COMMONWEALTH OF MASSACHUSETTS
APPEALS COURT

DOCKET NO. 2013-P-0640
SJC-11545

MASSACHUSETTS STATE AUTOMOBILE DEALERS ASSOCIATION, INC., CONNOLLY BUICK CO., INC., D/B/A HERB CONNOLLY CHEVROLET, and JAKE KAPLAN'S INC., D/B/A FISKER NORWOOD,
Plaintiffs/Appellants

v.

TESLA MOTORS MA, INC. and TESLA MOTORS, INC.,
Defendants/Appellees

On Appeal From A Judgment of the Superior Court of Massachusetts, Norfolk County
Civil Action No. 12-01691

BRIEF OF THE DEFENDANTS/APPELLEES, TESLA MOTORS MA, INC. and TESLA MOTORS, INC.

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CERTIFICATE OF SERVICE

I, Joanna Wuehr, hereby certify that the enclosed brief was served upon the Court and Plaintiff's Counsel by Hand Delivery on June 26, 2013 at the following addresses:

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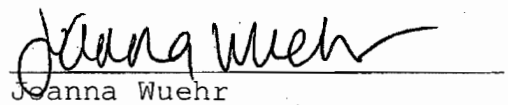

Joanna Wuehr

SUPREME JUDICIAL COURT RULE 1:21
CORPORATE DISCLOSURE STATEMENT ON POSSIBLE JUDICIAL CONFLICT OF INTEREST

Defendant/Appellant Tesla Motors MA, Inc. is a privately held corporation owned by Tesla Motors, Inc., its sole shareholder.

Defendant/Appellant Tesla Motors, Inc. is a publicly traded corporation. It has no parent corporation, and no publicly held corporation owns 10% or more of its stock.

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STATEMENT OF THE ISSUES PRESENTED ON APPEAL

1. Did the Trial Court in its order and decision denying the Plaintiffs' Motion for a Temporary Restraining Order and Preliminary Injunction, denying Plaintiffs' Motion for Reconsideration and granting Defendants' Motion to Dismiss properly follow clear decisional law that establishes motor vehicle dealers lack standing to sue unaffiliated motor vehicle manufacturers and their wholly owned sales entities for perceived violations of G.L. c.93B?

2. Do the principles of res judicata or collateral estoppel bar any relief sought by the MSADA in this appeal because the MSADA failed to appeal from the judgment of dismissal in a second lawsuit it filed in Middlesex Superior Court?

STATEMENT OF THE CASE

This case is about stifling competition. The plaintiffs – the Massachusetts State Automobile Dealers Association, Inc. ("the MSADA"), Connolly Buick Co., Inc. d/b/a Herb Connolly Chevrolet ("Connolly"), and Jake Kaplan's, Inc. d/b/a Fisker Norwood ("Kaplan's")– are asking this Court and the Commonwealth of Massachusetts to institutionalize their roles as state-supported middlemen entitled to

collect thousands of dollars per car arising from inflated vehicle prices at the consumers' expense while eliminating potential competition from new manufacturers that do not buy into their system.

This matter comes before this Court on appeal from the first of two judgments of dismissal in two separate, but nearly identical, actions filed by the MSADA on behalf of its dealer members in Norfolk County Superior Court (docket number NOCV2012-01691, the "first lawsuit") and Middlesex County Superior Court (docket number MICV2012-04922, the "second lawsuit"). In each action, the MSADA alleged that Defendant Tesla Motors, MA, Inc. ("Tesla MA") could not legally operate a new motor vehicle sales facility in Massachusetts because (1) it was wholly owned by its parent corporation, Defendant Tesla Motors, Inc. ("Tesla") and (2) G. L. c. 93B, § 4(c)(10) prohibits motor vehicle manufacturers from owning and operating, directly or indirectly, retail motor vehicle sales businesses in the Commonwealth. In each action, Tesla MA denied the allegations of illegality, demonstrated the applicability of G. L. c.93B, § 4(c)(10) only to motor vehicle dealers affiliated with manufacturers and its inapplicability to Tesla MA, and asserted that

the MSADA and its dealers did not and would not sustain any legally cognizable harm from its sale of Tesla motor vehicles.

The second lawsuit, filed before the first lawsuit was dismissed, proceeded to final judgment. The MSADA did not timely appeal from that judgment.

STATEMENT OF FACTS RELEVANT TO THE ISSUES PRESENTED

I. The First Lawsuit (Filed in Norfolk County)

The MSADA, along with two of its members,[1] initiated the first lawsuit by filing a verified complaint in Norfolk Superior Court and by obtaining a summons and order of notice setting a hearing on a temporary restraining order and preliminary injunction for October 25, 2012. (A4.) The MSADA averred that it "represents the interests of all new car and truck franchised dealerships throughout Massachusetts" and organized its complaint into four counts: Count I, styled as "Violations of Mass. Gen. L. c. 93B" and asserting "harm and damage to the plaintiffs"; Count II, styled as "Declaratory Judgment, Mass. Gen. L. c. 231A, § 57"; Count III, styled as "Civil Conspiracy"; and Count IV, styled as "Injunctive Relief – Mass. R.

[1] Connolly and Kaplan's. The MSADA's President, James G. Boyle, also joined as an individual plaintiff but he is not a party to this appeal.

Civ. P. 65." (A10, ¶ 1; A20, ¶ 63; A20, ¶ 64 - A21, ¶ 67; A21, ¶ 68 - 71; A21, ¶ 72 - A23, ¶ 87.)

The MSADA and its dealer members alleged that "Chapter 93B prohibits, inter alia, a dealership from operating without a license, a manufacturer owning a dealership, and unconscionable conduct" and that "Tesla has engaged in such prohibited conduct." (A18, ¶ 42.) It went further and averred that "Tesla directly or indirectly owns Tesla MA. Massachusetts law prohibits manufacturers from either directly or indirectly owning dealerships," citing to "Mass. Gen. L. C. 93B, § 4 (10)." [sic]. (A18, ¶ 47.) They concluded that "Tesla's direct or indirect ownership of Tesla MA violates Chapter 93B § 4 (10)." [sic] (A19, ¶ 56.) They asserted that "[b]y operating a showroom in violation of law, Tesla and Tesla MA are creating irreparable confusion in the automotive marketplace. The distinctions between manufacturer and dealer will be blurred and Tesla will appear to have special treatment as a manufacturer." (A22, ¶ 79.) And they averred that, unless enjoined, Tesla and Tesla MA would "compete unfairly with the dealers as their model of manufacturer owned dealerships with remote service centers will allow Tesla and Tesla MA

financial savings which would not be available to Massachusetts dealers who must spend considerably to conform to Massachusetts law." (A22, ¶81.)

In support of their application for a preliminary injunction, the plaintiffs argued that:

- "Tesla is trying to create a new automobile distribution system which conflicts with Massachusetts law." (A443.)
- "Therefore, Tesla and Tesla MA are prohibited from getting a dealership license." (A445.)

The plaintiffs presented their arguments and proofs (such as they were) to the Superior Court (Fishman, J.) on October 25, 2012. (A4.) On November 9, 2012, Tesla and Tesla MA filed a motion to dismiss the MSADA's and its dealers' complaint for lack of standing and for failure to state claims on which relief could be granted. (A4-A5.)

