SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1753-20

ALTOMARE AUTO GROUP, LLC,

Plaintiff-Appellant,

and

ANTHONY ALTOMARE, ALTOMARE 22 UNION, LLC, and ALTOMARE REALTY, LLC,

Plaintiffs/Intervenors-Appellants,

v.

VOLKSWAGEN GROUP OF AMERICA, INC., d/b/a VOLKSWAGEN OF AMERICA, INC., VW CREDIT, INC., and PARK AVENUE UNION, LLC,

Defendants-Respondents,

and

VOLKSWAGEN GROUP OF

AMERICA, INC, d/b/a
VOLKSWAGEN OF AMERICA,
INC,

Third-Party Plaintiff-
Respondent,

v.

PARK AVENUE UNION, LLC,

Third-Party Defendant-
Respondent.

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Argued on February 13, 2023 – Decided October 19, 2023

Before Judges Gooden Brown, DeAlmeida and Mitterhoff.

On appeal from the Superior Court of New Jersey, Law Division, Union County, Docket No. L-4143-14.

Shalom D. Stone argued the cause for appellant (Stone Conroy, LLC, attorneys; Shalom D. Stone, on the briefs).

Owen H. Smith (Barack Ferrazzano Kirschbaum & Nagelberg, LLP) of the Illinois and New York bars, admitted pro hac vice, argued the cause for respondents Volkswagen Group of America, Inc., d/b/a Volkswagen of America, Inc., and VW Credit, Inc. (Cooper Levenson, PA, and Owen H. Smith, attorneys; Randolph C. Lafferty and Owen H. Smith, on the brief).

The opinion of the court was delivered by

GOODEN BROWN, J.A.D.

This dispute involves a failed Volkswagen franchised dealership in Union, New Jersey, that opened in December 2010 and sold in bankruptcy at a substantial loss in 2016. As a result of the losses sustained, the franchisee, plaintiff Altomare Auto Group, LLC (AAG), and intervenor-plaintiffs Anthony Altomare, Altomare 22 Union, LLC (Altomare 22), and Altomare Realty, LLC (Altomare Realty) (collectively, plaintiffs), sued defendant franchisor, Volkswagen Group of America, Inc., d/b/a Volkswagen of America, Inc. (VWOA), and VW Credit, Inc. (VCI), a wholly owned subsidiary of VWOA (collectively, defendants).[1]

Plaintiffs alleged defendants bore legal responsibility for the failure of the Union dealership by misrepresenting forecasts about the new dealership's anticipated sales, misleading them about the assistance it would provide to open the dealership, and failing to provide sufficient vehicle inventory to the dealership after it opened to ensure success. Ultimately, plaintiffs' complaints were dismissed with prejudice. Plaintiffs now appeal from three Law Division orders: (1) the May 8, 2020, order barring plaintiffs' liability

[1] VWOA is a franchisor and AAG is a franchisee as defined in the New Jersey Franchise Practices Act (FPA), N.J.S.A. 56:10-3(c) and (d).

expert's opinion as a net opinion; (2) the May 8, 2020, order sanctioning plaintiffs for spoliation of evidence, namely, destruction of the dealership's general ledgers for 2010 through 2014; and (3) the January 19, 2021, order granting summary judgment to defendants. We affirm.

I.

We glean these facts from the extensive motion record. Anthony Altomare owned AAG, Altomare 22, and Altomare Realty. Although he never graduated from high school, Anthony[2] had significant experience in the automobile industry, having worked in car dealerships for over a decade before opening his first automobile dealership in 1981. Thirteen years later, in 1994, Anthony purchased a Volkswagen dealership in Bernardsville, which he operated successfully for about seventeen years, until he sold it in January 2012.

VWOA is the exclusive distributor of Volkswagen brand motor vehicles, parts, and accessories within the United States, distributing through a network of franchised dealers. VCI, VWOA's wholly owned subsidiary, provides financial services to dealerships and consumers. In December 2007,

[2] We refer to Anthony Altomare by his first name to avoid confusion and intend no disrespect.

VWOA and Anthony began discussing the possibility of opening a new dealership on Route 22 in Union, along a desirable "auto row" where several other automobile dealerships were located. VWOA had confidence in Anthony's abilities based on his successful operation of the Bernardsville dealership and Anthony was interested in the opportunity.

Over the course of the next three years, the parties took steps to achieve their shared goal of opening the Union dealership, which eventually opened on December 23, 2010. AAG owned and operated the dealership pursuant to a franchise agreement with VWOA. AAG leased the dealership property from Altomare 22, which had purchased the property at a cost of $6.5 million and had spent additional money improving the property to VWOA's specifications. AAG also entered into a lease/purchase agreement with Union Center National Bank to acquire a nearby property where it would operate a service center. In addition, AAG entered into a lease agreement for a storage lot for the Union dealership as well as a credit agreement with VCI for floorplan financing. To capitalize the dealership, AAG utilized loans from Altomare Realty, funds from the Bernardsville dealership, and financial assistance from VWOA.

In 2011, its first full year of operation, the dealership sold 794 new vehicles, and, in 2012, it sold even more new vehicles, having its best year for sales. Plaintiffs conceded that the dealership always had sufficient inventory to satisfy demand, admitting it met its projected monthly sales performance goal from 2011 to 2015. Nevertheless, the dealership suffered financial losses in 2010, 2011, and 2012, and required capital contributions from Anthony between 2010 and 2015.

