THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Jocelyn Newman, Circuit Court Judge

Appellate Case No. 2021-001489

Stivers Brothers Automotive, Inc., Appellant,

v.

W. Warner Peacock and Peacock Automotive, LLC, Respondents.

INITIAL BRIEF OF APPELLANT

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STATEMENT OF THE CASE

This is an appeal from two separate but related orders. In one order, the lower court granted a motion for judgment on the pleadings filed by W. Warner Peacock ("Warner") and Peacock Automotive, LLC (hereafter referred to jointly as "Peacock") and dismissed a cause of action under the Regulation of Manufacturers, Distributors, and Dealers Act ("Act") by Stivers Brothers Automotive, Inc. ("Stivers"). In the other, the lower court denied Stivers' motion to serve a second amended and supplemental complaint.

This action was initiated by the filing of a summons and complaint on April 13, 2020. Therein, Stivers alleged that on January 7, 2020, it entered into two separate Asset Purchase And Sale Agreements ("agreements") with Peacock.

One of the agreements provided for the sale of the assets of Stivers' Chevrolet dealership, and the other provided for the sale of the assets of Stivers' Hyundai dealership. Each agreement was subject to approval by the manufacturer.

Each agreement provided for the payment by Peacock to Stivers of the sum of $3,500,000 for a total of $7,000,000, in addition to the purchase price of certain assets including new vehicles, fixed assets, parts, accessories, materials, and work in process. Each agreement obligated Peacock to enter into an assignment of a Lease Agreement ("lease") with the owner of the premises requiring the payment of approximately $1.25 million dollars per year in rent, $174,000 per year in property taxes, and $118,000 per year in insurance.

Stivers alleged that Peacock sabotaged the transactions by failing to pursue approval by the manufacturers and by failing to pursue an assignment of the lease. Stivers further alleged that on March 27, 2020, in response to the COVID-19 pandemic, notwithstanding the absence of a "force majeure" clause, Peacock sent notice of termination of the agreements ("the termination letter")

for pretextual reasons and requested the return of a $100,000 earnest money deposit from the escrow agent.

Stivers further alleged that 10 days before filing, it made a demand for adequate assurance of performance, but no assurance was provided.

Stivers sought a declaration that the agreements remained valid and enforceable notwithstanding the purported termination for pretextual reasons. Stivers also asserted claims for breach of contract, violation of the Act, intentional interference with contractual relations, and veil piercing.

Stivers sought specific performance and damages if specific performance could not be had, together with an award of costs and expenses including a reasonable award of attorney's fees. In addition to Warner and Peacock, Mary Kaye Peacock ("Mary Kaye"), and shareholders, Ken Griffey, Jr. ("Griffey") and Jay Brennan ("Brennan"), were named as Defendants.

On June 5, 2020, Mary Kaye filed a motion to dismiss and to strike. On the same day, Peacock filed an answer and counterclaim. Therein, Peacock asserted that ". . . the world had changed since the signing of the [agreements]" and that "[the pandemic] had caused irreparable damage to [Stivers'] business assets. . ." (Answer, par. 12). Peacock denied the material allegations of the complaint including Warner's residency, asserted numerous defenses including impossibility, *impracticability*, and frustration of purpose based upon the COVID-19 pandemic (Answer, par. 122-127), and counterclaimed for breach of contract, breach of contract accompanied by a fraudulent act, fraud in the inducement, and negligent misrepresentation.

On July 1, 2020, Stivers filed a reply. Therein, Stivers denied the material allegations of the counterclaims. On July 2, 2020, Stivers filed a notice of dismissal as to Mary Kaye, Griffey, and Brennan.

Also, on July 2, 2020, Stivers filed an amended complaint as a matter of course naming only Warner and Peacock as defendants. Other than deleting the other parties, adding additional jurisdictional allegations, providing additional context for the months of negotiations leading up to the execution of the agreements, attaching the termination letter, and adding a cause of action for breach of contract accompanied by a fraudulent act, the amended complaint was substantially the same as the original complaint.

