NO. 09-35343

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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SKYE TAYLOR,

Plaintiff - Appellant,

v.

VOLKSWAGEN GROUP OF AMERICA INC.; CASCADE CHRYSLER INC., doing business as Karmart Volkswagen; HANSON MOTORS INC., doing business as Hanson Motors Volkswagen; ROGER JOBS MOTORS INC., doing business as Roger Jobs Volkswagen

Defendants - Appellees

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# APPELLEE VOLKSWAGEN GROUP OF AMERICA, INC.'S BRIEF

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON (Seattle), NO.2:07-cv-01849-RSL
HONORABLE ROBERT S. LASNIK

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**CORPORATE DISCLOSURE STATEMENT**
**REQUIRED BY RULE 26.1, FRAP**

The undersigned counsel for Defendant/Appellee Volkswagen Group of America, Inc., ("VWGoA") declares that VWGoA is a wholly owned subsidiary of Volkwagen AG and that no further publicly held company owns 10% or more of VWGoA's stock.

Dated this 9th day of July, 2009.

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## STATEMENT OF JURISDICTION

Defendant/Appellee Volkswagen Group of America, Inc. ("VWGoA") states that the subject matter of this action undisputedly arose as a federal question as an antitrust claim under § 1 of the Sherman Act, 15 U.S.C. §1, in accordance with 28 U.S.C. §1331.

## STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Whether the District Court's Order granting of VWGoA's Motion for Summary Judgment as to the only cause of action of the Second Amended Complaint for purported violation of § 1 of the Sherman Act was incorrect.

A. Whether the District Court correctly analyzed VWGoA's agreements with its dealers to not sell vehicles for foreign export as a vertical restraint under a rule of reason analysis;

B. Whether the District Court correctly found no evidence of any negative effects on competition arising from VWGoA's policy and correctly ruled that VWGoA's geographic sales limit policy furthered interbrand competition;

C. Whether the District Court correctly found that VWGoA's market share was insufficient to affect interbrand competition; and,

D. Whether the District Court correctly found that there was no evidence of any conspiracy by and among VWGoA and its dealers.

# STATEMENT OF THE FACTS

## A. VWGoA's Geographic Sales Limit Policy

VWGoA is the distributor of Volkswagen vehicles in the United States. (ER 158; 172[1]). VWGoA is a wholly owned subsidiary of Volkswagen AG, a German Corporation. (ER 158; 172). Volkswagen AG has other subsidiaries that are responsible for distribution of Volkswagen vehicles in the rest of the world. (ER 158). VWGoA distributes Volkswagen vehicles in the United States through independent dealers. (ER 158; 172).

VWGoA has no authority to sell new vehicles for distribution outside the United States. (ER 158). VWGoA's distribution of new Volkswagen vehicles has always been limited to the fifty United States. (ER 158). VWGoA, therefore, only authorizes its dealers to sell new vehicles for use in the fifty United States, and does not authorize sales of new vehicles for resale or use elsewhere. (ER 158; 161).

Specifically, VWGoA's standard agreement with its dealers provides:

> … VWGoA does not restrict Dealer's sale of Authorized Products within the 50 United States. VWGoA hereby informs Dealer, however, that VWGoA has no authority to sell any products for distribution outside the United States, and it is VWGoA's policy not to do so. Dealer acknowledges its understanding that this is intended to preserve the integrity of the orderly worldwide distribution network for the products supplied to VWGoA, and to maximize customer satisfaction by

[1]Citation throughout this brief to "ER" refers to Excerpt of Record as filed by VWGoA in light of Appellant's pro per status. (9th Cir. R. 30-1.1(a)-(b)).

> ensuring that Authorized Products meet the certification and operational standards to which they were designed. Dealer therefore is authorized to sell new Authorized Products only in the 50 United States, and is not authorized to, and agrees it will not, sell any new Authorized Product for sale or use elsewhere.

(ER 158;161). This particular clause has been in place in VWGoA's dealer agreements since 1992. (ER 158). VWGoA's geographic sales limit policy is the result of a unilateral decision by VWGoA. (ER 158). The geographic sales limit policy is delineated in VWGoA's standard dealership agreement that all dealers across the United States are required to sign. (ER158; 159).

This policy is intended to preserve the integrity of Volkswagen's distribution network and to maximize customer satisfaction by ensuring that new vehicles meet the certification and operational standards for the countries in which they are sold. (ER 159). Preventing unauthorized geographical exports also protects VWGoA's dealer network from the vagaries of price fluctuations due to currency exchange rates. For example, a dealer near a border could see all of its business disappear overnight if there was a sudden increase in the exchange rate resulting in Volkswagen vehicles across the border becoming substantially cheaper in terms of U.S. dollars. (ER 158). It is essential to VWGoA's business to have a nationwide network of dealers available to sell and service Volkswagen vehicles. In order to keep the dealership network functioning, it is essential that the dealers have a reasonably stable business platform in which to operate. (ER 158).

Each of the three VWGoA independent dealers sued in this action, were required to sign a dealer agreement including the above geographic sales limit policy. (ER 159). VWGoA did not and still does not negotiate the terms of the geographic sales limit policy with the three defendant dealers. Similarly,

VWGoA's distribution agreement with Volkswagen AG does not allow for such negotiations. (ER 159).

