

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF WEST VIRGINIA**

BOB ROBINSON CHEVROLET-)
OLDSMOBILE-CADILLAC, INC.,)

Plaintiff,)

v.)

Case No. 5:01 CV 145

GENERAL MOTORS CORPORATION,)
a Delaware Corporation,)

Defendant.)

**MEMORANDUM IN SUPPORT OF DEFENDANT GENERAL MOTORS'
MOTION TO DISMISS PLAINTIFFS' FIRST AMENDED COMPLAINT
AND MOTION FOR RECONSIDERATION**

INTRODUCTION

On September 26, 2002, the Court entered a Memorandum Opinion and Order that dismissed, with prejudice, most of Robinson's eleven counts against General Motors Corporation. As to the remainder, the Court permitted Robinson the opportunity to replead two counts – claims for constructive termination and “intentional” breach of contract – and the Court denied GM's Motion as to one breach of contract claim and as to an unjust enrichment claim. On October 15, 2002, Robinson filed its First Amended Complaint in which it abandoned its claim for “intentional” breach but attempted to plead the remaining three claims.

As GM urged at the October 18, 2002 status conference, however, each of the three counts asserted in Robinson's Amended Complaint fail to state a claim. As to Robinson's claim of “constructive” termination, no such claim exists under West Virginia law and, even if such a claim did exist, Robinson has failed to adequately plead it. As to Robinson's remaining claims for breach of contract and unjust enrichment, which GM respectfully requests that the Court reconsider, neither claim states a cause of action based on the announcement of the Oldsmobile phase-out on December 12, 2000. For these reasons, GM respectfully requests that the Court dismiss Robinson's First Amended Complaint, with prejudice, pursuant to Federal Rule of Civil Procedure 12(b)(6).

BRIEF STATEMENT OF FACTS

Having already considered GM's original Motion to Dismiss, the Court is well aware of the background of this dispute. (*See* Order, at 1-2; Memorandum in Support of GM's Motion to Dismiss, at 1-2). GM will not repeat that history here, other than to stress that Robinson's relationship with GM has been governed by a series of written and fully integrated

Dealer Agreements, the latest of which became effective on November 1, 2000 and does not expire until October 31, 2005. (Am. Cmplt. ¶ 9). The Robinson Dealer Agreement remains valid, effective, and in force today. (Am. Cmplt. ¶¶ 9–14). On these facts, as the Court found in its September 26, 2002 Order, GM’s December 12, 2000 announcement of an eventual phase-out of the Oldsmobile division was not a “termination” of Robinson’s Oldsmobile Dealer Agreement. (*See* Order, at 4-5).¹ The Court concluded that “Robinson and GM continue to perform pursuant to the Dealer Agreement” (*Id.* at 10). GM intends to offer Oldsmobile products and services over the next several years, and Robinson continues to sell and service Oldsmobile vehicles today pursuant to the Dealer Agreement and will have the ability to do so in the future. (Am. Cmplt. Ex. B).

ARGUMENT

I. ROBINSON CANNOT STATE A CLAIM FOR CONSTRUCTIVE TERMINATION UNDER W.VA. CODE § 17A-6A-4 (COUNT I).

A. No Claim of Constructive Termination Has Been Recognized in West Virginia.

In Count I, Robinson attempts to assert a claim for “constructive” termination under W.Va. Code § 17A-6A-4. Section 17A-6A-4 is part of a regulatory scheme that specifically addresses the issue of cancellation, termination, and non-renewal of automobile dealer franchise agreements (if and when such acts actually happen). However, and as the Court observed in its September 26, 2002 Order, “West Virginia courts have not directly addressed the issue of *de facto* or *constructive* termination” under W. Va. Code § 17A-6A-4. (Order, at 5, n. 2 (emphasis added)) Indeed, no such claim has been recognized under West Virginia law. Based on the authority of a case applying Connecticut law, *Petereit v. S.B. Thomas, Inc.*, 63 F.3d 1169,

¹ Notwithstanding the Court’s ruling, plaintiff persists in characterizing the announcement as a “termination” in the Amended Complaint. (*See, e.g.*, Am. Cmplt. ¶¶ 15, 21, 28, 29).

