

STATE OF MAINE
CUMBERLAND, ss.

BUSINESS AND CONSUMER COURT
Location: Portland
Docket Nos.: BCD-AP-08-01
BCD-AP-08-02 ✓
BCD-AP-10-05
JCN - cum - 2/1/2012

FORD MOTOR CO.,)
)
)
 Petitioner,)
)
 v.)
)
 DARLING'S, ET AL.,)
)
 Respondents)
)

DECISION AND ORDER

Following the entry of a judgment after a jury trial on certain issues in this matter, the parties, in accordance with the Court's directive, filed memoranda in which they identified and addressed the issues that the parties believe remain unresolved. The Court will discuss and resolve the issues.

ISSUES PRESENTED FOR DETERMINATION

Petitioner Ford Motor Co. (Ford) asserts that the following issues remain pending before the Court:

(1) whether the Maine Motor Vehicle Franchise Board (the Board) erred as a matter of law when it concluded that Ford's discontinuation of the Blue Oval Certified 1.25% incentive payment (Blue Oval payments) substantially and adversely affected Respondent Darling's (Darling's) return on investment;

(2) whether the Board erred as a matter of law by failing to make findings on whether Darling's had actual notice of the discontinuation of the Blue Oval payments prior to April 1, 2005;

(3) whether Darling's had actual notice of the discontinuation of the Blue Oval payments prior to April 1, 2005;

(4) whether the Board erred as a matter of law when it failed to find that Darling's waived its rights under 10 M.R.S. § 1174(3)(B) (2011)¹ by failing or declining to file a protest of the discontinuation of the Blue Oval payments prior to April 1, 2005;

(5) whether the Board erred when it failed to determine that Darling's did not incur legally-cognizable damages if Darling's had actual notice of the discontinuance of the Blue Oval payments but failed or declined to file a protest under 10 M.R.S. § 1174(3)(B);

(6) whether the Board erred when it failed to determine that Darling's did not incur any legally-cognizable damages if Ford had good cause for the discontinuation of the Blue Oval payments;

(7) whether the Board erred as a matter of law when if failed to make findings as to whether Ford had good cause for the discontinuation of the Blue Oval payments;

(8) whether Ford had good cause for the discontinuation of the Blue Oval payments; and

(9) whether the Board erred as a matter of law when it failed to find that Darling's failed to mitigate its damages.

Darling's asserts that the following issues remain pending before the Court:

(1) whether the Board erred when it failed to determine that Darling's damages continue to accrue until Ford provides Darling's with the statutorily required advance notice of its decision to terminate the Blue Oval payments and, after doing so, if a timely protest is made, the Board determines that Ford has demonstrated good cause for the modification of the franchise;

¹ Title 10 M.R.S. § 1174 has been amended several times since the relevant time period, but not in any way that affects the Court's analysis.

(2) whether the Board erred when it limited Darling's total damages to \$678,942.96, which represents 1.25% of the manufacturer's suggested retail price of Ford vehicles sold by Darling's from April 1, 2005 through November 30, 2007, despite the fact that Ford has not provided Darling's with the statutorily required certified mail notice informing Darling's of the termination of the Blue Oval payments;

(3) whether the Board erred when it limited Darling's damages to \$214,723.08, which represents 1.25% of the manufacturer's suggested retail price for the Ford vehicles sold by Darling's in the first 270 days following April 1, 2005, the date on which Ford terminated the Blue Oval payments;

(4) whether the Board erred when it reduced Darling's damages of \$214,723.08 by \$68,875 for a total damage award of \$145,848, concluding that Darling's earned \$68,875 during the 270 day period following April 1, 2005, from other promotional programs; and

(5) whether the Board erred when it imposed a single \$10,000 penalty against Ford.

DISCUSSION

As referenced above, Ford maintains that whether the Board erred when it concluded that Ford's termination of the Blue Oval payments substantially and adversely affected Darling's return on investment remains an issue for the Court's consideration. Contrary to Ford's argument, the issue was resolved as the result of the trial and Ford's post-trial motion.

Through this action, Ford directly challenged the Board's determination that Ford's discontinuation of the Blue Oval payments substantially and adversely affected Darling's return on investment. Pursuant to Ford's request, the issue was tried to a jury. At the conclusion of the trial, the jury answered affirmatively the question of whether "the elimination of the 1.25% payment as part of the Blue Oval Certification program substantially and adversely affected

Darling's return on investment." In its post-trial motion, Ford argued that notwithstanding the jury's verdict, the Court should enter judgment as a matter of law in favor of Ford principally because of the way in which the Board interpreted and applied the phrase "return on investment." The Court denied Ford's request, thereby resolving the issue.