On July 17, 2020, Peacock filed an answer and counterclaim to the amended complaint. The answer and counterclaim was substantially the same as the original answer and counterclaim.

On July 29, 2020, Stivers filed a reply. The reply was substantially the same as the original reply.

On December 9, 2020, Peacock filed a motion and memorandum for judgment on the pleadings, suggesting that one dealer can not sue another dealer under the Act. On February 5, 2021, Stivers filed a cross-motion for judgment on the pleadings and memorandum in response.

Also on February 5, 2021, Stivers filed a motion to serve a second amended and supplemental complaint. A copy of the proposed complaint was attached thereto and incorporated therein by reference.

On March 23, 2021, a hearing was conducted on a number of motions including the motions for judgment on the pleadings and motion to amend.

On March 24, 2021, the lower court entered a Form 4 denying Stivers' motion to amend. On the same date, in a separate Form 4, the lower court denied both motions for judgment on the pleadings.

On March 25, 2021, the lower court issued a third Form 4 amending the second Form 4 issued on March 24, 2021. Therein, the lower court granted the motion for judgment on the

pleadings by Peacock and directed its counsel to prepare a proposed order.

On April 2, 2021, Stivers filed a motion to alter or amend and memorandum in support. The lower court never ruled on Stivers' motion.

On November 12, 2021, the lower court signed Peacock's proposed order granting the motion for judgment on the pleadings by Peacock and dismissing Stivers' claim under the Act.

Notice of appeal was timely served on December 10, 2021.

STANDARD OF REVIEW

Judgment on the Pleadings

The appellate court applies the same standard of review on a motion for judgment on the pleadings as implemented by the circuit court. *Hambrick v. GMAC Mortg. Corp.*, 370 S.C. 118, 122, 634 S.E.2d 5, 7 (Ct.App. 2006).

"Any party may move for a judgment on the pleadings under Rule 12(c), SCRCP. When considering such motion, the court must regard all properly pleaded factual allegations as admitted." *Falk v. Sadler*, 341 S.C. 281, 286, 533 S.E.2d 350, 353 (Ct. App. 2000). "On review of the motion, the court may not consider matters outside the pleadings." *Id.*

In evaluating a Rule 12(c) motion, the court must consider that "a complaint is sufficient if it states any cause of action or it appears that the plaintiff is entitled to any relief whatsoever. Our courts have held that pleadings in a case should be construed liberally so that substantial justice is done between the parties." *Id.* at 287, 533 S.E.2d at 353 (quoting *Russell v. City of Columbia*, 305 S.C. 86, 89, 406 S.E.2d 338, 339 (1991)). Moreover, "a judgment on the pleadings is considered to be a drastic procedure by our courts." *Id.* (quoting *Russell*, 305 S.C. at 89, 406 S.E.2d at 339). *Pope v. Wilson*, 427 S.C. 377, 831 S.E.2d 442 (2019).

Amended and Supplemental Pleadings

Rule 15(a), SCRCP provides that a party may amend his pleadings once as a matter of course at any time before or within 30 days after a responsive pleading is served. Subsequent to a first amendment, a party may amend his pleading by leave of court or by written consent of the adverse party, and "leave shall be freely given when justice so requires and does not prejudice any other party." Rule 15(a), SCRCP. "This rule strongly favors amendments and the court is encouraged to freely grant leave to amend." *Patton v. Miller*, 420 S.C. 471, 489-90, 804 S.E.2d 252, 261-62 (2017) (quoting *Parker v. Spartanburg Sanitary Sewer Dist.*, 362 S.C. 276, 286, 607 S.E.2d 711, 717 (Ct. App. 2005)).