1182 (2d Cir. 1995), however, the Court's Order suggests "it is likely that West Virginia law would allow a claim for constructive termination" Order at 5. Respectfully, GM disagrees and will now briefly explain why.²

As an initial matter, the *Petereit* court offered no supporting authority for its recognition of a cause of action for constructive termination under the Connecticut Franchise Act, with the exception of a federal district court opinion also recognizing such a claim under the same Connecticut act. *See Carlos v. Philips Business Systems, Inc.*, 556 F.Supp. 769, 772-73 (E.D.N.Y. 1983), *cert. denied*, 517 U.S. 119 (1996). GM's research reveals that *Petereit* and *Carlos* are the **only** two published cases recognizing a cause of action for constructive termination based on a franchise or dealer statutory scheme containing language similar to the West Virginia act.

In contrast, courts in other jurisdictions faced with statutes akin to W. Va. Code § 17A-6A-4 have squarely refused to impose a cause of action for constructive termination that the legislature did not explicitly create. *See, e.g., Healy v. Carlson Travel Network Association, Inc.*, No. CIV.01-1103, 2002 WL 31356218, *9 (D.Minn. Oct. 16, 2002) ("neither [the Minnesota Franchise Act] nor [Illinois Franchise Disclosure Act] recognize de facto termination as a cause of action"); *Fuller Ford, Inc. v. Ford Motor Co.*, No. CIV. 00-530-B, 2001 WL 920035, at *13 (D.N.H. Aug. 6, 2001) (holding that recognition of "a cause of action for constructive termination [under N.H. Rev. Stat. § 357-C:7] would lead to an absurd result); *Zeno Buick-GMC, Inc. v. GMC Truck & Coach*, 844 F.Supp. 1340, 1351 (E.D. Ark. 1992) ("as the Court reads the statutory language, the prohibition [in the Arkansas Motor Vehicle Commission

² The Court likewise recognized a claim for constructive termination in the unrelated case of *Shupbach's Valley Motor Co. v. General Motors Corp.*, Memorandum Opinion and Order

Act] goes to actual termination of the franchise rather than to constructive termination”), *aff’d*, 9 F.3d 115 (8th Cir. 1993); *Carlock v. Pillsbury Co.*, 719 F.Supp. 791, 852 (D. Minn. 1989) (“Constructive termination of a franchise is not actionable under” the Washington Franchise Investment Protection Act); *Cabriolet Porsche Audi, Inc. v. American Honda Motor Co., Inc.*, 773 F.2d 1193, 1214 (11th Cir. 1985) (holding that the Florida Motor Vehicle Act “contemplate[s] an actual termination of the business relationship between the dealer and distributor”).

Moreover, those courts that have recognized causes of action for constructive termination have done so only where the statute at issue *expressly* permitted a claim for constructive termination. For instance, in *Astleford Equip. Co., Inc. v. Navistar Intern. Transp. Corp.*, 632 N.W.2d 182 (Minn. 2001), the Minnesota Supreme Court addressed a claim of constructive termination arising from the defendant manufacturer’s establishment of a new dealership within 10 miles of the plaintiff’s dealership. *See id.* at 183-84. The relevant statute, the Minnesota Heavy and Utility Equipment Manufacturers and Dealers Act (HUEMDA), provided in relevant part that no equipment manufacturer “may terminate, cancel, fail to renew, **or substantially change the competitive circumstances of a dealership agreement** without good cause.” Minn. Stat. § 325E.0681, subd. 1 (emphasis added). Thus, unlike W. Va. Code § 17A-6A-4(a), the Minnesota statute addressed in *Astleford* expressly permitted a heavy equipment dealer to make a claim for something less than an actual termination. *See Astleford*, 632 N.W.2d at 191 (“**[T]he express language of the statute encompasses a de facto or constructive termination situation . . .**” (emphasis added)). Similarly, in *Remus v. Amoco Oil Co.*, 794 F.2d 1238 (7th Cir. 1986), the Seventh Circuit addressed a Wisconsin statute which expressly forbids

the franchisor to “terminate, cancel, fail to renew *or substantially change the competitive circumstances of a dealership agreement* without good cause.” Wis. Stat. § 135.03.³

GM respectfully suggests that *Petereit* stands as lonely support for the proposition that West Virginia would permit a constructive termination claim to be made under its dealer statute, and that support is thin indeed.⁴ Rather, the bulk of authority suggests, as a matter of law, that West Virginia *would not* recognize such a cause of action and, therefore, GM urges the Court to reconsider its conclusion to the contrary. Robinson’s claim for “constructive” termination – brought by a dealer against a supplier when both are still performing pursuant to their contract – should be dismissed on this basis alone.