As early as February 2011, just two months after the dealership opened, Anthony told VWOA he was having financial problems. In particular, he referred to a dispute he was having with Union Center National Bank regarding the repayment of a $1.4 million loan for the Union dealership's service center. As a result of the financial problems, over the course of 2011, Anthony discussed with VWOA his plan to sell both the Bernardsville and the Union dealerships, or at least sell the Bernardsville dealership and use some of the proceeds to capitalize the Union dealership.

In January 2012, Anthony sold the Bernardsville dealership. In 2012 and 2013, Anthony made several attempts to sell the Union dealership to DCH Auto Group Limited (DCH), Park Avenue Union, LLC (Park Avenue), and Planet Honda. However, for a variety of reasons, each of the deals fell

through. The DCH deal was not consummated because Anthony wanted $1 million more that DCH was willing to offer. Although VWOA ultimately disapproved Park Avenue's franchise application for failure to meet certain financial requirements, Park Avenue had already terminated the sale agreement it had negotiated with Anthony due to unfulfilled contingencies. The Planet Honda deal never materialized because Planet Honda and Anthony were never able to agree on a purchase price. As a result, AAG continued to operate the Union dealership until June 2016, when AAG and Altomare 22 filed for bankruptcy. Three months later, in September 2016, the dealership's assets were sold. According to Anthony, he lost his entire investment in the dealership and was forced to sell the dealership at a discount.

Plaintiffs' damages expert, Thomas Reck, concluded that AAG and Anthony suffered $7,333,305 in economic damages from losing the dealership. However, Reck did not examine what caused the economic damages. Plaintiffs' liability expert, Kenneth Rosenfield, had opined that all of plaintiffs' losses were attributable to VWOA's failure to provide sufficient inventory, premised upon an industry standard requiring a ninety-day supply of new vehicles. However, Rosenfield's opinion was excluded as an inadmissible net opinion.

Among other things, Anthony blamed his economic losses on VWOA's refusal to fairly and equitably allocate new vehicle inventory to the Union dealership. During the years the Union dealership operated, Anthony had repeatedly complained about the amount and mix of inventory provided by VWOA. Anthony stated that on the day the Union dealership opened in December 2010, it had only forty new vehicles on site. Shortly after opening, VWOA provided additional vehicles. By December 31, 2010, the dealership had 100 new vehicles in inventory, and 110 as of January 31, 2011. However, according to Anthony, the majority of the inventory was an unpopular model.

The "sales to availability" ratio reflected a dealer's sales as a percentage of its total available inventory. The number of new vehicles that a dealership has available in any given month is the inventory that it has at the end of the month plus the vehicles that it sold during the month. VWOA provided inventory to its dealerships in an amount tied to anticipated sales. A comparison of a dealership's monthly sales relative to its availability is one way to measure the effectiveness of that dealership at selling its inventory during that month.

The Union dealership regularly sold 20% to 30% of its availability in any given month from January 2011 through December 2015, meaning the

dealership met its sales performance goal selling less than one-third of its available inventory. The other two-thirds or more of its available inventory could have been used to make additional sales had potential customers sought to purchase vehicles. Nonetheless, Anthony asserted VWOA misrepresented the anticipated sales and profit forecast for the Union dealership, and the amount of inventory that would be provided to him in order to achieve the anticipated sales.[3]

Anthony stated that at various times before the Union dealership opened, VWOA representatives told him that he would have enough cars allocated to sell 1,500 to 2,000 new cars a year. According to Anthony, he was provided documentation showing sales projections of 1,200 to 1,400 cars per year. He claimed that VWOA promised to supply the Union dealership with the volume and variety of cars necessary to sell at those projected amounts. At his deposition, however, Anthony acknowledged he did not

[3] VWOA's expert, Herbert E. Walter, disputed plaintiffs' allegation that its financial problems were caused by a lack of inventory. He noted that between January 2011 and December 2015, the Union dealership "regularly maintained a 60 to 150 days supply" of new vehicles, which was sufficient to satisfy its new vehicle sales. Walter further stated that the Union dealership earned vehicle allocation consistent with the other dealerships in the Northeast Region, through VWOA's balanced days supply allocation system, and the Union dealership's sales-to-availability ratio was within the range of other dealerships in the Northeast Region.

believe the VWOA representatives had lied to him about the dealership's anticipated sales, nor had they given these optimistic sales estimates in order to deceive him. Instead, he believed that "there was a euphoria" about opening the new dealership, and "everybody was excited."

Anthony testified further that at a meeting in July or September 2008, before the dealership opened, VWOA promised him an opening allocation of 400 cars. Anthony also believed he "would be provided inventory sufficient . . . [to] maintain[] 300 cars on the lot to begin each month," for a three-month or ninety-day supply, which Anthony stated was "industry standard." However, Anthony acknowledged that nobody at VWOA ever told him he would have 300 cars on the lot to begin each month.