While the trial court does have the discretion to deny a motion to amend if the party opposing the amendment can show a valid reason for denying the motion, "[t]he burden is ... on the party opposing the motion to show how it is prejudiced." *Stanley v. Kirkpatrick*, 357 S.C. 169, 175, 592 S.E.2d 296, 298 (2004). A court's decision to grant or deny a motion to amend should not be based on the court's perception of the merits of the proposed amendments. *Patton*, 420 S.C. at 490-91, 804 S.E.2d at 262. In rare cases, however, a trial court may deny a motion to amend if the amendment would be futile. See *Jennings v. Jennings*, 389 S.C. 190, 209, 697 S.E.2d 671, 681 (Ct. App. 2010); *rev'd on other grounds*, 401 S.C. 1, 736 S.E.2d 242 (2012).

"If a proposed amendment is not clearly futile, then denial of leave to amend is improper." *Skydive Myrtle Beach, Inc. v. Horry County*, 426 S.C. 175, 183, 826 S.E.2d 585, 589 (2019).

ARGUMENTS

I. THE ACT APPLIES TO ALL ACTIONS ARISING UNDER THE ACT AGAINST DEALERS, INCLUDING ACTIONS BROUGHT BY OTHER DEALERS.

The Act identifies both the parties subject to its provisions and the parties whose rights can be vindicated under its provisions.

EVERYONE ENGAGED IN THE CAR BUSINESS IN S.C. IS SUBJECT TO THE ACT

S.C. Code Ann. § 56-15-20 provides:

> *Any* person who engages directly or indirectly in purposeful contacts within this State in connection with the offering or advertising for sale or has business dealings with respect to a motor vehicle within this State shall be subject to the provisions of this chapter and shall be subject to the jurisdiction of the courts of this State upon service of process in accordance with the provisions of Chapter 9 of Title 15. (emphasis added).

The statute's language is considered the best evidence of legislative intent. *Ventures S.C., LLC v. S.C. Dep't of Revenue*, 378 S.C. 5, 8-9, 661 S.E.2d 339, 341 (2008). The court should give words their plain and ordinary meaning, without resort to subtle or forced construction to limit or expand the statute's operation. *Garrison v. Target Corp.*, Op. No. 28080 (S.C. Sup. Ct. filed January 26, 2022) (quoting *Sonoco Prods. Co. v. S.C. Dep't of Revenue*, 378 S.C. 385, 391, 662 S.E.2d 599, 602 (2008)). When the language of a statute is clear and explicit, a court cannot rewrite the statute and inject matters into it which are not in the legislature's language, and there is no need to resort to statutory interpretation or legislative intent to determine its meaning. *Id.* (quoting *Hodges v. Rainey*, 341 S.C. 79, 87, 533 S.E.2d 578, 582 (2000)). Under the plain meaning rule, it is not the court's place to change the meaning of a clear and unambiguous statute. *Id.*

There is nothing ambiguous about the word "any." The word "any" is defined by *Merriam-Webster* as

> 1: one or some indiscriminately of whatever kind:
> a. one or another taken at random//Ask *any* man you meet.
> b. EVERY — used to indicate one selected without restriction//*Any* child would know that.

Any, Merriam-Webster.com Dictionary (last visited February 4, 2022), https://www.merriam-webster.com/dictionary/any.

"Person" is defined by S.C. Code Ann. § 56-15-10(n) as:

> a natural person, corporation, partnership, trust or other entity,
> and, in case of an entity, it shall include any other entity in which it has a majority interest or effectively controls *as well as the individual officers, directors and other persons in active control of the activities of each such entity.*

(emphasis added).

"Dealer" or "motor vehicle dealer" is defined by S.C. Code Ann. § 56-15-10(h) as "*any **person*** who sells or attempts to effect the sale of any motor vehicle." (emphasis added). "Sale" is defined to include "*the agreement for transfer ... of any motor vehicle ... or of any franchise related thereto*; and *any contract*, or solicitation, looking to a sale, or offer ... in any form, whether spoken or written." S.C. Code Ann. § 56-15-10(l). (emphasis added).

In its amended complaint, Stivers alleged that Warner purported to be a resident of both Florida and South Carolina (Am. Compl., par. 10) and was a person as defined by S.C. Code Ann. § 56-15-10(n). (Amend. Compl., par. 64). Peacock specifically admitted these allegations. (Answer, par. 25 and 57).