B. Robinson Has Failed to State a Claim for “Constructive” Termination.

There are yet additional reasons, however, as to why Robinson’s constructive termination claim should be dismissed. In particular, even if a cause of action for “constructive” termination were available in West Virginia, none of the jurisdictions that have recognized such a claim have done so on the meager factual basis Robinson alleges here: namely, that GM has issued an announcement that the Oldsmobile line-make will be phased out over a number of

1999), citing *Petereit*.

³ In contrast to the Minnesota Heavy and Utility Equipment Manufacturers and Dealers Act and Wisconsin statute addressed in *Remus*, W. Va. Code § 17A-6A-4(a) provides “a manufacturer or distributor shall not *cancel, terminate, fail to renew or refuse to continue* any dealer agreement” without good cause and notice. *Id.* (emphasis added).

⁴ Moreover, the basis behind the *Petereit* court’s conclusion that a constructive termination claim was necessary or else franchisors would be able “to accomplish indirectly that which they are prohibited from doing directly” is inapplicable here. *Id.*, 63 F.3d at 1182. *Petereit* involved a territorial realignment, not the eventual phase-out of a brand. Thus, in the absence of a constructive termination claim, the aggrieved distributors in *Petereit* never would have had an opportunity to seek redress under the Connecticut Franchise Act. In contrast, GM does not dispute here that prior to any non-renewal or termination of the Robinson Dealer Agreement, GM *must* give Robinson the statutorily required notice. Robinson then *will* have an opportunity to seek redress under W. Va. Code § 17A-6A-4.

years in the future. Stated another way, Robinson’s Amended Complaint hinges on a GM letter giving advance notice of a change that would be made years in the future. (*See* Cmplt. ¶ 6). This hardly suffices as the kind of action taken by a manufacturer that can be alleged to state a claim for constructive termination. *See, e.g., Petereit*, 63 F.3d at 1174 (the defendant manufacturer actually undertook a major realignment of its distributors’ sales territories, including the elevation of three sub-distributorships, the redistribution of four stores, and the addition of four independent markets); *Healy*, 2002 WL 31356218 at *9 (“the doctrine [of de facto termination] applies only where the franchisor, though not officially terminating the franchise, makes it effectively impossible for the franchisee to do business”); *Carlos*, 556 F.Supp. at 772-73 (manufacturer attempted through its actions to transform formerly exclusive distributor of dictation equipment into non-exclusive distributor).⁵

Here, as the Court found, the Dealer Agreement has not been terminated and Robinson has failed to allege any change in its dealership operations similar to those in *Petereit* and *Carlos* caused by GM, nor has Robinson alleged that the Oldsmobile announcement has “ma[de] it effectively impossible for the franchisee to do business.” *See Healy*, 2002 WL 31356218, at *9; *see also Carlos*, 556 F.Supp. at 774 (allowing constructive termination claim where defendant’s action “represent[ed] nothing less than the gravest threat to the viability of the business”). To the contrary, at this time, Robinson and GM continue to perform pursuant to their written agreement – hardly the stuff out of which a “termination” claim can be made.

⁵ In *Shupbach’s Valley Motor Co. v. General Motors Corp.*, Memorandum Opinion and Order Granting Motion For Leave to Amend Complaint, No. 5:98CV154 (N.D.W.Va. April 22, 1999), GM had actually sent the dealer a termination notice of the dealer agreement because of the death of Schupbach’s dealer-operator and failure to name an acceptable successor in a timely manner; no such claim can be made here.

