. Kreuter using the performance data of several of Plaintiffs' dealerships. The data used in the Report, however, was from the performance of Plaintiffs' dealerships during a period ending in 2014. As such, the predicted profits in the Report are conjecture; the proposed dealership would have operated from approximately 2018 onwards, under very different economic conditions which would have led to a vastly different dealership performance. The use of performance numbers prior to 2014 came in

spite of the fact that Plaintiffs operated at least five dealerships through the year 2020, at which time Plaintiffs sold off all of its automobile dealerships. Further, the Report states an exorbitant year-over-year growth rate of 29.6%, a number which is far from Defendants' sales figures in its experience selling Volvo cars.

The numbers used in the Report are vastly inflated and from an irrelevant time period. Simply put, the Court cannot conclude that Plaintiffs calculated its lost profits with reasonable certainty; its numbers are pure conjecture which lack a sufficient basis in existing data. As such, the Court must grant Defendant's motion for Summary Judgment as to Plaintiff's claim for lost profits.

CONCLUSION

For the aforementioned reasons, Defendant's Motion for Summary Judgment is **GRANTED**.