Several of the remaining issues identified by Ford are at least in part related to Darling's notice of Ford's intent to terminate the Blue Oval payments. For instance, Ford contends that the Board should have determined that Darling's had actual notice of Ford's decision to terminate, and that because Darling's had actual notice, Darling's did not sustain any legally-cognizable damages. Ford also contends that because Darling's had actual notice of the termination, the Board should have considered whether Ford had good cause to terminate the Blue Oval payments. *See* 10 M.R.S. § 1174(3)(B)(1)-(6) (listing relevant factors in a good cause determination).

The Court has previously addressed the issue of notice. In its Decision and Order dated July 10, 2009, the Court concluded that written certified mail notice was required in order to comply with 10 M.R.S. § 1174(3)(B), and that actual notice was not an adequate substitute. Accordingly, the Board was not required to make findings regarding actual notice and any of the related issues (e.g., filing of protest, good cause, waiver).² To the extent, therefore, that Ford contends that the Board erred in failing to make those findings as they relate to Ford's violation of the statute, Ford's argument is unpersuasive.

Nevertheless, Ford's assertions regarding actual notice, good cause and waiver are arguably significant to the damages issues raised by both Ford and Darling's. Darling's argues that the Board improperly limited the damages to which Darling's was entitled as a consequence

² The statute contemplates the filing of a protest and a good cause assessment only after written certified mail notice is provided. *See* 10 M.R.S. § 1174(3)(B).

of Ford's failure to provide written certified mail notice the termination of the Blue Oval payments. In particular, Darling's maintains that the Board committed error when it limited Darling's damages to a 270 day period, and when it reduced the recoverable damages by the amount received by Darling's through an incentive program introduced by Ford upon termination of the Blue Oval payments. Darling's contends that given Ford's failure to provide Darling's with a written certified mail notice, Darling's is entitled to recover the 1.25% incentive payment on each vehicle sold by Darling's from April 1, 2005 until Ford provides the certified mail notice, which Ford has not yet done.

Although 10 M.R.S. § 1174(3)(B) is silent on the damages to which Darling's is entitled as the result of Ford's failure to provide written certified mail notice, Darling's contends that because the modification of the franchise (i.e., the termination of the Blue Oval payments) is not effective without the certified mail notice, the Blue Oval payments must continue. According to Darling's, because Ford did not continue the payments, the Board must order Ford to pay Darling's the Blue Oval payments for each vehicle sold from April 1, 2005 to the present.

The applicable statute does not, however, mandate a particular damage calculation. In fact, the statute does not provide the Board with much guidance in the event it determines that damages are appropriate.³ The only reference to the amount of a monetary award is 10 M.R.S. § 1171-B(3), which provides for a civil penalty in the event of a violation of the statute. Not insignificantly, the statute does not explicitly require the Board to award Darling's damages in an amount equal to the 1.25% incentive payment on every vehicle sold by Darling's after April 1, 2005. Rather, as mentioned above, the statute is silent on damages. In the absence of a specific

³ Title 10 M.R.S. § 1173(1) (2011) simply allows a "franchisee or motor vehicle dealer who suffers financial loss of money or property, real or personal, or who has otherwise adversely affected as a result of . . . any practice declared unlawful by this chapter may bring an action for damages and equitable relief, including injunctive relief." The statute does not address how those damages should be calculated.

statutory prescription for the calculation of damages, the Board presumably has the discretion to consider a variety of pertinent factors when determining whether and to what extent Darling's is entitled to recover damages in the event of a violation of the statute.

Contrary to Darling's arguments, therefore, the Board was not required to award damages for an indefinite period until Ford sent to Darling's a written certified mail notice. While the Court previously concluded that Ford was required to provide a written certified mail notice in order to avoid liability under the statute, the Court did not conclude, nor did the Court intend to suggest, that in this case the Board must award damages in an amount equal to the Blue Oval payments for each vehicle that Darling's has sold or might sell before Ford provides written certified mail notice to Darling's. Provided that the Board does not act in an arbitrary manner, and provided that the Board's determination is supported by substantial evidence on the record, the Board is afforded the discretion to assess the damages that it finds are related to the violation.