Moreover, Robinson has failed to meet even the fairly lenient standard the Second Circuit set out in *Petereit* to state a claim of constructive termination under the Connecticut statute:

A constructive termination may be easy to discern where, for instance, a franchisor attempts to drive its franchisee out of business . . . or refuses to continue doing business with its franchisee At the other end of the spectrum, were every minor alteration of the franchise that resulted in a decrease in income deemed a constructive termination, the franchise form of doing business would lose its usefulness to franchisors. It is certainly not the will of the . . . legislature to afford such a high level of protection to franchisees as to drive franchisors from the state.

As a consequence, it appears that something greater than a *de minimis* loss of revenue – and less than the stark scenario of driving a franchisee out of business – must be shown in order to justify a finding of constructive termination. ***We think such may be found when a franchisor’s actions result in a substantial decline in franchisee net income. Such analysis will be strictly financial,*** except in close cases, where non-financial factors may have some bearing.

Id., 63 F.3d at 1183 (emphasis added).

Robinson does not allege, nor can it, that GM has “attempt[ed] to drive [Robinson] out of business . . . or refuse[d] to continue doing business with [Robinson].” *Id.* Thus, even under *Petereit*, Robinson must, at a minimum, allege that GM’s actions “result[ed] in a substantial decline in franchisee net income.” *Id.* Because the analysis must be “strictly financial,” Robinson’s Amended Complaint must set forth, with specificity, the alleged ***financial*** consequences of GM’s purported actions. *Id.* None of Robinson’s allegations, set forth at ¶¶ 31(A) – 31(G) meet this standard.

Finally, given the ongoing nature of the parties’ performance, any such claim by Robinson would be premature – the contract still has three years of performance remaining. For the same reason that the Court deemed Robinson’s other contract claims “premature,” so too is a claim in 2002 for “constructive termination.”

In sum, even if the Court remains of the opinion that West Virginia would generally recognize a claim for constructive termination, Robinson's specific claim should still be dismissed for failing to adequately allege its elements and as being premature.

II. ROBINSON CANNOT STATE A CLAIM FOR BREACH OF CONTRACT UNDER ARTICLE 4.1 OF THE DEALER AGREEMENT (COUNT II).

Robinson's claim under Article 4.1 of the Dealer Agreement asserted that GM's announcement concerning Oldsmobile breached plaintiff's interpretation of the "reasonable return on investment" clause in the "Dealer Network Planning" provision of the Dealer Agreement. (*See Am Cmplt., Ex. A, § 4.1, at 2-3*). In its September 26, 2002 Order, the Court concluded that "[w]hether or not an affirmative obligation is imposed on GM by the terms of [Article 4.1] of the Dealer Agreement is a question of *fact*." Order at 13-14 (emphasis added). Accordingly, the Court held that Robinson has stated a claim under Federal Rule of Civil Procedure 8(a) and denied GM's Motion to Dismiss as to that count.⁶ Respectfully, GM asks the Court to reconsider its conclusion and will now briefly explain why.

As a matter of well-established West Virginia law, where a contract is unambiguous, "contract construction is a question of *law*. . . ." *Williams v. Professional Transp. Inc.*, 294 F.3d 607, 613 (4th Cir. 2002) (West Virginia case reviewing interpretation of settlement agreement) (emphasis added); *see also Pilling v. Nationwide Mut. Fire Ins. Co.*, 201 W.Va. 757, 760, 500 S.E.2d 870, 873 (1997). Further, "[t]he mere fact that parties do not agree to the construction of a contract does not render it ambiguous. *The question as to whether a contract is ambiguous is a question of law to be determined by the court.*" Syllabus Point 1, *Berkeley County Public Service District, etc. v. Vitro Corporation of America*, 152 W.Va. 252,

⁶ Robinson's breach of contract claim based on Article 4.1 of the Dealer Agreement was designated Count VI in the original Complaint and is numbered Count II in the Amended Complaint.

252 162 S.E.2d 189, 191 (1968) (finding contract “clear and unambiguous” and “need[ing] no construction or interpretation”) (emphasis added). Where a contract is found to be unambiguous, it is the duty of the court “to construe the contract according to its plain meaning” and grant judgment as a matter of law. *Fraternal Order of Police v. Fairmont*, 196 W.Va. 97, 100, 468 S.E.2d 712, 715 (1996) (reversing circuit court’s finding that contract was ambiguous and holding that while “[t]he defendants have presented us with an artful reading of the agreement, [] that reading belies the plain meaning of the contract as a whole. The agreement is clear, and lengthy judicial proceedings do not make it any clearer. This Court refuses to rewrite the contract to favor the defendants”).