Stivers further alleged that Peacock was a limited liability company, organized and existing under the laws of the State of Florida, conducting business, directly or through affiliates, in Jasper, Lexington, and Richland Counties. (Amend. Compl., par. 13). Peacock specifically admitted these allegations, too. (Answer, par. 26).

Stivers also alleged that both Warner and Peacock were dealers as defined by S.C. Code Ann. §56-15-10(h) (Amend. Compl., par. 64) and that Peacock had engaged in the motor vehicle business in South Carolina under various names since March 26, 2007. (Amend. Compl., par. 4). Peacock also admitted these allegations. (Answer, par. 19 and 57).

Finally, in its answer, Peacock asserted that, "at all times relevant to the matters contained in the Amended Complaint and this Answer and Counterclaims, Warner Peacock was acting in his capacity as Manager, CEO and President of Peacock Automotive . . ." (Answer, par. 74).

In addition to the specific admissions of Peacock in its answer, when considering a motion for judgment on the pleadings, the court must regard all properly pleaded factual allegations as admitted. *Falk,* 341 S.C. at 286, 533 S.E.2d at 353.

The Act prohibits motor vehicle dealers and manufacturers from participating in unfair methods of competition and deceptive trade practices. In particular, § 56-15-40(1) of the South Carolina Code (Supp. 2012) declares it unlawful "for *any* ... wholesaler ... or motor vehicle dealer to engage in any action which is arbitrary, in bad faith, or unconscionable and which causes damage to any of the parties or to the public." *Ritter and Associates, Inc. v. Buchanan Volkswagen, Inc.,* 405 S.C. 643 at 653, 748 S.E.2d 801 at 806 (Ct. App. 2013). (emphasis added).

"Section 56-15-20 creates two scenarios when the Dealer's Act will apply: (1) when a 'person ... engages directly or indirectly in purposeful contacts within [South Carolina] in connection with the offering or advertising for sale' of a motor vehicle; and (2) when a person has 'business dealings with respect to a motor vehicle within [South Carolina].'" *Ritter*, 405 S.C. at 654, 748 S.E.2d at 807.

Clearly, Warner, a natural person and an officer or person in active control of the activities of Peacock as Manager, CEO, and President, and Peacock, an entity, are subject to the Act under a plain reading of S.C. Code Ann. § 56-15-20 because both admitted to selling or attempting to effect the sale of motor vehicles. Both engaged directly in purposeful contacts within South Carolina in connection with the offering or advertising for sale of motor vehicles. (Peacock sold all of its assets in South Carolina to AutoNation, a publicly traded dealer, during the pendency of this action.) (Plaintiff's Mem. In Opp. To Defendants' Motion To Compel, Exhibit A).

Not only did they engage in offering or advertising motor vehicles for sale in South Carolina, they also had business dealings with respect to motor vehicles in South Carolina.

Peacock contracted to buy Stivers' entire inventory of new motor vehicles. (Amend. Compl., par. 30).

ANY CITIZEN'S RIGHTS CAN BE VINDICATED UNDER THE ACT

The Dealer's Act provides "[i]n addition to temporary or permanent injunctive relief ..., ***any person*** who shall be injured in his business or property by reason of anything forbidden in [the Dealer's Act] may sue therefor in the court of common pleas and shall recover double the actual damages by him sustained, and the cost of suit, including a reasonable attorney's fee." S.C. Code Ann. § 56-15-110(1) (Supp. 2012). *Id.* (emphasis added).

"A standard principle of statutory construction provides that identical words and phrases within the same statute should normally be given the same meaning." *Powerex Corp. v. Reliant Energy Services, Inc.*, 551 U.S. 224, 232, 127 S.Ct. 2411, 168 L.Ed.2d 112 (2007). Where the same word is used more than once in a statute, it is presumed to have the same meaning throughout unless consistent meaning would lead to an absurd result. See *Busby v. State Farm Mutual Auto Insurance Co.*, 280 S.C. 330, 312 S.E. 2d 716 (Ct. App. 1984).

