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UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

SODERHOLM SALES AND LEASING, INC., Plaintiff-counter-defendant-Appellee, v. BYD MOTORS, INC., Defendant-counter-claimant-Appellant.	No. 21-16778 D.C. No. 1:19-cv-00160-LEK-KJM MEMORANDUM*

SODERHOLM SALES AND LEASING, INC., Plaintiff-counter-defendant-Appellant, v. BYD MOTORS, INC., Defendant-counter-claimant-Appellee.	No. 21-16779 D.C. No. 1:19-cv-00160-LEK-KJM

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

Appeal from the United States District Court
for the District of Hawaii
Leslie E. Kobayashi, District Judge, Presiding

Argued and Submitted October 13, 2022
Honolulu, Hawaii

Before: SCHROEDER, RAWLINSON, and BRESS, Circuit Judges.
Dissent by Judge BRESS

BYD Motors Inc. (BYD), a manufacturer of electric vehicles and batteries, appeals the district court's award of statutory damages to Soderholm Sales and Leasing, Inc. (Soderholm), a vehicle dealership in Hawaii, after finding that BYD engaged in bad faith conduct.

In its cross-appeal, Soderholm asserts that the district court erroneously determined that BYD's bad faith conduct ended when Soderholm filed its complaint, and that the district court improperly disregarded the opinion of Soderholm's expert when it calculated the statutory damages.

"After a bench trial, we review a district court's conclusions of law and mixed questions of law and fact de novo." *Bax v. Doctors Med. Ctr. of Modesto, Inc.*, No. 21-16532, – F.4th –, 2022 WL 10227441, at *4 (9th Cir. Oct. 18, 2022) (citation omitted). "The district court's factual findings are reviewed for clear error. We will affirm a district court's factual finding unless that finding is illogical, implausible, or without support in inferences that may be drawn from the

record." *Id.* (citations, alteration, and internal quotation marks omitted). "A monetary award following a bench trial is a finding of fact we review for clear error. . . ." *Crockett & Myers, Ltd. v. Napier, Fitzgerald & Kirby, LLP*, 664 F.3d 282, 285 (9th Cir. 2011) (citation omitted).

1. The district court did not err in awarding damages under Haw. Rev. Stat. § 437-58(g), a provision for the award of damages "upon the termination, discontinuation, cancellation, or failure to renew" a franchise agreement "without good cause and good faith." At a minimum, the district court reasonably concluded that BYD discontinued the franchise agreement when it ceased all communications with Soderholm. The district court's award of statutory damages was not "illogical" or "implausible," *Bax*, 2022 WL 10227441, at *4 (citation omitted), because the statute defines "good faith" as "the duty of each party to any franchise agreement to fully comply with that agreement, and to act in a fair and equitable manner towards each other." Haw. Rev. Stat. § 437-58(h).

2. Prior to calculating Soderholm's ongoing business value,[1] the district court ordered supplemental briefing "addressing the amount of the award that would be consistent with this Court's rulings."

[1] Under Haw. Rev. Stat. § 437-58(g), damages "include the going business value of the business."

At trial, Soderholm's expert had calculated the entire value of anticipated future earnings from the BYD franchise and determined that it was over $8 million, so Soderholm's supplemental briefing reiterated its request for $8 million in statutory damages.

BYD's expert did not make an independent calculation, but critiqued the damages calculation from Soderholm's expert. In response to Soderholm's assertion that it lost profits from other sources because of its preparation for the BYD franchise, the BYD expert examined Soderholm's tax returns reflecting substantial gross profits. Accordingly, BYD asserted that Soderholm incurred no loss, that the going business value of the franchise investment was zero, and that Soderholm was entitled to zero statutory damages.

The district court rejected both expert opinions. Instead, it looked to the only evidence in the record of what the value of the business might be. That evidence was the Soderholm tax returns reflecting the total business income for the years in which the bad faith discontinuation occurred. Consistent with its determination that Soderholm was only entitled to damages for the period of the bad faith discontinuation, the district court divided the total yearly income for each year into average daily income and multiplied that by the number of bad faith days in each year to calculate the damages.

BYD fails to cite any persuasive authority supporting its argument that calculation of going business value may not be premised on a franchise's total income, particularly as Haw. Rev. Stat. § 437-58(g) does not define "ongoing business value." *See Amazon.com, Inc. v. Comm'r of Internal Revenue*, 934 F.3d 976, 987 (9th Cir. 2019) (observing that "going concern value" is a "nebulous" concept). In a bench trial involving less than elucidating expert opinions and a complete lack of precedential guidance, it was not "illogical, implausible, or without support in inferences that may be drawn from the facts in the record" for the district court to calculate Soderholm's ongoing business value based on Soderholm's tax returns and total income. *Bax*, 2022 WL 10227441, at *4 (citation omitted).