Thus, under West Virginia law, GM respectfully suggests that the Court’s initial task here is to determine, as a matter of law, whether there is any ambiguity to Article 4.1 of the Dealer Agreement. “Contract language usually is considered ambiguous where an agreement’s terms are inconsistent on their face or where the phraseology can support reasonable differences of opinion as to the meaning of the words employed and obligation undertaken.” *Fraternal Order of Police*, 196 W.Va. at 101, 468 S.E.2d at 716; *see also Williams v. Precision Coil, Inc.*, 194 W.Va. 52, 65, 459 S.E.2d 329, 342 n. 23 (1995) (“A contract is ambiguous when it is reasonably susceptible to more than one meaning in light of the surrounding circumstances and after applying the established rules of construction”).

In terms of the contract at issue here, the question presented is whether the language of Article 4.1 can *reasonably* support Robinson’s contention that the provision: (1) prohibits GM from announcing the eventual phase-out of the Oldsmobile line-make; or (2) requires GM “to adjust its network of sales, brands and dealers” to somehow compensate

Robinson for the announcement. (Am. Cmplt. ¶ 38). A plain reading of Article 4.1 permits no such conclusion:

4.1 Dealer Network Planning

Because General Motors distributes its Products through a network of authorized dealers operating from approved locations, those dealers must be appropriate in number, located properly, and have proper facilities to represent and service General Motors products competitively and to permit each dealer the opportunity to achieve a reasonable return on investment if it fulfills its obligations under its Dealer Agreement. Through such a dealer network, General Motors can maximize the convenience of customers in purchasing Products and having them serviced. As a result, customers, dealers, and General Motors all benefit.

To maximize the effectiveness of its dealer network, General Motors agrees to monitor marketing conditions and strive, to the extent practicable, to have dealers appropriate in number, size and location to achieve the objectives stated above. Such marketing conditions include General Motors sales and registration performance, present and future demographic and economic considerations, competitive dealer networks, the ability of General Motors existing dealers to achieve the objectives stated above, the opportunities available to existing dealers, the alignment of Line-Makes, General Motors dealer network plan, and other appropriate circumstances.

(Am Cmplt., Ex. A, § 4.1, at 2-3) (emphasis added).

Certainly, nothing in Article 4.1 *explicitly* precludes GM from announcing the phase-out or requires GM to somehow grant Robinson a substitute line-make as a result of the phase-out announcement. Nor can the Court reasonably conclude that Article 4.1 *implicitly* mandates such a result. On the contrary, the language Robinson seizes upon – “to permit each dealer the opportunity to achieve a reasonable return on investment if it fulfills its obligations under its Dealer Agreement” – cannot reasonably be interpreted to impose an obligation on GM to continue producing a declining, unprofitable vehicle line such as Oldsmobile simply so that dealers can continue to obtain a return on their investment. Indeed, if Article 4.1 could be read in this manner, then there is no obligation whatsoever that a dealer might not claim, as a matter

of contract, that GM must undertake to help achieve that dealer a “reasonable return on investment.” Such an anomalous result cannot be a reasonable interpretation of this provision.

Indeed, when read reasonably and in context, the only obligation imposed on GM by Article 4.1 is clear, unambiguous, and located in the *second* paragraph of the provision. In Article 4.1, titled “Dealer *Network Planning*,” GM actually “*agrees* to monitor marketing conditions” – including conditions relating to “sales and registration performance, present and future demographic and economic considerations, competitive dealer networks,” etc. – and, based on the information gathered, “strive, to the extent practicable, to have dealers appropriate in number, size and location to achieve the objectives stated above.” (Am. Cmplt., Ex. A, § 4.1, at 2-3). Nothing in Robinson’s Complaint asserts that GM has breached this obligation which, in contrast to the first paragraph of Article 4.1, actually imposes a term that GM “agrees” to perform.⁷