The Court entered its order denying the application for a preliminary injunction on November 16, 2012. (A5.) The Court concluded that the MSADA and the individual plaintiff Boyle "lack[ed] standing to seek injunctive relief for violation of c. 93B because they are not manufacturers, distributors, or motor vehicle dealers." (A476.) Relying on explicit SJC decisional authority, the Court likewise found

that the MSADA dealer members, Connolly and Kaplan's, lacked standing because they were not affiliated with Tesla. (A476-477.) The Court quoted from American Honda Motor Co. v. Bernardi's, Inc., 432 Mass. 425, 433 (2000), in pointing out that "existing dealers' interests and the public's interests are frequently at odds. Public interest will favor increased competition in most circumstances, where the existing dealers' interests may be opposite." (A479.) The Court explicitly held that the MSADA and its dealers lacked standing to sue unaffiliated manufacturers like Tesla. (A476.)

On or about November 26, 2012, the MSADA and its dealers moved for reconsideration of the Court's order denying the application for injunctive relief. (A5.) In support of its motion, the MSADA relied in part on a hearsay document purporting to be a "position paper" that it allegedly submitted to the Legislature in conjunction with proposed changes to G. L. c. 93B. (A521.) But the document was neither part of any Legislative file or record nor part of any published legislative history. (A510-515, A557.) The MSADA did not and could not offer any proof that the "position paper" was in fact ever read or considered by any

legislator, leave aside serve as proof of legislative intent. (A557.)

On or about December 10, 2012, the Board of Selectmen for the Town of Natick ("the Board") voted to issue a Class 1 license to Tesla MA permitting it to sell new Tesla-manufactured vehicles from a sales facility located in that town. And, on or about December 17, 2012, the Board issued the Class 1 license.[2]

On December 31, 2012, the court denied the motion for reconsideration and allowed Tesla and Tesla MA's motion to dismiss. (A5-A6.) The Court held that:

> Moreover, this Court is unconvinced that the 2002 amendment to Chapter 93B expanded the purpose of the statute to protect the motor vehicle franchise system. While G.L. c. 93B §4 (c) (10) was amended in 2002, the change in statutory language does not indicate that the Legislature intended to protect a motor vehicle dealer from an unaffiliated manufacturer operating a motor vehicle dealership. Instead, the amendment to §4 (c) (10) retained an assumption of affiliation, and eliminated the complicated 'relevant market area' requirement.

(A560.)

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[2] Tesla MA has been engaged in the sale of new Tesla motor vehicles since that date, without complaint by any consumer and in full compliance with all Massachusetts laws. The Attorney General, despite solicitation by the MSADA, has not issued any complaint to Tesla Motors, Inc. or Tesla Motors MA, Inc. (A584.)

The Court went on to hold:

> In light of the Legislature's decision to keep the 'same line make' language in §4 (c) (10), and in the absence of clear language indicating a change in the purpose of Chapter 93B, this Court declines to read §4 (c) (10) as intending to protect a motor vehicle dealer from an **unaffiliated** manufacturer.
>
> . . . . **Affiliated** motor vehicle dealers may bring suit to enforce §4 (c) (10). In addition, the Massachusetts Attorney General may enforce compliance with Chapter 93B to protect all motor vehicle dealers and the public. G.L. c. 93B, §14.

(A562.)(emphasis added.)

The MSADA and its dealer members filed their notice of appeal from the judgment of dismissal on or about January 22, 2013. (A6.)

II. The Second Lawsuit (Filed in Middlesex County)

On or about December 19, 2012 (2 days after the issuance of the Class 1 license and 12 days before the Court issued its order dismissing the first lawsuit), the MSADA[3] filed a second lawsuit in Middlesex County Superior Court against the Board.[4] The MSADA organized its second complaint in two counts: Count I, a

[3] The MSADA was joined in the lawsuit by one of its members, Brigham-Gill Motorcars, Inc., an automobile dealer operating 817 Worcester Road, Natick, Massachusetts.

[4] A certified copy of the docket report is attached as Addendum A to this brief.

petition in the nature of certiorari pursuant to G.L. c. 249, §4; and Count II, a declaratory judgment action. The gravamen of the MSADA's complaint centered on the averment that the Board had acted illegally in violation of G. L. c. 93B § 4(c)(10) in issuing Tesla MA a Class 1 license to sell new Tesla motor vehicles from its Natick, Massachusetts sales facility. Massachusetts State Auto. Dealers Assoc., Inc. vs. Board of Selectmen of Natick, Middlesex County Superior Court, No. 12-4922, Petition Appealing Decision of Licensing Authority Pursuant to Chapter 249, § 4 and Request for Declaratory Judgment at ¶¶ 12-27 (Dec. 19, 2012)(cited hereinafter as "Pet.").[5] The MSADA and its members claimed to be "aggrieved parties who have and will suffer damage[6] as a result of the issuance of the license in that: the value of their franchises is affected and diminished, they are subject to unfair competition by a manufacturer who is avoiding the franchise system and its protection of

[5] A certified copy of the Petition Appealing Decision of Licensing Authority Pursuant to Chapter 249, § 4 and Request for Declaratory Judgment is attached as Addendum B to this brief.

[6] The alleged "damage" is said to be Tesla MA's competitive advantage as a corporation owned by Tesla, an original equipment manufacturer, over "independent" motor vehicle dealers.

both dealers and consumers, they are forced to spend money in light of a clear violation of law and are further damaged by the confusion in the marketplace which an illegal dealership will cause." (Pet. at ¶ 12.) The MSADA and its dealer members asked for a "judgment declaring that the issuance of the license violates Chapter 93B and that Tesla Motors MA, Inc. is not a proper person for such license." (Pet. at ¶ 27.)

On or about January 7, 2013,[7] Tesla MA moved to intervene and to dismiss the complaint.[8] Over MSADA's objection,[9] the Superior Court allowed Tesla MA's motion to intervene on February 12, 2013, and scheduled a hearing on its motion to dismiss for April 2, 2013.

The Superior Court (Henry, J.) allowed Tesla MA's motion and entered judgment dismissing the case on

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[7] As stated above, the MSADA and two of the other plaintiffs in the Norfolk County action filed their notice of appeal on or about January 22, 2013.

[8] A certified copy of Tesla Motor MA, Inc.'s Motion to Intervene and to Dismiss the Complaint is attached as Addendum C to this brief.

[9] See Massachusetts State Auto. Dealers Assoc., Inc. vs. Board of Selectmen of Natick, Middlesex Superior Court, No. 12-4922, Plaintiffs' Objection to Tesla Motors MA, Inc.'s Motion to Intervene and Motion to Dismiss the Complaint and Request for Oral Argument (January 17, 2013)(cited hereinafter as "Pltfs. Obj." and attached as Addendum D to this brief).

April 12, 2013.[10] In its order and memorandum of decision, the Court made the following findings:

- The plaintiffs did not sustain any "substantial injury or injustice.". . . . "Neither of the plaintiffs has demonstrated any injury which has been caused or is likely to be caused by the issuance of the license to Tesla. While they argue that allowing Tesla to sell vehicles under the proposed plan will destroy the franchise system, they have not pointed to any harm or injury that they have suffered as a result of the Board's granting a license to Tesla."

Massachusetts State Auto. Dealers Assoc., Inc. vs. Board of Selectmen of Natick, Memorandum of Decision and Order on Motion to Dismiss Complaint at p. 3 (April 12, 2013)(cited hereinafter as "Middlesex Decision").