3. The district court did not err in awarding damages based on the acquisition costs of four BYD vehicles and a forklift. Although BYD relies on Haw. Rev. Stat. § 437-58(f), limiting recoverable costs to new vehicles with fewer than five hundred miles on the odometer, Haw. Rev. Stat. § 437-58(g) governed the award of damages due to BYD's bad faith conduct. Under that provision, the district court did not clearly err in determining that the vehicles and forklift were purchased as part of Soderholm's inventory "for the purpose of the franchise." Haw. Rev. Stat. § 437-58(g).

4. Soderholm's cross-appeal also lacks merit. The district court did not clearly err in determining that the filing of Soderholm's complaint was "the last date when Soderholm attempted to exercise its right to buy BYD products." Soderholm confirmed that it "notif[ied] BYD that [it] considered the agreement to no longer be in effect prior to filing [its] lawsuit." From that date forward, Soderholm was no longer relying on the contract, and no further damages accrued. *See Kawakami v. Kahala Hotel Investors, LLC*, 421 P.3d 1277, 1286 (Haw. 2018) (explaining that "[t]he nature of the loss and the measure of the damages will depend in part on the party's expectation or performance interest and the nature of the bargain") (citations and internal quotation marks omitted).

AFFIRMED.

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Soderholm Sales & Leasing, Inc. v. BYD Motors, Inc., No. 21-16778

BRESS, Circuit Judge, dissenting:

I respectfully dissent because I believe that the district court's award of damages to Soderholm is legally infirm. Hawaii's Motor Vehicle Industry Licensing Act (MVILA) provides for statutory damages if a motor vehicle manufacturer acts in bad faith in relation to the "termination, cancellation, discontinuation, or failure to renew a franchise agreement." Haw. Rev. Stat. § 437-58(g). I seriously question how the required event occurred here when the franchise agreement remained in effect. But even assuming a discontinuation took place, the district court's award of statutory damages still reflects legal error.

First, the district court erred as a matter of law in awarding Soderholm $1,259,065.07, which represented the going value of Soderholm's *entire* business—consisting of seventeen different franchises—as opposed to the going value of Soderholm's business relationship with BYD. Under Haw. Rev. Stat. § 437-58(g), a manufacturer that terminates a franchise agreement in bad faith must

> compensate the dealer at the fair market value for the dealer's capital investment, which shall include the going business value of the business, goodwill, property, and improvement owned or leased by the dealer for the purpose of the franchise as of the effective date of the termination or one day prior to the date of the notice, whichever is greater.

The statute provides for a single category of damages: "compensat[ion] . . . at the fair market value for the dealer's capital investment" in the franchise. Haw. Rev.

Stat. § 437-58(g). That category "*includes*" the "going business value of the business." *Id.* (emphasis added). The items "included" within "dealer's capital investment" are those "*for the purpose of the franchise*." *Id.* (emphasis added).

Reading the statute as a whole, it is incorrect to interpret the word "business" as referring to the sum total of profits from a dealer's *other* unrelated franchises. The statute does not permit that construction. The "dealer's capital investment" is a reference to the dealer's capital investment in the particular franchise relationship that was terminated/discontinued, not its total capital investment in all of its businesses. What is "included" in the "dealer's capital investment" must therefore be specific to the franchisor-franchisee relationship that was terminated. The word "included" requires this, as does the statutory phrase "for the purpose of the franchise." The district court's reading, which the majority endorses, produces a windfall for Soderholm based only on the fact that it is a large business that has many franchise operations. Nothing in the statute favors large dealers over small ones. That result is contrary both to the text of the statute and common sense.

The majority suggests that this is a factual issue on which the district court deserves deference, but that is not correct. Soderholm's expert attempted to offer a damages estimate that comported with my interpretation of the statute set forth above. The problem, however, was that the district court rejected that estimate (*$8.3 million*) as impermissibly speculative. That should have ended the matter. Instead,

the district court took data in BYD's expert's report and repurposed it using the incorrect methodology that the majority now validates. That was legal error.

Second, as part of the "fair market value" of Soderholm's capital investment, the district court awarded another $300,220.18, which was based on the market value at the time of purchase of certain vehicles that Soderholm acquired from BYD. The court did not account for depreciation, finding it irrelevant. The majority errs in ratifying that approach. Section 437-58(g) looks to the fair market value of the capital investment "as of the effective date of the termination or one day prior to the date of the notice," not as of the date of purchase. The statutory language required consideration of any decrease in value between the time of purchase and the relevant termination date under the statute.