S.C. Code Ann. § 56-15-30 does not restrict the application of the Act to actions which are arbitrary, in bad faith, or unconscionable in connection with the sale of motor vehicles. Indeed, the definition of the word "sale" in § 56-15-10(l) specifically includes the agreement for transfer of *any franchise*. Here, the negotiations between Stivers and Peacock contemplated the transfer of both a Chevrolet and a Hyundai franchise. (Amend. Compl., par. 20-37).

In the amended complaint, Stivers alleged that it had lawfully engaged in the business of selling and servicing new Chevrolet and Hyundai motor vehicles and used motor vehicles in Richland County, South Carolina since August 4, 2017 (Amend. Compl., par. 2), that it was a domestic corporation, maintaining its principal place of business in the County of Richland, State

of South Carolina (Amend. Compl., par. 8), and that it was a citizen of South Carolina entitled to protection from frauds, impositions, and other abuses by dealers or motor vehicle dealers (Amend. Compl., par. 65).

Peacock specifically admitted that Stivers operated dealerships in Richland County (Answer, par. 17), admitted upon information and belief that Stivers was a domestic corporation, maintaining its principal place of business in Richland County, South Carolina (Answer, par. 23), and that Stivers was a citizen of South Carolina. (Answer, par. 58).

Stivers is a ***person*** as defined by S.C. Code Ann. Section 56-15-10(n). Stivers is also a dealer as defined by S.C. Code Ann. Section 56-15-10(h). "Dealer" or "motor vehicle dealer" is defined as any ***person*** who sells or attempts to effect the sale of any motor vehicle.

Stivers further alleged that by sabotaging the agreements after months of negotiations and inventing pretext in an effort to avoid them, Peacock had engaged in unfair methods of competition and unfair and deceptive acts or practices declared unlawful by S.C. Code Ann. § 56-15-30. Stivers further alleged that Peacock had engaged in malicious action which was arbitrary, in bad faith, or unconscionable, and which had caused and continues to cause it damage. (Amend. Compl., par. 86 and 87).

Thus, Stivers, ***a person*** as defined by S.C. Code Ann. § 56-15-10(n), which has been injured in its business or property by reason of unfair acts or practices, including action which was arbitrary and in bad faith, may sue a dealer and its manager, CEO, and president therefor in the court of common pleas and recover double the actual damages by it sustained, and the cost of suit, including a reasonable attorney's fee.

Peacock argues that S.C. Code Ann. § 56-15-80 "expressly limits" the Act in such a way as to forbid its application in disputes between dealers (Peacock Automotive and Warner Peacock's

Mot. and Mem. J. Pleadings, p. 2). That section, in its entirety, reads,

> The provisions of this chapter shall apply to all written or oral agreements between a manufacturer, wholesaler or distributor with a motor vehicle dealer including, but not limited to, the franchise offering, the franchise agreement, sales of goods, services or advertising, leases or mortgages of real or personal property, promises to pay, security interests, pledges, insurance contracts, advertising contracts, construction or installation contracts, servicing contracts, and all other such agreements in which the manufacturer, wholesaler or distributor has any direct or indirect interest.
>
> S.C. Code Ann. § 56-15-80.

The plain language of § 56-15-80 doesn't "expressly limit" the Act in any conceivable way, and neither S.C. Code Ann. § 56-15-80 nor any other provision of the Act insulates a dealer from liability when the plaintiff also happens to be a dealer. The legislature created no special exceptions or safe harbors for dealers.

Had the legislature intended to provide such an exemption, it could have qualified the term ***"any person"*** in S.C. Code Ann. § 56-15-110 (1) with four simple words, i.e., "other than a dealer." §§ 56-15-10(h)(1)-(5), 56-15-40 (A)(1), 56-15-40 (D)(5), 56-15-40 (D)(13), 56-15-60 (I)(4), 56-15-65 (B)(2), and 56-15-90 (D) demonstrate that the legislature uses clear language when it intends to "expressly limit" the provisions of the Act.