When assessing damages, including the period of time for which damages should be assessed, the Board reasonably could have considered factors such as Ford's justification for terminating the Blue Oval payments, when and how Darling's learned of Ford's intent to terminate the payments, and whether Ford instituted an incentive program to compensate dealers for the loss of the payments. Here, upon review of the record and the Board's written decision, the Court can discern that when it determined the damages to which Darling's was entitled, the Board in fact properly considered Ford's purpose in terminating the payments, Darling's prior actual knowledge of Ford's intent to terminate the payments, and Ford's implementation of an alternative incentive program.

In its decision, however, the Board wrote that "it limited the damages to the 90 day notice period and the 180 day adjudication period contained in § 1174(3)(B)." While under the

circumstances of this case, the Board reasonably could have concluded that Darling's damages should be confined to a nine-month period, the Court cannot determine whether the Board believed it was statutorily required to limit Darling's damages to that time period, or whether in the Board's judgment, the Board determined it was reasonable to award Darling's damages for a nine-month period. If the Board concluded that it must limit the damages to a specific time period as a matter of statutory interpretation, the Board's decision generates a legal issue for the Court. See *FPL Energy Me. Hydro LLC v. Dep't of Env'tl. Prot.*, 2007 ME 97, ¶ 11, 926 A.2d 1197 (outlining standard of review for issues of statutory interpretation). If after considering the evidence of record, the Board concluded that it was appropriate to award damages for a nine-month period, the Board's decision presents a factual determination for review. See *Concerned Citizens to Save Roxbury v. Bd. of Env'tl. Prot.*, 2011 ME 39, ¶ 24, 15 A.3d 1263, 1271 (outlining standard of review for factual determinations). The Court thus cannot, without further clarification from the Board, review the issue. Cf. *In re Me. Motor Rate Bureau*, 357 A.2d 518, 527 (Me. 1976).⁴

The Court will, therefore, remand the matter to the Board for further findings as to the basis of its decision to award Darling's damages for a nine-month period. The Board is not required to take additional evidence on the issue.

⁴ In *Maine Motor Rate Bureau*, the Law Court stated:

In a case reaching us on appeal from the judgment of a court, we may uphold what we find to be a proper result, even if we disagree with the accompanying reasoning, for we may engraft our own rationale upon the decision reached. *Lafferriere v. Paradis*, Me., 293 A.2d 526 (1972). However,

"in dealing with a determination or judgment which an administrative agency alone is authorized to make, [a court] must judge the propriety of such action solely by the grounds invoked by the agency. If those grounds are inadequate or improper, the court is powerless to affirm the administrative action by substituting what it considers to be a more adequate or proper basis. To do so would propel the court into the domain . . . set aside exclusively for the administrative agency." *Securities & Exchange Commission v. Chenery Corporation*, 332 U.S. 194, 196, 67 S. Ct. 1575, 1577, 91 L. Ed. 1995 (1947)[.]

357 A.2d 518, 527 (Me. 1976) (first alteration in original).

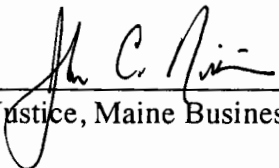
Finally, Darling's argument that the Board should have assessed multiple civil penalties because Ford's failure to provide written certified mail notice constitutes an ongoing violation of 10 M.R.S. § 1174(3)(B) is unconvincing. Title 10 M.R.S. § 1171-B(3) authorizes the imposition of a civil penalty of no less than \$1,000, nor more than \$10,000 for "each violation" of the applicable law. After concluding that Ford did not provide Darling's with proper notice of the termination of the Blue Oval payments, the Board assessed a civil penalty in the amount of \$10,000. Darling's maintains that the Board should have assessed multiple penalties because Ford's failure to provide the notice constitutes multiple violations of 10 M.R.S. § 1174(3)(B). The alleged violation is Ford's modification of the franchise agreement without providing proper notice. Ford's failure to provide the notice constitutes one violation. The Board did not err when it assessed the highest civil penalty allowable under the statute for that single violation.

Conclusion

Based on the foregoing analysis, the Court remands the matter to the Board for further findings in accordance with this Decision and Order.

Pursuant to M.R. Civ. P. 79(a), the Clerk shall incorporate the Decision and Order into the docket by reference.

Dated: 2/1/12



Justice, Maine Business & Consumer Court

Entered on the Docket 2-7-12
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Ford Motor Co. v. Darlings et al – Docket no's AP-08-01, AP-08-02 , AP-10-05

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