Moreover, Robinson’s claim under Article 4.1 is premature. For the same reasons that the Court found other of Robinson’s contract claims premature, so too is this claim in Count II. With the parties still performing under their agreement and expiration of the agreement not occurring until 2005, GM respectfully submits that Article 4.1 cannot be the basis of a breach of

⁷ In its initial Motion to Dismiss, GM argued that if the first paragraph of Article 4.1 “imposes any obligation, it is not upon GM, but upon Robinson itself, the subject of the sentence fragment: The ‘dealers must ... have proper facilities ... to permit each dealer the opportunity to achieve a reasonable return on investment.’” See Motion to Dismiss, at 11. Regardless of whether this is so, or whether the first paragraph is merely precatory – see, e.g., *Carr v. Stillwaters Dev. Co.*, 83 F. Supp. 2d 1269, 1279 (M.D. Ala. 1999) (granting summary judgment to defendants on a breach of contract claim because the “handbook’s policies were merely precatory and did not constitute an enforceable agreement”); *Burr v. Melville Corp.*, 868 F. Supp. 359, 364-65 (D. Me. 1994) (holding that an employment manual that operates as a “guide to classification” could not provide the basis for a claim of breach of implied contract); *Master Palletizer Sys. v. T.S. Ragsdale Co.*, 725 F. Supp. 1525, 1532 (D. Colo. 1989) (holding no breach of contract where only language reflecting possible breach was

contract claim that Robinson has *currently* been deprived of an “opportunity” to earn a reasonable return if “Robinson fulfilled its obligations under the agreement.” (Order, at 11). Robinson’s breach of contract claim under Article 4.1 of the Dealer Agreement should be dismissed as a matter of law.

III. ROBINSON CANNOT STATE A CLAIM FOR UNJUST ENRICHMENT (COUNT III).

Finally, in its September 26, 2002 Order, the Court held that West Virginia law did not allow “unjust enrichment” claims to be brought when the subject matter is governed by a contract between the parties. (Order, at 19). The Court then found, however, that “the express terms of the Dealer Agreement do not cover the identical subject matter alleged in Robinson’s Complaint.” Order at 19-20. Specifically, the Court concluded that the “goodwill created by Robinson” is not addressed in the parties’ Dealer Agreement. *Id.* Again, GM respectfully urges the Court to reconsider this ruling and will now briefly explain why.

As to the Court’s specific holding that the Dealer Agreement does not cover the identical subject matter alleged in Robinson’s Complaint, two points need to be stressed. First, although the word “goodwill” is not used in the Dealer Agreement, it is well-established that “goodwill is inseparable from the business with which it is associated.” *Gidatex, S.r.L. v. Campaniello Imports, Ltd.*, 13 F.Supp.2d 420, 430 (S.D.N.Y. 1998) (granting motion to dismiss unjust enrichment claim based on goodwill in suit arising from distribution agreement) (quoting *Visa, U.S.A., Inc. v. Birmingham Trust Nat’l Bank*, 696 F.2d 1371, 1375 (Fed.Cir.1982)). Thus, a plaintiff may not assert “an interest in the goodwill associated with the trademark, independent of an interest in the mark itself.” *Gidatex*, 13 F.Supp.2d at 430. In other words, the concepts of

precatory) – what is important is that the first paragraph unambiguously does *not* impose any obligation on GM.

goodwill and trademark are inseparably bound and, of course, Robinson's use of GM's trademarks is expressly governed by Article 17.5 of the Dealer Agreement. (Am. Cmplt. Ex. A, ¶17.5, at 27-28 ("Trademarks and Service Marks")).

Second, any "valuable time and monies" (Am. Cmplt. ¶ 41) allegedly expended by Robinson in generating "goodwill" through the conduct of its Oldsmobile dealership, are expressly addressed by, *inter alia*, Article 5 of the Dealer Agreement, "Dealer's Responsibility to Promote, Sell, and Service Products." (Am. Cmplt. Ex. A, ¶5, at 5-8)). Only through the promotion, sale, and service of Oldsmobile products could any "goodwill" in Oldsmobile be created.