In October 2010, closer to the dealership's opening date, Anthony asserted that VWOA assured him the dealership would have "more than enough new vehicle inventory by the time it opened." However, approximately two weeks before the dealership opened, VWOA told Anthony that the company "had allocated inventory of 160 new vehicles to the Union Dealership," but some of those 160 new vehicles were in transit and some had not yet been built. As a result, the 160 new vehicles promised when the dealership opened never materialized. VWOA's representative, John Miele,

opined that VWOA pushed Anthony to open the dealership before it had sufficient inventory in order to meet the company's own end-of-year performance requirements.

In answers to interrogatories, Anthony asserted the dealership's monthly inventory from December 23, 2010, when it opened to July 1, 2016, when it closed, ranged from a low of 107 on June 1, 2012, to a high of 283 on January 1, 2015, excluding the first month of operations. VCI provided financing for AAG's vehicle inventory, which is known as floor plan financing. Anthony became displeased with VCI at least as early as 2012, when he over-drafted on his floor plan financing and was placed on a credit hold, limiting the number of vehicles that could be ordered.

On January 9, 2012, during the sale of the Bernardsville dealership, Anthony, AAG, and Altomare Realty entered into a temporary forbearance agreement with VCI, by virtue of which VCI agreed to forego foreclosing on loans to Altomare Realty when the sale of the Bernardsville dealership triggered a default on those loans. The forbearance agreement also released VCI and VWOA of all claims, "whether accrued or unaccrued, known or unknown," "arising out of any other agreement, transaction or occurrence."

The agreement was subsequently extended by amendment on May 8, 2012.[4] Anthony stated that in March 2014, the Union dealership stopped using VCI as its floor plan lender and from that point on, the dealership was able to obtain as many vehicles as he wanted.

On October 30, 2008, more than two years before the dealership opened, VWOA and Anthony executed a letter of intent (LOI) in connection with the development of the Union dealership, with an amendment executed on May 14, 2009. The LOI included a provision requiring that Anthony establish, "[n]o later than 30 calendar days prior to the scheduled opening of the" Union dealership, a "credit line . . . sufficient to floor plan a 60-day supply of Volkswagen vehicles. (Based on a 2009 annual planning objective of 897 units at an average invoice cost of $23,500, the required floor plan commitment can be no less than $3,500,000)." (Emphasis added).

The LOI also included a provision stating:

> This Agreement contains the entire understanding of the parties hereto in respect of the subject matter hereof, and supersedes all prior and contemporaneous agreements and understandings, oral and written, between the parties with respect to such subject matter. Neither party has relied upon any representation, warranty, covenant, agreement,

[4] The forbearance agreements releasing all claims were subsequently invoked by defendants as a bar to plaintiffs' claims related to the Union dealership.

> promise or condition in entering into this Agreement that is not set forth in this Agreement.

Consistent with the LOI, Werner Mersch, VWOA's Northern Region Manager, testified at his deposition that VWOA's goal was to provide dealers with a sixty-day supply of cars, with the specific amount based upon planning volume and anticipated sales. He stated that VWOA's ability to provide that level of inventory would depend upon availability. VWOA's vehicle allocation policy, dated September 2011, also provided for a two-month supply of vehicles to new dealerships, and a one-month supply for other dealerships.

Other VWOA representatives, John Miele and Gregory Swetoha, gave deposition testimony suggesting that a three-month inventory based on projected sales was standard in the industry. However, Miele admitted that he lacked expertise on the issue of allocating inventory to new dealerships, and, although he could not recall what standard VWOA used, Swetoha admitted that some manufacturers used a sixty-day supply standard, rather than a ninety-day supply standard.

A few months after executing the LOI, on February 4, 2009, VWOA shared with Anthony a "Dealership Sales and Profit Forecast," forecasting annual new-car sales for the Union dealership at 1,200 units. However, the

document indicated that the forecast was "only an estimate" and did not constitute a representation by VWOA as to the accuracy of the projection. In May 2009 and July 2009, VWOA provided documents to Anthony that forecasted annual new-car sales for the Union dealership at 700 units. These forecasts contained the same disclaimer as the February 2009 forecast. A document dated September 25, 2009, titled "Retail Network Development Improvement Program," prepared by VWOA in connection with the amount of financial assistance to be provided to Anthony, identified the "2010 Sales Opportunity" for the Union dealership at 796 units, and the "2011 Sales Opportunity" at 1,048 units.

Some internal analyses were less optimistic about the Union dealership's potential for success. For example, in September 2008, before the LOI was executed, Rocco DiAntonio, VWOA's manager of network performance, expressed concern about the profitability of a Union dealership, noting:

> The last time Urban Science[5] looked at this scenario for us was in Dec 2006, using PR55 national sales volumes. I asked USAI to review the scenario for us using PR57 national sales volumes. I expect the sales opportunity to be around 700-750 for both 2009 and

[5] Urban Science is a data analytics company.

> 2010. Do you think this point will pencil with this volume?
>
> Despite the fact we have had numerous conversations on this OP,[6] and have vacillated on the merits of filling this OP, these are the issues we need to address.

Thereafter, in February and September 2010, DiAntonio sent internal emails to VWOA employees containing VWOA's analysis that a minimum registration potential of 750 was expected for metro markets with a population of more than ten million. The emails included charts showing the projected registrations for Union were just 441 for 2010, and 841 in 2014. As of December 2010, VWOA's internal projected annual sales for Union was 674 in 2012, 684 in 2013, 688 in 2014, and 641 in 2015. These internal analyses were not shared with Anthony. However, DiAntonio noted that the analyses were very "high-level strategic" documents, that did not take into account factors specific to the market such as "existing dealer's performance from a sales perspective, locations of auto rows in a particular geography, traffic patterns, [and] traffic flows on the highways adjacent to the auto rows." Moreover, other projections were more optimistic.