- The plaintiffs failed to establish that Tesla MA was "not a proper party to which a license to sell should have been issued . . . . Furthermore, the issue of whether c. 93B prohibits Tesla from selling motor vehicles from its Natick site has been determined adversely to the plaintiffs in the Norfolk County action. I note Judge Fishman's decisions in that matter and adopt his well-articulated rationale in this case."

(Middlesex Decision. at p. 4.)

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[10] The Memorandum of Decision and Order on Motion to Dismiss Complaint is attached as Addendum E to this brief. The Middlesex County docket records the entry of the judgment of dismissal (attached as Addendum F) as April 16, 2013.

The time for filing an appeal of the judgment of dismissal expired no later than May 17, 2013. Mass R. A. P. 4(a). The Court's findings in that action are final, not susceptible to appeal at this time, and binding on the MSADA and its dealer members.

SUMMARY OF ARGUMENT

The Trial Court's denial of the plaintiffs' Motion for a Temporary Restraining Order and Preliminary Injunction and dismissal of the plaintiffs' complaint was proper and in accordance with established principles of statutory construction and decisional law construing standing under G. L. c. 93B ("the Act"). (Pages 16-38.) The Supreme Judicial Court has held that before a court can decide the merits of a claim, the plaintiffs must establish that they have standing to sue by showing that the alleged act has caused them injury, and that the alleged injury "falls within an area of concern of the statute or regulatory scheme under which the injurious action has occurred." HSBC Bank USA, N.A. v. Matt, 464 Mass. 193, 200 (2013). The Trial Court therefore was required to look beyond the language of the statutory section purportedly conferring standing, G. L. c. 93B, § 15(a), and examine the legislative intent behind c.

93B. (Pages 16-19.)

The legislative history of c. 93B and prior decisional law interpreting the Act unequivocally establish that one of the Legislature's primary purposes in enacting c. 93B was to protect automobile dealers from the oppressive acts of their affiliated manufacturers. The Act was designed to be procompetitive and was not intended to protect dealers from potential competition from unaffiliated manufacturers with whom they had no contractual relationship. (Pages 20-25.)

Contrary to the plaintiffs' assertions, the 2002 amendment of c. 93B did not alter the purpose of c. 93B and transform it into an act protecting dealers from interbrand competition or mandating that all manufacturers adopt the franchise business model. (Pages 25-38.) Prior to 2002, the Supreme Judicial Court held that only dealers of the same line and make of a new prospective dealership had standing to challenge the establishment of a new dealership under c. 93B. The material language of the statutory section conferring standing to sue for violations of c. 93B did not change in any substantial way as a result of the 2002 amendments to the Act;

consequently, the affiliation requirement recognized by the Supreme Judicial Court prior to 2002 was not removed by way of the 2002 amendments. (Pages 25-27.) Moreover, following the amendment of c. 93B in 2002 and again in 2012, the Legislature's intent to preserve the affiliation requirement is manifested in its retention of the phrase "same line make" in the subsection addressing intrabrand competition between a manufacturer and a dealer (now G. L. c. 93B, § 4(c)(10), formerly § 4(3)(k)) and its references to dealership agreements in the later-added definition of "line make." (Pages 28-34.) Finally, the Legislature's rejection of language in a Senate bill that would have prevented Tesla from owning a dealership in Massachusetts belies the plaintiffs' argument that the Legislature adopted the MSADA's position paper calling for an amendment to prevent manufacturers with no existing independent dealers in Massachusetts from owning a dealership and selling vehicles directly to consumers. (Pages 35-38.) The Trial Court therefore properly concluded that the plaintiffs lack standing to sue Tesla and Tesla MA under G. L. c. 93B because their alleged injuries were not within the area of concern of the Act.

Additionally, the plaintiffs lack standing to bring a claim under G. L. c. 93B because they failed to demonstrate that the defendants' actions caused or are substantially likely to cause them injury. The injuries alleged by the plaintiffs are speculative at best and solely derived from business competition. The Supreme Judicial Court, however, has held that injuries derived from business competition are not sufficient to confer standing. Accordingly, the plaintiffs have not sufficiently pleaded harm flowing from the defendants' alleged violation of c. 93B. (Pages 38-41.)

Because the MSADA is not itself a motor vehicle dealer, manufacturer, or distributor and its members lack standing to bring suit, the MSADA also lacks standing to sue for perceived violations of c. 93B. Hence, even if it did not explicitly apply the test for associational standing, the Trial Court properly concluded that the MSADA did not have standing. (Page 41-42.)

Lastly, even if the plaintiffs were found to have standing under G. L. c. 93B, their claims are now barred because the MSADA failed timely to file an appeal of judgment entered against it in the related

Middlesex County action while the case at bar was pending. In that decision, the Middlesex County Superior Court found that c. 93B does not prohibit Tesla from selling motor vehicles at its Natick dealership and that the MSADA failed to demonstrate any injury caused or likely to be caused by Tesla's ownership and operation of a dealership. Under the doctrines of claim preclusion and issue preclusion, the plaintiffs are bound by the judgment of the Middlesex County Superior Court. (Pages 42-47.)

For these reasons, this Court should affirm the Trial Court's decisions denying the Plaintiffs' Motion for a Temporary Restraining Order and Preliminary Injunction, denying Plaintiffs' Motion for Reconsideration, and granting Defendants' Motion to Dismiss.

ARGUMENT

I. THE TRIAL COURT PROPERLY CONCLUDED THAT CONNOLLY CHEVROLET AND KAPLAN'S DID NOT HAVE STANDING UNDER G. L. C. 93B, § 15(A) TO CONTEST TESLA'S OWNERSHIP OF A TESLA DEALERSHIP IN MASSACHUSETTS BECAUSE THEIR ALLEGED INJURIES WERE NOT WITHIN THE AREA OF CONCERN OF THE STATUTE

A. The Trial Court Properly Examined the "Area of Concern" of G. L. Chapter 93B to Determine Whether the Appellants Had Standing

In their argument concerning the rules of

statutory construction generally applicable to unambiguous statutes, the plaintiffs inexplicably ignore the body of law specific to standing. As a threshold matter, a plaintiff must establish that it has standing before the courts can consider the merits of its claim. HSBC Bank USA, N.A. v. Matt, 464 Mass. 193, 199 (2013). To establish standing, a plaintiff must show that the alleged act caused the plaintiff injury, and that the alleged injury falls "within the area of concern of the statute or regulatory scheme under which the injurious action has occurred." HSBC Bank USA, N.A., 464 Mass. at 200 (citations omitted); see also Massachusetts Ass'n of Independent Ins. Agents & Brokers, Inc. v. Commissioner of Ins., 373 Mass. 290, 293 (1977) ("The plaintiff must . . . be one who, by virtue of a legally cognizable injury, is a person entitled to initiate judicial resolution of the controversy.").

A court necessarily must look beyond the language of the statutory provision conferring standing (even "unambiguous" language) and examine the language and purposes of the entire statute at issue to determine whether the plaintiff is one whom the Legislature intended to protect from the type of injury alleged.