Under the lower court's interpretation of the Act, a behemoth like BOEING (BA) (NYSE), for example, could bring an action against a local Toyota dealer, but an individual with a dealer's license, could not bring an action against a publicly traded dealer like AutoNation (AN) (NYSE). This can not be the law. Any such interpretation deprives a citizen of equal protection under the

law.

THE S.C. COURT OF APPEALS HAS PREVIOUSLY APPLIED THE ACT IN A SCENARIO INVOLVING A CLAIM BY ONE DEALER AGAINST ANOTHER DEALER'S SURETY BOND.

In addition to the plain meaning of the word "any" and the definition of "person" in the Act, this Court has previously applied the Act in a scenario involving a claim by one dealer against another dealer's surety bond. In *Connecticut Indemnity Company v. Burdette Chrysler Dodge Corporation*, 317 S.C. 406, 453 S.E.2d 902 (1994) *overruled on other grounds* in *Mid-State Auto Auction Of Lexington, Inc. v. Altman*, 324 S.C. 65, 476 S.E.2d 690 (1996), this Court addressed S.C. Code Ann. § 56-15-320 within the Act in connection with a claim by Burdette, a franchised dealer, against a surety bond posted by Eagle Auto Sales, a used car dealer.

S.C. Code Ann. § 56-15-320(2) (Supp. 1993) provided:

> Each applicant for licensure as a dealer ... must furnish a surety bond in the penal amount of fifteen thousand dollars ... The bond must be conditioned upon the applicant or licensee complying with the provisions of the statutes applicable to the license and as indemnification for any loss or damage suffered by an owner of a motor vehicle ... by reason of any fraud practiced or fraudulent representation made in connection with the sale or transfer of a motor vehicle by a licensed dealer ... or any loss or damage suffered by reason of the violation by the dealer ... of any of the provisions of this chapter.

Although the amount of the bond has been increased from fifteen thousand dollars to thirty thousand dollars, the substance of the statute has remained relatively unchanged. The current version of the statute also provides:

> *An owner ... who suffers the loss or damage has a right of action against the dealer* ... and against the dealer's ... surety upon the bond and may recover damages as provided in this chapter. (emphasis added).

S.C. Code Ann. §56-15-320(B).

This Court affirmed the lower court's conclusion that Burdette, a dealer, was an "owner of

a motor vehicle" within the meaning of § 56-15-320(2) entitled to recover upon the other dealer's bond. This Court also observed,

> "Had the legislature intended to preclude a motor vehicle dealer from being considered an "owner of a motor vehicle," the legislature would have used a less inclusive term to define those who could recover under a motor vehicle dealer bond."

Burdette, 317 S.C. at 408, 453 S.E.2d at 904.

This Court had an opportunity in *Burdette* to exclude dealers as ***persons*** entitled to vindicate their rights against other dealers under the Act. This Court declined that opportunity both in *Burdette* in 1994 and in *Ritter* in 2013.

There is no reasonable basis for allowing a dealer to recover against a dealer under one section of the Act and precluding a dealer from recovering against a dealer under another section of the same Act.

II. THE LOWER COURT IMPERMISSIBLY CONSIDERED MATTERS OUTSIDE THE PLEADINGS WHEN IT APPLIED THE DRASTIC PROCEDURE OF GRANTING JUDGMENT ON THE PLEADINGS AND DISMISSED STIVERS' CLAIM UNDER THE ACT.

In its opening comments, the lower court stated:

> "I've also read a number of letters submitted by counsel for both parties. I have intentionally not responded to them because as a court of record, you have – one very important tenant of this Court is that it is a court of record and I do not decide motions or any other substantive matters by letter or e-mail or anywhere outside the record. So I have intentionally failed to respond to those, but I have read each of them, *each and every condescending word*, but I'm prepared to go forward.
>
> As I said, I've denied the motion for a continuance. And I'll just tell you, I found it to be a bit *illogical* and to some extent, *disingenuous*. Counsel was ill-prepared, or would not be prepared, had insufficient time to prepare to argue motions today because of some optional filings that were made within the deadline - - or prior to the deadline set by the Court, but did have time to send numerous letters, e-mails and other correspondence to the Court, to my office. Frankly, I think

> if there was a shortage of time, it would have been better spent preparing for the hearings rather than writing letters and e-mails to the Court.