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6 OP means "open point" and referred to the new dealership.

On December 6, 2010, a few weeks before the dealership opened, VWOA and AAG executed a dealer agreement. The agreement required AAG to "maintain in inventory at all times the assortment and quantity of Authorized Products required by the Operating Standards, Operating Plan or Recommendations." It also required VWOA to provide a "fair and equitable" allocation of cars to AAG, as follows:

> Dealer recognizes that certain Authorized Products may not be available in sufficient supply from time to time because of factors such as product importation, consumer demand, component shortages, manufacturing constraints, governmental regulations, or other causes. [VWOA] will endeavor to make a fair and equitable allocation and distribution of the Authorized Products available to it.
>
> [(Emphasis added).]

The agreement further stated, in multiple places, that there was no guarantee that the dealership would be financially successful, and the parties agreed to a covenant not to sue for losses incurred in operating the dealership, "excepting only losses or damages caused directly by a violation of the applicable law by [VWOA], or breach by [VWOA] of its contractual responsibilities provided in the Standard Provisions of the Volkswagen

Dealer Agreement."[7] The agreement also contained a merger clause, which stated: "This instrument contains the entire agreement between the parties. No representations or statements other than those expressly set forth or referred to herein were made or relied upon in entering into this Agreement."

Anthony also blamed the Union dealership's failure on the level of financial assistance VWOA provided to open the dealership. He claimed he was repeatedly assured that VWOA would provide him with $2.5 million in direct financial assistance in the form of a grant. However, he had no evidence of an explicit promise to that effect. Instead, the documentary record showed, and Anthony acknowledged, that VWOA advised him that its financial assistance would be provided in the form of a loan, albeit one with extremely generous terms.

To that end, before the dealership opened, Anthony and VWOA entered into a "Funding and Site Control Agreement," dated March 23, 2010. Pursuant to the agreement, VWOA agreed to provide $2.5 million in funding, for which "the Altomare Parties [had] no obligation to repay to VWOA . . . ,

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[7] See N.J.S.A. 56:10-7(a) ("It shall be a violation of this act for any franchisor . . . [t]o require a franchisee at time of entering into a franchise arrangement to assent to a release, assignment, novation, waiver or estoppel which would relieve any person from liability imposed by this act.").

except as provided in this Agreement." The agreement expressly provided that the amount Anthony was required to repay would decrease for every year he continued to operate the Union dealership, and his repayment obligation would end entirely if he continued to operate the dealership through 2016. The agreement further provided that it superseded all previous negotiations regarding the matter. Anthony understood that he was bound by the agreement's terms and acknowledged in a November 21, 2009, email that if he sold the dealership "before [seven] years[, he] would have to pay back a prorated amount," but "[p]ast the seven years[, he had] no obligations."

After the dealership opened, Anthony complained to VWOA that he was not receiving the amount of advertising support he expected. Anthony claimed that VWOA promised to provide the Union dealership with advertising assistance in the form of newspaper inserts and radio advertising. Anthony estimated that the amount of advertising he discussed with VWOA would cost $600,000. However, he admitted that nobody from VWOA ever expressly promised him $600,000 in advertising support and, ultimately, VWOA reimbursed Anthony $140,000 for advertising expenses incurred in the first four-to-five months of the dealership's operations.

Although Anthony primarily blamed the dealership's losses on VWOA, he also blamed mismanagement by Michael LaMotta, the Union dealership's general manager between February 2014 and February 2015, as well as actions by his lender, Union Center National Bank. During the dealership's six years of operation, there were approximately seven general managers and six chief financial officers.

In November 2014, AAG initiated this litigation by filing a complaint against defendants VWOA, VCI, and Park Avenue, primarily alleging that defendants interfered with AAG's attempts to sell the Union dealership beginning in 2011 after VWOA and VCI "made it impossible for AAG to operate the Union Dealership profitably." On September 25, 2017, AAG filed an amended complaint, adding that after inducing AAG to open the Union Dealership, VWOA "sabotaged AAG's ability to profitably operate" the dealership "by, inter alia, reneging on its promise to provide a grant to offset the costs associated with opening the . . . [d]ealership; refusing to deliver sufficient new vehicle inventory that had been promised; and failing to provide promised marketing support for the . . . [d]ealership."

The amended complaint asserted seven causes of action as follows:

> Count One (against VWOA): violation of the Franchise Practices Act, N.J.S.A. 56:10-6, in

connection with AAG's proposed sale of the Union dealership to Park Avenue;

Count Two (against VWOA): tortious interference with contract, in connection with AAG's proposed sale of the Union dealership to Park Avenue;

Count Three (against VWOA): tortious interference with prospective economic advantage, in connection with AAG's proposed sale of the Union dealership to DCH;

Count Four (against VWOA and VCI): tortious interference with prospective economic advantage, in connection with AAG's proposed sale of the Union dealership to Planet Honda;

Count Five (against Park Avenue): breach of contract for failure to proceed with the proposed purchase of the Union dealership;

Count Six (against VWOA): fraudulent inducement to open the Union dealership, through false promises of marketing and advertising support, sufficient inventory, and financial assistance totaling $2.5 million in the form of a grant rather than a loan; and

Count Seven (against VWOA): breach of contract, specifically, the parties' franchise agreement, by failing to provide the Union dealership with sufficient vehicles to operate profitably.