See Beard Motors, Inc. v. Toyota Motor Distrib., Inc., 395 Mass. 428, 431-432 (1985); see also HSBC Bank USA, N.A., 464 Mass. at 200. "This is true even when a literal reading of the statute, without regard to the Legislature's purpose in enacting it, would appear to provide a broader grant of standing." Beard Motors, Inc., 395 Mass. at 431. See, e.g., Gallo v. Division of Water Pollution Control, 374 Mass. 278, 283-284 (1978) (finding Legislature did not intend for statute authorizing action by "any . . . . person interested," to authorize suit by private landowners against parties to municipal contracts that were allegedly breached); Circle Lounge & Grille, Inc. v. Board of Appeal of Boston, 324 Mass. 427, 429-430 (1949) (holding that despite statute authorizing action by "any person aggrieved," plaintiff was not a person aggrieved by zoning variance within the meaning of the statute); see also Bennett v. Spear, 520 U.S. 154, 164-165 (1997)(distinguishing "private attorneys general" provision conferring standing from "more restrictive formulations, such as '[any person] having an interest which is or may be adversely affected,'" to which the zone-of-interests test applies). Indeed, with respect to the statute at issue here, the Supreme

Judicial Court has stated in unequivocal terms that "[t]he scope of the grant of authority to bring an action for violation of G.L. c. 93B, § [15(a)] must be determined with reference to the content and subject matter of the statute." Beard Motors, Inc., 395 Mass. at 431.[11] Hence, the Trial Court did not err in looking beyond the language of § 15(a) and examining the legislative intent behind G. L. c. 93B. Under Beard Motors, Inc. and the long-standing decisional law of the Commonwealth's appellate courts, the Trial Court had a mandate to do so.[12]

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[11] The plaintiff in Beard Motors, Inc. sought relief pursuant to G. L. c. 93B, § 12A. Pursuant to St. 2002, c. 222, § 3, the § 12A heading was removed from the chapter, its contents amended slightly and transplanted to the current version of § 15. The basis for relief under both sections is identical. Standing for "dealers" under § 15(a) was neither expanded nor diminished upon the repeal of § 12A.

[12] The plaintiffs place undue weight on dicta from Beard Motors, Inc. concerning an "anomalous situation" that would have resulted had the Court accepted the dealer's interpretation of G. L. c. 93B. See Beard Motors, Inc., 395 Mass. at 433. The "anomalous situation" was not the basis for the Court's consideration of the Legislature's intent in enacting the Act; accordingly, any improbability of a similar absurd result does not justify ignoring the Supreme Judicial Court's directive to look beyond the language of the statutory provision conferring standing.

B. The Trial Court Properly Concluded that the Purpose of G. L. Chapter 93B Was to Curb the Potentially Oppressive Power of Automobile Manufacturers in Relation to Affiliated Dealers

The Trial Court correctly concluded that one of the primary purposes of G. L. c. 93B ("the Act") is the protection of dealers from affiliated manufacturers and distributors.[13] (A561.) The legislative history and decisional law interpreting the Act could not be clearer on this point, which the plaintiffs cannot, and indeed, do not, dispute. Appellants' Brief at 31.

In 1968, then Representative Raymond F. Bourke of Lowell "charge[d] that manufacturers hold an unfair bargaining position over local dealers because of their concentrated economic power, particularly in respect to the cancellation of dealers' franchises" and requested the Massachusetts Legislative Research Council to study the regulation of the automotive

[13] G. L. c. 93B also protects the public. American Honda Motor Co., Inc. v. Bernardi's, Inc., 432 Mass. 425, 433 (2000). The Trial Court found that the plaintiffs did not have standing to seek a preliminary injunction arising from Chapter 93B's purpose to protect the public. (A478-A479.) The plaintiffs failed to argue in their brief that the legislative purpose to protect the public confers upon unaffiliated motor vehicle dealer standing to sue any manufacturer and therefore have waived any such claim. See Mass. R. A. P. 16(a)(4).

industry. 1968 Senate Doc. No. 983 at 7. In its report, the Legislative Research Council explained the history of the automotive industry's sales and distribution model. 1968 Senate Doc. No. 983 at 7. In the early 1900s, numerous small manufacturers sold relatively few vehicles through "manufacturers' agents who handled cars on consignment and whose investment often included no more than the agent's personal car which he used as a demonstrator." 1968 Senate Doc. No. 983 at 8. As the industry consolidated and the number of units manufactured soared into the millions, "the manufacturer's need for cash for plant expansion and development brought about the present practice . . . ." 1968 Senate Doc. No. 983 at 8. The franchise dealer system, established through the use of a unilateral franchise contract that reflected the disparity of the parties and imbalance of power to the manufacturers' advantage, became the means by which large, remote manufacturers could build nationwide distribution systems on the efforts and financial investments of individual entrepreneurs. See 1968 Senate Doc. No. 983 at 9. Because of the imbalance of the dealer's and manufacturer's positions under the standard franchise agreement, the Legislature was

concerned with "coercion and intimidation on the part of the manufacturer[,]" particularly through the threat of invoking the contract's cancellation clause. See 1968 Senate Doc. No. 983 at 10, 12. Manufacturers and distributors had "virtually complete control over their dealers as a result of their awesome power to terminate or fail to renew a franchise." Brown, A Bill Of Rights For Auto Dealers, 12 B.C. Indus. & Com. L. Rev. 757, 801 (1971) (hereinafter cited as "Brown, supra, at ___"). Dealers claimed that legislation was needed "to protect their investment" so that "bankruptcies and loss of employment would be curtailed." 1968 Senate Doc. No. 983 at 13.

General Laws c. 93B was enacted in 1970[14] "in recognition of the potentially oppressive power of automobile manufacturers and distributors in relation to their affiliated dealers." Beard Motors, Inc., 395 Mass. at 432 (emphasis added). The Act was the Legislature's "response to long-recognized problems including that of the coercion of dealers by automotive manufacturers through such means as the cutting off or purposeful manipulation of the supply of cars." Tober Foreign Motors, Inc. v. Reiter

[14] St. 1970, c. 814.

Oldsmobile, Inc., 376 Mass. 313, 320 (1978). The new Act was said to prohibit the "termination of a franchise before the franchisee . . . had a reasonable opportunity to recoup his investment with a reasonable profit." Brown, supra, at 795.

Determining the scope of standing conferred by G. L. c. 93B, § 15(a) also requires consideration of which interests the Act was not intended to protect. The Act "was not intended to provide all dealers with a statutory right to seek protection from potential competition." American Honda Co. v. Bernardi's, Inc., 432 Mass. 425, 436 (2000). Rather, the Act was "designed to protect franchisees from having to succumb to dictation by manufacturers pressing their own interests in disregard of the health of other elements in the trade and perhaps ultimately of the welfare of the public." Tober Foreign Motors, Inc., 376 Mass. at 322. Accordingly, the Act's statutory prohibition against manufacturers owning motor vehicle dealerships "of the same line make" as any of their vehicles[15] in the Commonwealth should not be read as an endorsement of the franchise model, nor did the

[15] Prior to 2002, this prohibition was found in G. L. c. 93B, § 4(3)(k). Following the 2002 amendment of the Act, the section was designated § 4(c)(10).

Legislature intend to mandate a single type of motor vehicle sales and distribution system for all manufacturers for all time, regardless of how costly and consumer unfriendly that system might be. In stark contrast to the plaintiffs' attempted reliance on c. 93B to keep Tesla out of Massachusetts, the Act was intended to foster, not stifle competition. As the Supreme Judicial Court noted in Tober Foreign Motors, Inc., G. L. c. 93B contains "provisions evidently directed to the time-honored State purpose of preserving a sound competitive market free of the domination of oligopolists at the top of a vertical chain of manufacture, distribution, and sale. . . . [I]f the statute works sometimes to protect established dealers from new competition [from new dealerships of the same line make as the established dealership], this may not be seen as the object of the legislation, but as an incident in the pursuit of an ultimately procompetitive goal." Tober Foreign Motors, Inc., 376 Mass. at 322-323. Thus, the legislative history of the Act and decisional law interpreting it firmly establish that G. L. c. 93B was not intended to insulate established motor vehicle dealers against competition from new unaffiliated manufacturers

operating their own state-of-the-art galleries and dealerships.