(Tr. p. 2, line 12 – p. 3, line 3)

There was nothing illogical or disingenuous about accepting the lower court's invitation to request a continuance in each of the seven hearing notices emailed to counsel. (Notices dated March 3, 2020). Counsel did prepare to argue the motions. The motion for continuance was filed after Peacock's service of five additional memoranda spanning 92 pages, and the submission of 60 additional pages of documents by email in connection with Peacock's motion to seal.

The lower court continued:

> "Although the senior Mr. Studemeyer didn't think it was possible for me to be ready for motion hearings or possibly adequately to do my job, I suppose . . .

(Tr. p. 4, lines 21 – 24)

After granting Peacock's motion for judgment on the pleadings without considering Stivers' cross-motion, the lower court snapped in response to an explanation that it requested about Stivers' cross-motion:

> "Mr. Studemeyer, I'm happy for you to file a motion for reconsideration once you receive my written order, but the Court decided and counsel shall not continue to argue an issue after the Court has ruled . . .

(Tr. p. 94, lines 3 – 7).

The tone and the substance of the lower court's incendiary comments belie its suggestion that matters outside the record played no part in the court's decision. The unjustified and inappropriate use of caustic terms like *condescending, illogical, and disingenuous* reflected prejudice towards Stivers' counsel.

III. THE LOWER COURT ABUSED ITS DISCRETION BY DENYING STIVERS' MOTION TO SERVE AN AMENDED COMPLAINT.

Peacock had been a moving target from the outset. First, it strung Stivers along for several months before sending the termination notice.

In its answer, Peacock asserted that it was *only exploring the possibility of acquiring Stivers' dealerships*. (Answer, par. 2). In the same answer, Peacock asserted that it *had entered into the agreements* in support of its counterclaims. (Answer, par.147).

After terminating the contracts, Peacock submitted a *non-binding* letter of intent, but failed to execute a new agreement in a timely manner. After missing a hard deadline, Peacock submitted an offer that Stivers declined after hiring a new general manager. (Affidavit of Richard L. McBride, Jr.).

While suggesting to the court that it wanted an early neutral evaluation to explore settlement (Motion For Early Neutral Evaluation), it was secretly negotiating with AutoNation to sell all of its assets in South Carolina. (Plaintiff's Mem. In Opp. To Defendants' Motion To Compel, Exhibit A). Any such agreement surely included a covenant not to compete, prohibiting Peacock, a former Hyundai dealer on Greystone Boulevard, from acquiring another Hyundai dealership in Northeast Columbia.

The motion to amend was filed on February 5, 2021. A number of developments had occurred since the filing of the amended complaint eight (8) months earlier and additional information had been made available through discovery.

Stivers sought to assert the following additional facts in support of its claim under the Act:

1. Peacock was a competitor of Stivers in the Columbia market (par. 8);

2. The negotiations between Stivers and Peacock spanned several months and resulted in confidentiality agreements, letters of intent, and the agreements (par. 10);

3. The agreements allowed Peacock access to Stivers' nonpublic and/or confidential, proprietary information (par. 11);

4. In accordance with Peacock's request, Stivers provided Peacock's CPA firm unfiltered and unfettered 24/7 access to its dealer management system (par. 53);

5. Peacock strung Stivers along for over six (6) months before sabotaging the transactions and breaching the confidentiality provisions (par. 12);

6. Warner was a member and manager of Peacock (par. 18);

7. Two of Peacock's other investors and managers, J. Gregory Humphries ("Humphries") and Brennan, were lawyers who reside in Orlando, Florida (par. 21);