On September 25, 2017, intervenor-plaintiffs, Anthony, Altomare 22, and Altomare Realty filed a complaint against VWOA, VCI, and Park Avenue

largely mirroring the amended complaint. The intervenor complaint asserted the following six causes of action:

> Count One (against VWOA): tortious interference in connection with a contract for sale of the Union dealership to Park Avenue;
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> Count Two (against VWOA): tortious interference with a prospective economic advantage, in connection with a proposed sale of the Union dealership to DCH;
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> Count Three (against VWOA and VCI): tortious interference with a prospective economic advantage, in connection with a proposed sale of the Union dealership to Planet Honda;
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> Count Four (against Park Avenue): breach of contract in connection with the contract to purchase the Union dealership;
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> Count Five (against VWOA): fraudulent inducement to open the Union dealership, through false promises relating to financing, inventory, and marketing support; and
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> Count Six (against VWOA): fraud in connection with the quality of Volkswagen's diesel vehicles.

On April 5, 2018, VWOA filed a third-party complaint against Park Avenue, asserting a claim for indemnification.

Counts three and four of the amended complaint, and counts two and three of the intervenor complaint were subsequently voluntarily dismissed by plaintiffs. As a result, no claims remained against VCI. In addition, the

motion judge dismissed count six of the intervenor complaint as barred by a settlement agreement in related federal litigation. That dismissal is not challenged on appeal.

In February 2020, defendants moved for sanctions related to plaintiffs' spoliation of evidence. Defendants argued that despite plaintiffs' claim that VWOA induced them to open the Union dealership and then plotted to cause the dealership's failure, plaintiffs failed to preserve the dealership's general ledgers from 2010 to 2014 that would have allowed defendants to show and quantify the losses caused by other factors. Defendants sought an order precluding plaintiffs from offering any evidence of damages at trial, and an order dismissing plaintiffs' claims in their entirety as a result of their inability to prove damages. In addition, defendants moved to exclude evidence from plaintiffs' liability and damages experts, Kenneth Rosenfield and Thomas Reck, respectively, on the ground that their opinions were inadmissible net opinions. Plaintiffs opposed the motions.

On May 8, 2020, following oral argument, the judge granted defendants' motion for sanctions on the spoliation of evidence claim and entered an order precluding plaintiffs from "offering any evidence of lost profits for the years 2010-2014." The judge added that defendants were also "entitled to an

adverse inference charge" at trial. In addition, the judge struck Rosenfield's reports and barred Rosenfield's testimony as a net opinion but denied defendants' motion to bar Reck's testimony.

In August 2020, over plaintiffs' objection, defendants moved for summary judgment. The judge heard oral argument on December 2, 2020, and entered an order on January 19, 2021, granting summary judgment and dismissing plaintiffs' complaint with prejudice. In an accompanying written statement of reasons, the judge applied the governing principles and concluded:

> The conclusive and, frankly, overwhelming evidence is that there are no material facts in dispute by which these [d]efendants bear legal responsibility to [p]laintiffs for the failure of [the Union dealership], whether or not the General Release between the parties is enforceable. . . . Under these circumstances, [d]efendants are entitled to summary judgment.

As to the fraudulent inducement claims, the judge explained that plaintiffs failed to establish the elements of the cause of action because Anthony himself acknowledged that he did not believe that VWOA's representations regarding projected sales, financial assistance, or marketing support were made with the intent to deceive him. Thus, the judge concluded there was "no proof that [d]efendants made any representations that were

knowingly false, or that there was detrimental reliance on the part of [p]laintiffs" as to all three accusations.

Turning to the breach of contract claims, the judge explained:

> Plaintiff[s'] breach of contract claim relies . . . on the theory that [d]efendants did not provide sufficient inventory to allow it to succeed. The uncontroverted evidence is that the dealership at all times had 60-150 days of inventory, an amount that met or exceeded [National Automobile Dealers Association (NADA)] industry guidelines . . . . In addition, the sales of vehicles exceeded the estimate provided by [Anthony] himself. [Anthony] also testified that any shortage of inventory was only during the first months of operation, and did not continue. There is no written agreement that [d]efendants would provide any specific number of vehicles, and specifically recognized that, based upon a number of variables, specific models could sometimes be unavailable. Under these circumstances, there is simply no cognizable evidence upon which a jury could rely to find that [d]efendants breached their obligations to [p]laintiffs, or that resultingly [plaintiffs] suffered damages.