C. The Trial Court Properly Concluded that the Purpose of G. L. Chapter 93B Was Not Altered By Amendments Enacted in 2002

i. The 2002 Amendments to G. L. c. 93B Did Not Materially Change the Statutory Section Creating Standing to Sue

The Legislature included in G. L. c. 93B a section creating private rights of action to supplement the Attorney General's enforcement of the Act on behalf of the public at large. Prior to 2002, the section was designated § 12A. In 2002, the Act was amended, and the section creating private rights of action was designated § 15(a). Compare St. 1977, c. 717, § 5 and St. 1985, c. 689, § 2 with St. 2002, c. 222, § 3 ("the 2002 Amendments").[16]

Before the 2002 amendments, § 12A provided in pertinent part:

> **Any** franchisee or **motor vehicle dealer who suffers any loss of money or property**, real or personal, **as a result of the use or employment by a manufacturer**, wholesaler, distributor, distributor branch or division, factory branch or division, or any agent, servant or employee thereof, **of an unfair method of competition or an**

[16] The Act was amended again in 2012 through St. 2012, c. 152, which went into effect on October 16, 2012, the same date on which the plaintiffs filed their Complaint in this action. This subsequent amendment is significant in that it added to G. L. c. 93B, § 1 a definition for the phrase "line make."

> **unfair or deceptive act or practice** declared unlawful by sections three through eleven, inclusive, or by any rule or regulation issued under paragraph (c) of section three **may bring an action in the superior court for damages and equitable relief, including injunctive relief**. A motor vehicle dealer, if it has not suffered any loss of money or property, may obtain equitable relief if it can be shown that the unfair method of competition, or unfair act or practice may have the effect of causing such loss of money or property.

St. 1977, c. 717, § 5 (emphasis added). Following the 2002 Amendments, § 15(a) provided:

> **Any** manufacturer, distributor or **motor vehicle dealer who suffers any loss of money or property**, real or personal, **as a result of the use or employment by a manufacturer**, distributor, or motor vehicle dealer **of an unfair method of competition or an unfair or deceptive act or practice** as defined by this chapter, any act prohibited or declared unlawful by this chapter, or any rule or regulation adopted under this chapter, **may bring an action in the superior court**, or if applicable in the federal district court for the district of Massachusetts, **for damages and equitable relief, including injunctive relief**, as described in the following sentence: The party filing suit may obtain equitable relief if it can be demonstrated: (1) that the unfair method of competition, deceptive act or practice or violation if not enjoined would have a substantial likelihood of causing loss of money or property or of causing damage to the public, and (2) that all other customary standards governing the issuance of injunctive relief in accordance with Massachusetts or Federal Rules of Civil Procedure, as applicable, are met.

G. L. c. 93B, § 15(a), as amended by St. 2002, c. 222, § 3 (emphasis added).

Notably, neither section explicitly referred to

"affiliated" dealers. Yet, it is clear that prior to the 2002 Amendments, only dealers of the same line and make as a prospective new dealership were held to have standing to challenge the establishment of a new dealership under G. L. c. 93B. American Honda Motor Co., 432 Mass. at 436; Beard Motor, Inc., 395 Mass. at 433. The material language of the section creating a private right of action did not change in any substantial way after the 2002 amendments. Consequently, decisional law interpreting a motor vehicle dealer's standing under the former § 12A remains good law and applies equally to actions brought under § 15(a). In order to have standing to sue a manufacturer, the dealer must allege injuries within the area of legislative concern of the Act, and therefore must be affiliated with the manufacturer it wishes to sue. See, e.g., Beard Motors, Inc., 395 Mass. at 433. The Trial Court correctly concluded that the unaffiliated dealer plaintiffs lack standing to sue Tesla or Tesla MA, and rightfully denied their application for injunctive relief and dismissed their Complaint.

ii. The 2002 Amendments to G. L. c. 93B Did Not Remove the Affiliation Requirement from the Statutory Section Addressing Intrabrand Competition Between a Manufacturer and a Dealer Selling Vehicles of the Same Line Make

As discussed supra in Section I(B), from its inception, G. L. c. 93B's essential purpose was to protect independent franchise motor vehicle dealers from the oppressive conduct of the manufacturers and distributors they were affiliated with. Intrabrand competition for consumer sales between dealers on the one hand and manufacturers of vehicles on the other hand was addressed in part by the prohibition against a manufacturer owning or operating a dealership of the same line make as its affiliated dealer. Prior to 2002, the section was designated 4(3)(k); after the 2002 Amendments, the section was designated 4(c)(10). Compare St. 1977, c. 717, § 3 and St. 1985, c. 689, § 2 with St. 2002, c. 222, § 3.

The Supreme Judicial Court's decision in American Honda Motor Co. sets forth the proper methods and means for construing G. L. c. 93B, § 4(c)(10):

> When interpreting a statute, we are to construe the words therein 'according to their natural import in common and approved usage.' Commonwealth v. Welosky, 276 Mass. 398, 401, 177 N.E. 656 (1931), cert. denied, 284 U.S. 684, 52 S.Ct. 201, 76 L.Ed. 578 (1932). 'While courts

> should look to dictionary definitions and accepted meanings in other legal contexts, ... their interpretations must remain faithful to the purpose and construction of the statute as a whole' (citations omitted). Heritage Jeep-Eagle, Inc. v. Chrysler Corp., 39 Mass. App. Ct. 254, 258, 655 N.E.2d 140 (1995).

432 Mass. at 428. Viewing the purpose and construction of G. L. c. 93B as a whole makes clear that § 4(c)(10), like the rest of the Act, applies to manufacturers and their dealings with affiliated dealers.

Section 4(3)(k) provided, in relevant part, that it was deemed to be an unfair method of competition and unfair and deceptive act or practice for a manufacturer:

> to own and operate, either directly or indirectly through any subsidiary, parent or affiliated company or firm, a motor vehicle dealership **within the relevant market area[17] of a motor vehicle dealer of the same line make**; . . . .

St. 1977, c. 717, § 3 (emphasis added).

Section 4(c)(10) now provides, in relevant part, that it is deemed to be an unfair method of competition and unfair and deceptive act or practice for a manufacturer:

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[17] Section 4(3)(k) then defined "relevant market area" using a complex formula that this Court has said to "perplex even the most percipient logician." Ricky Smith Pontiac, Inc. v. Subaru of New England, Inc., 14 Mass. App. Ct. 396, 412 (1982).

> To own or operate, directly or indirectly through any subsidiary, parent company or firm, a motor vehicle dealership **located in the Commonwealth of the same line make** as any of the vehicles manufactured, assembled or distributed by the manufacturer or distributor . . . .