Therefore, GM contends that both Robinson's creation of any alleged "goodwill" and the manner by which it was purportedly created *are* expressly governed by the Dealer Agreement, since it is only by having an Oldsmobile Dealer Agreement that Robinson could lawfully advertise, promote, sell, and service Oldsmobile products. As a result, because "[a]n implied contract and an express one covering the identical subject-matter cannot exist at the same time," Robinson's unjust enrichment claim must fail. *Rosenbaum v. Price Constr. Co.*, 184 S.E. 261, 263 (W. Va. 1936).

More generally, the Court's prior holding implies that there is some category of economic value stemming from GM's relationship with Robinson, a relationship that arises solely *from* the Dealer Agreement, that is not governed *by* the Dealer Agreement. But, in fact, *any* economic benefit to either Robinson or GM as a result of the Oldsmobile relationship *is* expressly contemplated by the preamble to the Dealer Agreement, titled "Purpose of Agreement" – "The purpose of this Agreement is to promote a relationship between General Motors and its Dealers which . . . permits General Motors and its dealers to fully realize their opportunities for

business success.” (Am. Cmplt. Ex. A, “Purpose of Agreement”, at 1). Indeed, Article 17.11 of the Dealer Agreement (“Sole Agreement of Parties”) expressly precludes the possibility that there is some subject matter outside the bounds of the parties’ written agreement. (Am. Cmplt. Ex. A, § 17.11, at 28 (“General Motors has made no promises to Dealer . . . and there are no other agreements or understandings, either oral or written, between the parties”)).

Moreover, because the parties were engaged in an ongoing business relationship, even if GM had received some intangible benefit from Robinson’s efforts, GM has not done so “unjustly” or “inequitably.”⁸ In other words, assuming Robinson “expended valuable time and monies in creating goodwill in its customers to promote the purchase of GM products” (Am. Cmplt. ¶ 41), it did so for its own benefit so that it could sell those products to the public and as part and parcel of Robinson acting, pursuant to a series of consecutive Dealer Agreements, as “a dealer of GM automobile products, including the Oldsmobile brand, since 1965.” (Am. Cmplt. ¶ 5). Numerous courts have held that where goodwill is created ancillary to the execution of a contract or an ongoing business relationship, no claim for unjust enrichment will lie. *See, e.g., Gidatex, S.r.L. v. Campaniello Imports, Ltd.*, 49 F.Supp.2d 298, 305 (S.D.N.Y. 1999) (granting summary judgment on unjust enrichment claim based on goodwill and holding that “business sense would indicate that Campaniello continued to support the mark because it continued to sell the furniture and because it wished to ensure that its customers would continue to purchase furniture at its stores. Any benefit to Gidatex was a by-product”); *Piccoli A/S v. Calvin Klein Jeanswear Co.*, 19 F.Supp.2d 157, 167 (S.D.N.Y.1998) (granting motion to dismiss unjust enrichment claim and holding that where plaintiff “performed for its own benefit,” no claim for

⁸ *See Realmark Devs., Inc. v. Ranson*, 542 S.E.2d 880, 884–85 (W. Va. 2000) (setting out the two elements of a claim for unjust enrichment as: (1) the receipt of a benefit by the defendant

unjust enrichment will lie); *Berry & Gould, P.A. v. Berry*, 757 A.2d 108, 117 (Md. 2000) (reversing trial court’s award of damages for goodwill under unjust enrichment theory where “[plaintiff] developed his patient following while practicing under the Agreement which is silent as to payment . . . for . . . goodwill”).

Finally, Robinson has not alleged the other element of a valid claim for unjust enrichment: receipt of an extra-contractual benefit by GM flowing from Robinson. In fact, the only “benefit” GM receives from Robinson is when, pursuant to the Dealer Agreement, Robinson purchases Oldsmobile products to resell to its customers. Robinson’s claim for unjust enrichment – set forth in mere conclusory terms (*see* Am. Cmplt. ¶¶ 41-42) – should be dismissed.

CONCLUSION

For the reasons stated herein and in GM’s Motion to Dismiss and Motion for Reconsideration, none of Robinson’s three counts can succeed under West Virginia law. Accordingly, defendant General Motors Corporation respectfully requests that the Court dismiss the First Amended Complaint with prejudice.

from the plaintiff; and (2) an inequity resulting to plaintiff because of the retention of the benefit by the defendant).

DATED: October 29, 2002

Respectfully submitted,

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