Regarding the tortious interference with economic advantage claim, the judge posited the claim involved plaintiffs' contention that defendants purposely interfered with the potential sale of the dealership to Park Avenue. However, according to the judge,

> It is clear that [VWOA] had concerns with the sale, just as it is also clear that [VWOA] contractually has a right to ensure that [a] subsequent purchaser is

> reasonably positioned to achieve success. In particular, [d]efendants sought to ensure that the purchaser had enough capital and wasn't overleveraged. It found that [Park Avenue] had $1.5M less than [VWOA] believed was necessary to run the operation and that, of the amount they did have, more than fifty percent was in the form of a loan. As a result, [VWOA] did issue a conditional denial. However, the uncontroverted facts show that [p]laintiffs and Park[ Avenue] terminated the deal prior to [d]efendants' decision and action. Under these circumstances, [p]laintiffs cannot prove that [VWOA]'s action was done "intentionally and with malice" or that [d]efendants[] caused damage.

The judge further determined that defendants were entitled to summary judgment regardless of the enforceability of the 2012 general releases Anthony signed barring his claims. The judge explained:

> [Anthony], by all indications, is a savvy and successful businessman in the operation of automobile dealerships. He had run the Bernardsville dealership and successfully enough that it allowed him to pursue this new opportunity. He owned one lot across from his former dealership and, apparently by virtue of selling that location, the note held by [d]efendants was accelerated. He then successfully negotiated a for[]bearance, with one of the requirements being that he sign this release. He did so not once, but twice, several months apart. He did so while represented by competent counsel in the area of commercial transactions. No argument can be advanced that the provisions are unreasonable. They are almost pro forma in a commercial transaction. Each side was represented. The provisions are not

> unreasonable. Against all of this, the mere allegation of unconscionability finds no footing.

Following the entry of the order granting defendants summary judgment, VWOA's cross-claim and third-party complaint against Park Avenue were dismissed as moot with the consent of all parties. This appeal followed.

On appeal, plaintiffs challenge the judge's orders granting summary judgment to defendants, excluding their liability expert's opinion as a net opinion, and precluding them from offering evidence of damages at trial due to spoliation. As to the summary judgment ruling, by not addressing the claims, plaintiffs have abandoned the tortious interference with economic advantage claims in connection with the potential sale of the dealership to Park Avenue (counts one and two of the amended complaint and count one of the intervenor complaint). See Thomas Makuch, LLC v. Twp. of Jackson, 476 N.J. Super. 169, 183 (App. Div. 2023) (explaining that because plaintiff abandoned certain causes of action by not addressing the claims on appeal, "the summary judgment order dismissing those claims" were affirmed); N.J. Dep't of Env't. Prot. v. Alloway Twp., 438 N.J. Super. 501, 505-06 n. 2 (App. Div. 2015) ("An issue that is not briefed is deemed waived upon appeal.").

II.

"[W]e review the trial court's grant of summary judgment de novo under the same standard as the trial court." Templo Fuente De Vida Corp. v. Nat'l Union Fire Ins. Co. of Pittsburgh, 224 N.J. 189, 199 (2016). That standard is well-settled.

> [I]f the evidence of record—the pleadings, depositions, answers to interrogatories, and affidavits—"together with all legitimate inferences therefrom favoring the non-moving party, would require submission of the issue to the trier of fact," then the trial court must deny the motion. On the other hand, when no genuine issue of material fact is at issue and the moving party is entitled to a judgment as a matter of law, summary judgment must be granted.
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> [Steinberg v. Sahara Sam's Oasis, LLC, 226 N.J. 344, 366 (2016) (citations omitted) (quoting R. 4:46-2(c)).]

Whether a genuine issue of material fact exists depends on "whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party in consideration of the applicable evidentiary standard, are sufficient to permit a rational factfinder to resolve the alleged disputed issue in favor of the non-moving party." Brill v. Guardian Life Ins. Co., 142 N.J. 520, 523 (1995). "If there exists a single, unavoidable resolution of the alleged disputed issue of fact, that issue should be considered insufficient to constitute a 'genuine' issue of material fact for

purposes of Rule 4:46-2." Brill, 142 N.J. at 540. "If there is no genuine issue of material fact, we must then 'decide whether the trial court correctly interpreted the law.'" DepoLink Ct. Reporting & Litig. Support Servs. v. Rochman, 430 N.J. Super. 325, 333 (App. Div. 2013) (quoting Massachi v. AHL Servs., Inc., 396 N.J. Super. 486, 494 (App. Div. 2007)). "We review issues of law de novo and accord no deference to the trial judge's [legal] conclusions . . . ." MTK Food Servs., Inc. v. Sirius Am. Ins. Co., 455 N.J. Super. 307, 312 (App. Div. 2018).

"The practical effect of [Rule 4:46-2(c)] is that neither the motion court nor an appellate court can ignore the elements of the cause of action or the evidential standard governing the cause of action." Bhagat v. Bhagat, 217 N.J. 22, 38 (2014). As such, pertinent to this appeal, the elements of a cause of action for fraudulent inducement are: (1) "a material misrepresentation" by the defendant to the plaintiff "of a presently existing or past fact;" (2) "knowledge or belief" on the part of the defendant that the representation is false, and belief by the plaintiff that the representation is true; (3) an intent on the part of the defendant that the plaintiff rely upon the misrepresentation; (4) the plaintiff's "reasonable reliance" upon the misrepresentation; and (5) "resulting damages." Banco Popular N. Am. v. Gandi, 184 N.J. 161, 172-73

(2005) (quoting Gennari v. Weichert Co. Realtors, 148 N.J. 582, 610 (1997)). See also Jewish Ctr. of Sussex Cnty. v. Whale, 86 N.J. 619, 624 (1981) ("A misrepresentation amounting to actual legal fraud consists of a material representation of a presently existing or past fact, made with knowledge of its falsity and with the intention that the other party rely thereon, resulting in reliance by that party to his detriment."). "'Fraud is not presumed; it must be proven through clear and convincing evidence.'" Stoecker v. Echevarria, 408 N.J. Super. 597, 617-18 (App. Div. 2009) (quoting Stochastic Decisions, Inc. v. DiDomenico, 236 N.J. Super. 388, 395 (App. Div. 1989)).