G. L. c. 93B, § 4(c)(10)(emphasis added).

The only difference between the pre-2002 and post-2002 section relating to a prohibition on manufacturers owning or operating a dealership of the same line make is the geographic reach. Before 2002, the prohibition was defined by the line make and the Relevant Market Area; after 2002 the prohibition was defined by the line make and the boundaries of the Commonwealth. The change in boundary lines has no impact on the standing of unaffiliated dealers like the plaintiffs;[18] however, the Legislature's decision to retain the phrase "same line make" is significant because by doing so the Legislature purposefully included in § 4(c)(10) language suggesting an affiliation requirement.[19] The canons of statutory

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[18] The change likely was enacted either because the courts encountered practical difficulty utilizing the complicated Relevant Market Area formula, or because the Act prior to amendment left some dealers vulnerable to competition from or oppression by affiliated manufacturers. See American Honda Motor Co., 432 Mass. at 426, 428-429.

[19] Of course, the phrase "same line make" is not the sole or even predominant source of the affiliation

construction prohibit the disregard of statutory terms. See International Org. of Masters, Mates & Pilots v. Woods Hole Martha's Vineyard & Nantucket S.S. Auth., 392 Mass. 811, 813 (1984) ("Wherever possible, we give meaning to each word in the legislation; no word in a statute should be considered superfluous"). The only rational interpretation of §4(c)(10) that gives the phrase "same line make" meaning ties the term "line make" to existing affiliated dealers. Otherwise, if the term "line make" as used in § 4(c)(10) means any and all models manufactured by a manufacturer, it is surplusage. When the Legislature passed the 2002 Amendments, it surely was aware that the Supreme Judicial Court had, time and again, held that only affiliated dealers have standing to sue manufacturers for violations of c. 93B. See Commonwealth v. Colturi, 448 Mass. 809, 812 (2007). If the Legislature had not intended to retain a requirement of affiliation, it would have omitted the phrase "same line make" and written § 4(c)(10) so as to prohibit a manufacturer from owning or operating

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requirement. Rather, the affiliation requirement is found in the body of statutory history (including Senate reports and case law) confirming the purpose of Chapter 93B – to protect dealers and distributors from oppression by affiliated manufacturers.

"directly or indirectly through any subsidiary a motor vehicle dealership . . . located in the Commonwealth."

Moreover, the Legislature's subsequent amendment to G. L. c. 93B, § 1 defining "line make" manifests an intent to limit the statutory prohibition found in § 4(c)(10) to manufacturers with existing affiliated dealers in the Commonwealth. "Line make" is defined under the Act as "a collection of models, series or groups of motor vehicles manufactured by or for a particular manufacturer . . . that is offered for sale, lease or distribution under a common brand name or mark. . . ." G. L. c. 93B, § 1, as amended by St. 2012, c. 152. The definition specifically references a "dealership agreement" in the exceptions:

- multiple brands may constitute a single line make "but only when included in **a common dealership agreement** and the manufacturer . . . offers such vehicles. . . **to its authorized dealers**;"
- different types of vehicles with a common brand or those intended for different types of use may constitute different line makes if "the manufacturer has expressly defined or covered the line makes of vehicles as separate and distinct line makes **in the applicable dealer agreements**" or "the manufacturer has consistently characterized [them] as constituting separate and distinct line makes **to its dealer networks**."

G. L. c. 93B, § 1 (emphasis added). The patent retention of the affiliation requirement compels the conclusion that the 2002 Amendments did not alter the purpose of c. 93B or expand the scope of standing under § 15(a).

The absurdity of the plaintiffs' contention is highlighted by a close reading of the Act as a whole. If the interpretation advanced by the plaintiffs were to be adopted, § 4(c)(10) would stand as the lone subsection of § 4 addressing interbrand competition. Indeed, it would be the lone provision of the entire Act addressing interbrand competition. Section 4 sets rules for conduct between manufacturers or distributors and dealers (and in one subsection between dealers and consumers). All of the provisions of § 4 apply to affiliated dealers and make no sense when an attempt is made to stretch them to apply to a remote manufacturer that is a stranger to an unaffiliated dealer. With the exception of a few provisions designed to protect consumers, provide the right of free association, or proscribe limitations on actions arising out of c. 93B, the entire Act relates to the motor vehicle franchise system and deals explicitly with the duties, obligations, rights, and

remedies between manufacturers, distributors, and dealers as contracting parties.[20] Even the title of the Act – "Regulation of Business Practices Between Motor Vehicle Manufacturers, Distributors, and Dealers" (emphasis added)–suggests the intent to regulate conduct between affiliated parties. There simply is no logical basis for concluding that the Legislature's removal of the Relevant Market Area restriction from the prohibition on manufacturers owning or operating a dealership of the same line make altered the purpose of the Act and transformed the Act into a mandate that all motor vehicle manufacturers adopt the franchise system model.

[20] General Laws Chapter 93B, section 5 addresses the renewal, termination, or transfer rights of a franchise. Section 6 concerns the granting and relocation of franchises. Section 8 addresses the indemnification obligations between manufacturers or distributors and their affiliated dealers. Section 10 concerns the transfer of ownership interests in a franchise dealership. Section 11 applies these provisions to all dealings between a manufacturer or distributor and its affiliated dealer. Section 12 pertains to the renewal of franchise agreements. Section 16 relates to arbitration and mediation provisions in franchise agreements. Section 18 grants distributors the same rights and remedies against manufacturers as those given to dealers.

iii. The Legislative History Relative to the 2002 Amendment Demonstrates That the Legislature Rejected Language That Would Have Prevented Manufacturers Without Existing Affiliated Dealerships From Owning New Dealerships or Selling Directly to Consumers

An examination of the legislative history pertinent to the 2002 Amendments to G. L. c. 93B exposes a fatal flaw in the plaintiffs' unsupported argument that the Legislature adopted changes the MSADA recommended in a 2001 position paper it submitted to members of the legislative committee considering an amendment to the Act. (A512-A515.)

The 2002 Amendments originated as House bill 4997 and incorporated language from Senate bill 2412.[21] See H.R. 4997, 182d Gen. Ct. (Mass. 2002); S. 2412, 182d Gen. Ct. (Mass. 2002). House bill 4997, itself, was based on an earlier version of the same amendment, introduced in 2001 as Senate bill 87 (the bill the MSADA's position paper addressed). S. 87, 182d Gen. Ct. (Mass. 2001).

Section 4(c)(10)in Senate bill 87 contained drastically different language from the language actually enacted in the 2002 Amendments. Senate bill

[21] The changes incorporated from Senate bill 2412 are immaterial to the issue before this Court.

87's proposed section 4(c)(10) declared it to be a violation of the Act for a manufacturer:

> (10) to own or operate, either directly or indirectly through any subsidiary or parent company or firm, a motor vehicle dealership located in the commonwealth of the same line make as any of the vehicles manufactured, assembled or distributed by the manufacturer or distributor. **It shall also be a violation of subsection (a) of section 3 for a manufacturer, but not for a distributor, either directly or indirectly through any subsidiary or parent company or firm: (a) to obtain a class 1 or class 2 license issued pursuant to the provisions of section 58 or 59 of chapter 140; or (b) to own or operate a business within the commonwealth for the purpose of selling motor vehicle parts or service directly to customers; or (c) to enter into a contract with a business or third-party located in the commonwealth, which does not have and cannot obtain a class 1 license issued pursuant to the provisions of section 58 of chapter 140, giving said business or third-party the right to provide warranty service to motor vehicles it manufactures, assembles or distributes** . . . .