8. Humphries, a partner at Shutts & Bowen, LLP, was tasked with preparing the agreements (par. 35);

9. Humphries never disclosed that he had a financial interest in Peacock as a member, manager, or investor (par. 37);

10. The agreements drafted by Humphries designated Humphries' law firm, Shutts & Bowen, LLP, as escrow agent (par. 38);

11. Peacock failed to disclose that one its members, managers, and investors would be serving as escrow agent over its own money through Humphries' law firm (par. 41);

Stivers also sought to assert additional facts supporting its contention that Peacock sabotaged the transactions by failing to respond to drafts of a proposed assignment of the lease provided by the owner of the premises. (par. 57).

Stivers also sought to provide further context for the business and economic climate at the time of sabotage. In addition to the pandemic itself, Stivers sought to allege that on March 18, 2020, "the big three" manufacturers, FCA US LLC, Ford, and General Motors shut down production. (par. 61). Further, Stivers sought to allege that on March 23, 2020, the Dow Jones Industrial Average plunged to its lowest level since November 8, 2016. (par. 62).

Stivers also sought to allege further unfair acts following receipt of the termination letter including Peacock's request for an open-ended or indefinite suspension of the agreements to string it along even further (par. 85), Peacock's objection to Stivers' intention to extend the lease to mitigate its damages (par. 88 and 89), Peacock's assertion of additional excuses in its supplemental

notice of termination (par. 90), Peacock's feigned interest in renegotiating in June for the purpose of securing further proprietary information (par. 94 – 106) relied upon by Peacock at the hearing, Peacock's feigned interest in renegotiating in July, submission of an offer after a hard deadline had passed and negotiations had ceased (par.107 – 113), and Peacock's further maneuvers to fabricate defenses. (par. 114 – 124).

The lower court never suggested that the proposed second amended and supplemental complaint was submitted in bad faith, that there was undue delay in submitting it, or that Peacock would be prejudiced by granting the motion.

At the conclusion of arguments on the motion to amend, the lower court opined, "I think this amendment is futile." (Tr., p. 21, lines 16 – 17). In its written order, the lower court failed to conduct an analysis as required by *Skydive* to determine whether *any* amendment would be futile.

The lower court's judgment was clouded by its hostility and misunderstanding of the Act. As suggested by Peacock, the lower court focused on a supplemental provision limited to a single paragraph in one section of the Act, to the exclusion of all others. Nothing in S.C. Code Ann. § 56-15-80 suggests that the legislature intended to limit any actions by ***persons*** against dealers under S.C. Code Ann. § 56-15-110(1). In fact, § 56-15-80 contains no words of limitation whatsoever.

Had the lower court conducted an analysis to determine whether *any* amendment would be futile as required by *Skydive*, perhaps it would have recognized that Stivers' proposed amendments would have bolstered its claims that Peacock had engaged in unfair acts and practices declared unlawful by S.C. Code Ann. § 56-15-30.

The lower court abused its discretion by denying Stivers' motion to amend. Justice so required and Peacock would not have been prejudiced by the amendment.

CONCLUSION

Words matter. "Any" doesn't mean "some," "a few," or "almost all;" "any" means *any*. The lower court was bound by the words used by the legislature because those words are the best evidence of legislative intent. The lower court engaged in extensive interpretation of a statute where none was called for and arrived at a conclusion completely contrary to the plain language of the Act.

The lower court harbored resentment about having received correspondence from counsel for both parties, including an incomplete "courtesy binder" from counsel for Peacock. The record reflects that the lower court considered matters outside the pleadings and applied a drastic procedure of granting Peacock judgment on the pleadings.

For both of these reasons, the lower court's order granting judgment on the pleadings must be reversed.

The lower court abused its discretion by denying Stivers' motion to amend. Peacock was in no position to complain as its own conduct necessitated the amendments, and now that Peacock has departed from South Carolina with the proceeds of the sale of its assets to AutoNation, yet additional amendments may be necessary.

For this reason, the order denying Stiver's motion to amend must also be reversed.

Respectfully submitted,

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