"In order to form the basis for an action in deceit, the alleged fraudulent representation must relate to some past or presently existing fact and cannot ordinarily be predicated upon matters in futuro." Ocean Cape Hotel Corp. v. Masefield Corp., 63 N.J. Super. 369, 380 (App. Div. 1960). "Statements as to future or contingent events, to expectations or probabilities, or as to what will or will not be done in the future, do not constitute misrepresentations, even though they may turn out to be wrong." Alexander v. CIGNA Corp., 991 F. Supp. 427, 435 (D.N.J. 1997), aff'd, 172 F.3d 859 (3d Cir. 1998); accord Middlesex Cnty. Sewer Auth. v. Borough of Middlesex, 74 N.J. Super. 591, 605 (Law Div. 1962), aff'd o.b., 79 N.J. Super. 24 (App. Div. 1963).

The exception to this general rule is where the defendant has made a false representation of its existing intention, that is, where the defendant has misrepresented its present state of mind. Ocean Cape Hotel Corp., 63 N.J. Super. at 380.

> Misrepresentation of a present state of mind, with respect to a future matter, may be concluded from the utter recklessness and implausibility of the statement in light of subsequent acts and events; from a showing that at the time of the making of the promise, the promisor's intention to perform was dependent upon contingencies known to the promisor and unknown to the promisee; or from circumstances indicating that the promisor must have known at the time of his promise that he could not or would not fulfill it.
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> [Id. at 381 (citations omitted).]

Accord Stochastic Decisions, Inc., 236 N.J. Super. at 395-96.

A breach of contract claim requires proof by a preponderance of the evidence that: (1) "the parties entered into a contract containing certain terms;" (2) the plaintiff fulfilled its obligations under the contract; (3) the defendant failed to perform its obligations under the contract, "defined as a breach of the contract;" and (4) the plaintiff sustained damages as a result. Woytas v. Greenwood Tree Experts, Inc., 237 N.J. 501, 512 (2019) (quoting Globe Motor Co. v. Igdalev, 225 N.J. 469, 482 (2016)). "A breaching party is 'liable for all of the natural and probable consequences of the breach of

[the] contract.'" Id. at 514 (quoting Pickett v. Lloyd's, 131 N.J. 457, 474 (1993)).

Our goal in contract interpretation is governed by familiar rules:

> "It is well-settled that '[c]ourts enforce contracts "based on the intent of the parties, the express terms of the contract, surrounding circumstances and the underlying purpose of the contract."'" [In re County of Atlantic, 230 N.J. 237, 254 (2017)] (alteration in original) (quoting Manahawkin Convalescent v. O'Neill, 217 N.J. 99, 118 (2014)). The plain language of the contract is the cornerstone of the interpretive inquiry; "when the intent of the parties is plain and the language is clear and unambiguous, a court must enforce the agreement as written, unless doing so would lead to an absurd result." Quinn v. Quinn, 225 N.J. 34, 45 (2016).
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> If we conclude that a contractual term is ambiguous, we "'consider the parties' practical construction of the contract as evidence of their intention and as controlling weight in determining a contract's interpretation.'" County of Atlantic, 230 N.J. at 255 (quoting County of Morris v. Fauver, 153 N.J. 80, 103 (1998)). "In a word, the judicial interpretive function is to consider what was written in the context of the circumstances under which it was written, and accord to the language a rational meaning in keeping with the express general purpose." [Owens v. Press Publishing Co., 20 N.J. 537, 543 (1956)].
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> [Barila v. Board of Educ. of Cliffside Park, 241 N.J. 595, 615-616 (2020).]

Thus, "[t]he judicial task is simply interpretative; it is not to rewrite a contract for the parties better than or different from the one they wrote for themselves." Kieffer v. Best Buy, 205 N.J. 213, 223 (2011).

"[I]n New Jersey the covenant of good faith and fair dealing is contained in all contracts and mandates that 'neither party shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract.'" Seidenberg v. Summit Bank, 348 N.J. Super. 243, 253 (App. Div. 2002) (quoting Sons of Thunder v. Borden, Inc., 148 N.J. 396, 420 (1997)). "Although the implied covenant of good faith and fair dealing cannot override an express term in a contract, a party's performance under a contract may breach that implied covenant even though that performance does not violate a pertinent express term." Wilson v. Amerada Hess Corp., 168 N.J. 236, 244 (2001).

"The guiding principle in the application of the implied covenant of good faith and fair dealing emanates from the fundamental notion that a party to a contract may not unreasonably frustrate its purpose[.]" Seidenberg, 348 N.J. Super. at 259.