S. 87, 182d Gen. Ct. (Mass. 2001)(emphasis added).

The plaintiffs suggest that the Legislature left the phrase "same line make" in the enacted § 4(c)(10) to protect the one, single distributor in the entire Commonwealth whom it believes has "at least an indirect" interest in independent unaffiliated dealerships. However, the earlier, rejected version of the amendment clearly prohibited manufacturers from owning any dealership or from selling directly to consumers, and would have permitted that one outlier

distributor to continue owning unaffiliated dealerships. Furthermore, the highlighted language reflects the MSADA's expectation that Senate bill 87 would:

> explicitly prevent factory ownership or operation of new or used vehicle stores. It would prohibit the direct sale of new cars to consumers by the factories. Manufacturers would also be prevented from owning dealerships through "straws" that are not in legitimate dealer development programs. And the manufacturers could not own service and parts outlets or contract with third parties to provide warranty service.

(A513.) Senate bill 87 shows that the Legislature knew exactly what language to use to force Tesla to contract with an independent dealer in order to do business in Massachusetts. And the Legislature rejected it. "Where the Legislature has deleted such language, apparently purposefully, the current version of the statute cannot be interpreted to include the rejected requirement. Reading in language that the Legislature chose to remove, as would be required here, violates basic principles of statutory construction and impermissibly interferes with the legislative function." Kenniston v. Department of Youth Services, 453 Mass. 179, 185 (2009).

The exclusion of the language from Senate bill 87 demonstrates that the 2002 Amendments were not meant

to broaden the Act's scope to protect the franchise system. Rather, the 2002 Amendments only make a limited prohibition against manufacturers who own "a motor vehicle dealership located in the Commonwealth **of the same line make.**" The legislative history is clear that manufacturers without existing affiliated dealerships were excluded from this requirement. Hence, the Trial Court properly concluded that the plaintiffs lack standing under G.L. c. 93B.

II. THE TRIAL COURT'S DENIAL OF THE PLAINTIFFS' MOTION FOR A TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION AND DISMISSAL OF THE PLAINTIFFS' COMPLAINT WAS PROPER BECAUSE THE PLAINTIFFS DID NOT SUFFICIENTLY ALLEGE HARM RESULTING FROM THE DEFENDANTS' ACTIONS

The plaintiffs' claims were also properly dismissed because the plaintiffs failed to sufficiently show harm suffered as a result of the defendants' alleged violations of G. L. c. 93B. In addition to demonstrating that they fall "within the area of concern of the statute" and therefore are the intended beneficiaries of the right to a cause of action, "to have standing in any capacity, [the plaintiffs] must show that the challenged action has caused the litigant injury." Slama v. Attorney Gen., 384 Mass. 620, 624 (1981). This is true even where

the plaintiff seeks injunctive relief; indeed, G. L. c. 93B, § 15(a) requires that a party seeking injunctive relief demonstrate "a substantial likelihood of causing loss of money or property or of causing damage to the public." Injuries that are merely "speculative, remote, and indirect are insufficient to confer standing." Ginther v. Commissioner of Ins., 427 Mass. 319, 323 (1998), citing Burlington v. Bedford, 417 Mass. 161, 164 (1994). Rather, in order to prevail under G. L. c. 93B, the plaintiff must show both a violation of the statute and harm resulting from that violation: "The latter showing requires competent proof that the plaintiff sustained a loss of money or property attributable to the manufacturer's unlawful ownership and operation of the competing dealership." Cadillac/Oldsmobile/Nissan Center, Inc. v. General Motors Corp., 391 F.3d 304, 312 (1st Cir. 2004). The First Circuit added:

> In our view, the language of [the Act] makes pellucid that a plaintiff seeking damages under chapter 93B must show more than that a defendant violated some substantive provision of the statute. Rather, the plaintiff must show both that a violation occurred and that the violation harmed the plaintiff. A necessary corollary of this injury requirement is that a non-injurious violation may occur and, if that is the case, the

plaintiff will not be able to recover damages." Id. at 309.

The harm the plaintiffs claim amounts to the loss of a competitive edge: Tesla "will be allowed to compete unfairly with dealers as their model of manufacturer owned dealerships with remote service centers will allow [them] financial savings which would not be available to Massachusetts dealers who must spend considerably to conform to Massachusetts law." (A22, ¶ 81; see also A575-A578.) But "an injury derived from business competition is not sufficient to confer standing" except when competitors in a regulated industry are challenging governmental action threatening their competitive position. Indeck Maine Energy, LLC v. Comm'r of Energy Resources, 454 Mass. 511, 517 (2009). That situation that does not apply here. Additionally, the plaintiffs' claims that Tesla's Natick Gallery causes "significant confusion" and that "irreparable injury to the marketplace, loss of consumer rights and injury to existing dealers" will occur is nothing more than unsupported rhetoric. (A8-A9.) Nowhere in their Complaint or in their brief do the plaintiffs support their conclusory suggestions that harm has occurred or is substantially likely to

occur as a result of Tesla's ownership of a dealership through Tesla MA. Indeed, at the hearing on the plaintiffs' request for a temporary restraining order and preliminary injunction, their attorney conceded that they have suffered no quantifiable harm, and unfacetiously suggested that monitoring blog posts on the internet was "the only way to gauge" the alleged injury to the marketplace. (A578-A579.) The plaintiffs therefore lack standing to bring their claims.

III. THE TRIAL COURT PROPERLY CONCLUDED THAT THE MSADA DID NOT HAVE STANDING UNDER G. L. C. 93B, § 15(A) TO CONTEST TESLA'S OWNERSHIP OF A TESLA DEALERSHIP IN MASSACHUSETTS

The MSADA acknowledges in its brief that it is not a motor vehicle dealer, manufacturer or distributor. Thus, it only has standing to bring a suit under G.L. c, 93B, § 15(a) if it meets the requirements for "associational standing." The first requirement for associational standing is that the association's members have standing to bring the suit. Associated Subcontractors of Mass., Inc. v. University of Mass. Building Auth., 442 Mass. 159, 164 (2004). The MSADA fails this test because, as discussed supra in Sections I and II, unaffiliated dealers do not have

standing to sue for a violation of c. 93B and the plaintiffs have not sufficiently alleged harm resulting from the defendants' actions. Consequently, the Trial Court properly dismissed the MSADA's claims based on its lack of standing.

IV. THE PLAINTIFFS' CLAIMS UNDER G. L. C. 93B ARE BARRED UNDER THE PRINCIPLES OF RES JUDICATA

Even if the plaintiffs were found to have standing under G. L. c. 93B, § 15(a) to challenge Tesla's ownership of a dealership in the Commonwealth, their claims are barred under the doctrine of res judicata because the MSADA failed to appeal a decision rendered against it in the lawsuit it filed in Middlesex County Superior Court.[22] "[I]rrespective of

[22] The defendants recognize that as a general rule appeals courts will not hear arguments that could have been raised below. See Albert v. Municipal Court of Boston, 388 Mass. 491, 493-494 (1983). Here, the defenses of claim preclusion and issue preclusion could not have been raised at trial because the Middlesex County Superior Court did not rule on the second lawsuit until four months after the Norfolk County Superior Court ruled on the motion to dismiss that is the subject of this appeal. In addition, a court will consider an argument raised for the first time on appeal to avoid a miscarriage of justice. Hormel v. Helvering, 312 U.S. 552, 558 (1941). This Court has previously applied issue preclusion, even where not raised at trial, when prior to the appeal, the defendant unsuccessfully litigated the same issues in federal court. See Federal Home Loan Mortgage Corp. v. Doust, 83 Mass. App. Ct. 1115, 1115 n.2 (2013), Memorandum and Order pursuant to Rule 1:28.

which action or proceeding was first brought, it is the first final judgment rendered in one of the courts which becomes conclusive in the other as res judicata." Chicago R.I. & P. Ry. Co. v. Schendel, 270 U.S. 611, 616-617 (1926).