> Proof of "bad motive or intention" is vital to an action for breach of the covenant. Wilson, 168 N.J. at 251. The party claiming a breach of the covenant of good faith and fair dealing "must provide evidence

> sufficient to support a conclusion that the party alleged to have acted in bad faith has engaged in some conduct that denied the benefit of the bargain originally intended by the parties." [23 Williston on Contracts § 63:22, at 513-14 (Lord ed. 2002) (footnotes omitted)]; see also Wilson, 168 N.J. at 251; Sons of Thunder, 148 N.J. at 420.
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> [Brunswick Hills Racquet Club, Inc. v. Rte. 18 Shopping Ctr. Assocs., 182 N.J. 210, 225 (2005).]

Applying these principles, we agree with the judge that defendants were entitled to summary judgment because plaintiffs did not present sufficient credible evidence to establish the causes of action alleged and the record discloses no genuine issue of material fact that would prevent summary disposition. On appeal, plaintiffs contend their claims against VWOA for fraudulent inducement were premised upon VWOA's inflated sales projections for the Union dealership and its promises of sufficient inventory. Plaintiffs' breach of contract claims were premised upon VWOA's failure to provide the Union dealership with "a fair and equitable allocation and distribution" of new vehicles, as required under the terms of the dealer agreement and under the covenant of good faith and fair dealing.[8]

[8] Plaintiffs have abandoned their reliance on VWOA's purported promises of financial assistance and marketing support to buttress their claims. See Alloway Twp., 438 N.J. Super. at 505-06 n. 2.

However, the record does not reflect any promise that VWOA would provide the Union dealership with a specific amount of vehicle inventory every month. Rather, as set forth in the dealer agreement, the parties agreed that VWOA would "endeavor to make a fair and equitable allocation and distribution" of vehicles to the dealership, "recogniz[ing] that certain Authorized Products may not be available in sufficient supply from time to time because of factors such as product importation, consumer demand, component shortages, manufacturing constraints, governmental regulations, or other causes[.]"

VWOA complied with this contractual obligation. Specifically, the record reflects the parties' understanding that VWOA would supply the dealership with inventory based upon the dealership's projected needs, which in turn was determined based upon the dealership's projected sales volume at the outset, and its actual sales volume as the dealership became established. Cf. 2 Corbin on Contracts § 6.5 (2022) (explaining that in a requirements contract, "the quantity term is not fixed at the time of contracting" but "[t]he parties agree that the quantity will be the buyer's needs or requirements of a specific commodity or service," signifying that "[i]t is a relational contract in which the kinks can be and frequently are ironed out in the course of

performance"). Indeed, plaintiffs admitted in responding to the summary judgment motion that the inventory provided to the dealership was more than sufficient to satisfy demand, notwithstanding Anthony's dissatisfaction with the number and mix of vehicles provided by VWOA.

The parties' October 2008 letter of intent anticipated that VWOA would provide the dealership with a sixty-day inventory of vehicles based upon the dealership's projected annual sales -- with the sixty-day supply consistent with VWOA's subsequent, written vehicle allocation policy dated September 2011. Although the actual monthly inventory VWOA provided to the dealership varied due to transportation and manufacturing delays, such circumstances were anticipated by the terms of the parties' dealer agreement, and the dealership's inventory was largely consistent with and sometimes exceeded the sixty-day supply referenced in the parties' LOI and VWOA's vehicle allocation policy, assuming sales of 700 vehicles per year.[9]

Plaintiffs argue that VWOA's projected sales before the dealership opened of between 700 and 2,000 vehicles per year could be considered

[9] A sixty-day supply for anticipated sales of 700 vehicles per year would be approximately 116 vehicles. A ninety-day supply would be 175 vehicles. After the first month of operations, the monthly inventory VWOA provided varied between a low of 107 vehicles in June 2012, the year the dealership was subject to a credit hold by VCI, to a high of 283 vehicles in January 2015.

fraudulent because they contradicted VWOA's internal projections of between 441 in 2010 and 841 in 2014, which projections were not shared with Anthony. However, VWOA's projections to Anthony were presented as mere projections, not guarantees of future sales figures. As such, the written projections of future sales all included disclaimers that they were only estimates, not guarantees. Critically, the record is clear that Anthony understood the projections to be mere projections, not statements of fact. Indeed, Anthony testified that he understood that the more optimistic sales estimates, provided to him early in the process, were the product of euphoria and excitement over the new dealership. He understood that the VWOA representatives had not made these projections with an intent to deceive him. Moreover, VWOA's projections were borne out as true, not false. In 2011, the dealership's first full year of operations, the dealership sold 794 new vehicles, which fell within the range of projected sales made by VWOA.

Plaintiffs also argue the judge erred in finding enforceable the general releases Anthony signed in 2012 to obtain forbearance on the loan he had with VCI that had become due upon his sale of the Bernardsville dealership. Plaintiffs contend that, for a variety of reasons, the forbearance agreements releasing all claims cannot bar plaintiffs' claims related to the Union

dealership. However, because our decision substantively addresses the claims, we need not address plaintiffs' argument. Likewise, because the judge's evidentiary ruling barring Rosenfield's expert opinion had no bearing on the summary judgment ruling, which ruling obviated the need for a trial, we need not address the exclusion of Rosenfield's opinion, or the imposition of sanctions based on plaintiffs' spoliation of evidence.

Affirmed.