A. The Middlesex County Superior Court's Determination that Chapter 93B Does Not Prohibit Tesla from Selling Motor Vehicles in Its Natick Dealership Precludes the Plaintiffs' Chapter 93B Claims

Claim preclusion prohibits the re-litigation of the same claim that was or could have been raised in a prior action. The elements of claim preclusion are: 1) identity or privity of the parties in both actions; 2) identity of the cause of action; and 3) a final judgment on the merits. Gloucester Marine Railways Corp. v. Charles Parisi, Inc., 36 Mass. App. Ct. 386, 390 (1994).

Here, the first element is satisfied because the MSADA and Tesla MA (as an intervenor) were parties to the second lawsuit filed in Middlesex County Superior Court ("the Middlesex lawsuit"), and Connolly and Kaplan's, as dealers whose interests are represented by the MSADA, are in privity with the MSADA. See DaLuz v. Department of Correction, 434 Mass. 40, 45 (2001)(union members in privity with union).

The second element is also met, as the plaintiffs seek re-litigation of their G. L. c. 93B claim, which was already raised and determined adversely to the MSADA and its member dealer in the Middlesex lawsuit. In that suit, the MSADA averred that "Tesla Motors MA, Inc. is a dealer of the same line make as any of the vehicles manufactured, assembled or distributed by Tesla Motors, Inc. which is the manufacturer of the vehicles Tesla Motors MA, Inc. will sell." (Pet. at ¶ 11.) It further recited that "Chapter 93B § 4(c)(10) prohibits a manufacturer 'to own or operate, either directly or indirectly through any subsidiary, parent company or firm, a motor vehicle dealership located in the commonwealth of the same line make as any of the vehicles manufactured, assembled or distributed by the manufacturer or distributor." (Pet. at ¶ 13.) And the MSADA averred that "[t]he license issued by the Board violates Chapter 93B § 4(c)(10) because Tesla Motors, Inc. directly owns 100% of Tesla Motors MA, Inc. and because Tesla Motors, Inc. will indirectly operate a dealership." (Pet. at ¶ 14.) The MSADA concluded that the Board's action in issuing the license was "arbitrary and capricious and an error of law" when doing so allegedly "violates Chapter 93B § 4 (c)(10)"

and where "Tesla Motors MA, Inc. was [not] a proper person for the license when it is a dealership owned by a manufacturer." (Pet. at ¶¶ 15, 20.) Additionally, in opposing Tesla MA's motion to dismiss, the MSADA made the same argument concerning c. 93B that it makes in its brief filed in support of this appeal:

> On its face Chapter 93B § 4(c)(10) prohibits a manufacturer from owning a dealer of the same line make. Thus, it prohibits Tesla Motors from owning Tesla Motors MA as a matter of law.

("Pltfs. Obj." at p. 5). Adopting the Trial Court's decisions regarding the c. 93B claim in the case on appeal here, the Middlesex County Superior Court found that the plaintiffs failed to establish that Tesla MA "was not a proper party to which a license to sell should have been issued" and that c. 93B does not prohibit Tesla from selling motor vehicles in its Natick site. (Middlesex Decision at p. 4.)

Finally, the last element is met because the MSADA did not file an appeal within the time proscribed by Mass R. A. P. 4(a). Consequently, the plaintiffs are bound by the Middlesex Decision and may not re-litigate their c. 93B claims.

B. The Middlesex County Superior Court's Determination that the Plaintiffs Suffered No Injury Precludes Their Chapter 93B Claims

Collateral estoppel, or issue preclusion, prevents the re-litigation of an issue that was determined in a previous action. A party asserting collateral estoppel must show: 1) the issue was actually litigated in the previous action; 2) the issue was essential to the case; and 3) the determination on the issue was final. Jarosz v. Palmer, 436 Mass. 526, 530-531 (2002). An issue is "actually litigated" when it was "'subject to an adversary presentation and consequent judgment' that was not 'a product of the parties' consent. . . .'" Jarosz, 436 Mass. at 531, quoting Keystone Shipping Co. v. New England Power Co., 109 F.3d 46, 52 (1st Cir. 1997). An issue is "essential" when it has a bearing on "a final determination on the merits of the proceeding." Jarosz, 436 Mass. at 532-533. Lastly, a determination is "final when 'the parties were fully heard, the judge's decision is supported by a reasoned opinion, and the earlier opinion was subject to review or was in fact reviewed.'" Jarosz, 436 Mass. at 533-534, quoting Tausevich v. Board of Appeals of Stoughton, 402 Mass. 146, 148 (1988).

Here, the plaintiffs are precluded from re-litigating whether they suffered substantial injury because the Middlesex County Superior Court already determined that they did not demonstrate any injury which has been caused or is likely to be caused by Tesla's ownership and operation of a dealership. (Middlesex Decision at p. 3.) The issue was actually litigated because there was an adversary proceeding, with briefing by both parties, and a consequent judgment following a hearing. The issue was essential to the merits because demonstration of substantial injury or injustice constituted a required element of the plaintiffs' G. L. c. 249, § 4 claim. (Middlesex Decision at p. 2.) Finally, the determination was entered as a final judgment and the MSADA did not file an appeal within the time proscribed by Mass. R. A. P. 4(a). The plaintiffs therefore are bound by the Middlesex Decision and are unable to establish an essential element of their c. 93B claim, an injury arising from a violation of the Act.

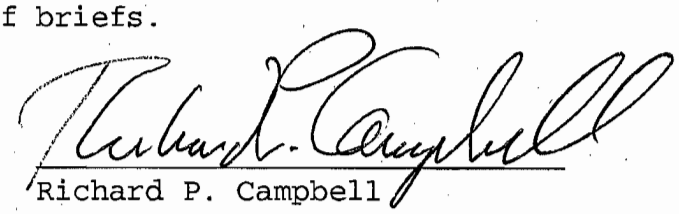
CONCLUSION

In its order and decision denying the Plaintiffs' Motion for a Temporary Restraining Order and Preliminary Injunction, denying Plaintiffs' Motion for

Reconsideration and granting Defendants' Motion to Dismiss, the Trial Court properly followed well-established decisional law on the lack of standing of motor vehicle dealers to sue unaffiliated motor vehicle manufacturers for perceived violations of G.L. c. 93B. Additionally, even assuming arguendo that the plaintiffs had standing to assert claims under G. L. c. 93B, their claims are barred under the doctrines of res judicata and collateral estoppel because the MSADA failed to appeal timely an adverse judgment on the same issue entered against it in the Middlesex County Superior Court action. Accordingly, this Court should affirm the Trial Court's decisions denying the Plaintiffs' Motion for a Temporary Restraining Order and Preliminary Injunction, denying Plaintiffs' Motion for Reconsideration, and granting Defendants' Motion to Dismiss.

CERTIFICATE OF COMPLIANCE WITH APPELLATE RULE 16(k)

I, Richard P. Campbell, counsel for the defendants/appellees, hereby certify that the attached brief complies with the applicable rules of court that pertain to the filing of briefs.



Richard P. Campbell