### B. Taylor Attempts To Buy a U.S. Based Volkswagen Car For Export to Canada

Appellant Skye Taylor ("Taylor") was at the times at issue in the underlying pleadings a resident of Vancouver, Canada. (ER 171). Taylor attempted to purchase two new Volkswagen vehicles, a Passat and a Jetta, from three different Volkswagen dealers in Washington for use in Canada. (ER 181). Two of the dealers refused to sell to Taylor and the third mistakenly allowed Taylor to purchase the Passat he wanted, but subsequently refused to sell him the Jetta he wanted. (ER 181-182). The three dealers refused to sell to Taylor because the sales would have violated VWGoA's geographic sales limit policy as set forth in each of the agreements that the dealers had with VWGoA. (ER 159; 181-182).

## SUMMARY OF ARGUMENT

## ARGUMENT

### A. Standards of Review

#### 1. De Novo Standard for Summary Judgment Motions

An appellate court generally reviews an order granting summary judgment *de novo*, "using the same standard as the district court." *Lovell v. Chandler*, 303 F.3d 1039, 1052 (9th Cir. 2002); *see Arpin v. Santa Clara Valley Transp. Agency*, 261 F.3d 912, 919 (9th Cir. Cal. 2001) (quoting *Triton Energy Corp. v. Square D Co.*, 68 F.3d 1216, 1220 (9th Cir. 1995) ("A grant of summary judgment is

reviewed *de novo*.")). Specifically, the appellate court determines whether the district court correctly applied the relevant substantive law and whether, viewing the evidence in the light most favorable to the nonmoving party, any genuine issues of material fact exist. *Robi v. Reed*, 173 F.3d 736, 739 (9th Cir. 1999).

A genuine issue of material fact exists where "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Villiarimo v. Aloha Island Air, Inc.*, 281 F.3d 1054, 1061 (9th Cir. 2002) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)). A grant of summary judgment is proper and, hence, will be affirmed on appeal, where the moving party shows the absence of a genuine issue of material fact, and the nonmoving party then "fails to designate, by affidavits, depositions, answers to interrogatories, or admissions on file, 'specific facts showing that there is a genuine issue for trial.'" *Arpin*, 261 F.3d at 919 (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 324-25 (1986) (internal quotation omitted)). The nonmoving party cannot prove the existence of a genuine issue of material fact by presenting only a "scintilla of evidence in support of" its position, *id.* (quoting *Triton Energy*, 68 F.3d at 1221), or producing "uncorroborated and self-serving testimony." *Villiarimo*, 281 F.3d at 1061 (9th Cir. 2002) (quoting *Kennedy v. Applause, Inc.*, 90 F.3d 1477, 1481 (9th Cir. 1996)). "This requires evidence, not speculation." *Meade v. Cedarapids, Inc.*, 164 F.3d 1218, 1225 (9th Cir. 1999). The non-moving party must introduce some

"significant probative evidence tending to support the complaint." *Summers v. A. Teichert & Son, Inc.*, 127 F.3d 1150, 1152 (9th Cir. 1997); *see also, Am. Int'l Group, Inc. v. Am. Int'l Bank*, 926 F.2d 829, 836-37 (9th Cir. 1999) ("[I]nferences cannot be drawn from thin air; they must be based on evidence which, if believed, would be sufficient to support a judgment for the non-moving party.").

The court may affirm an order granting summary judgment on any ground that has support in the record, whether or not relied upon by the lower court. *Jensen v. Lane County*, 222 F.3d 570, 573 (9th Cir. 2000).

**2. Standard of Review for a Motion To Dismiss**

Plaintiff Skye Taylor ("Taylor") takes issue with a Motion to Dismiss which was filed by VWGoA because of Taylor's failure to comply with the District Court's rules and scheduling order. (ER 35-62). The District Court did not rule on the Motion after granting VWGoA's Motion for Summary Judgment. However, to the extent that Taylor's brief references and objects to both the filing of the brief and the District Court's failure to rule on the Motion, the standard of review for such a Motion to Dismiss is an abuse of discretion standard. *Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995) (citing *U.S. v. Warren*, 601 F.2d 471, 474 (9th Cir. 1979) (noting that "[o]nly in rare cases will we question the exercise of discretion

in connection with the application of local rules.")).[2]

### B. VWGoA's GEOGRAPHIC SALES LIMIT POLICY DOES NOT VIOLATE § 1 OF THE SHERMAN ACT

Taylor's second amended complaint asserts one claim for relief under § 1 of the Sherman Act (15 U.S.C. § 1) (ER 169-192) which provides:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. …

To state a claim under § 1 of the Sherman Act, Taylor was required to establish the following before the District Court to defeat VWGoA's motion for summary judgment:

1) A contract, combination or conspiracy among two or more persons or distinct business entities;

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[2] In *Ghazali*, Nevada Local Rule 140-6 provided that "[t]he failure of the opposing party to file a memorandum of points and authorities in opposition to any motion shall constitute a consent to the granting of the motion." *Id.* The appellant in *Ghazali* failed to file a memorandum of points and authorities in opposition to a motion to dismiss, and as a result, his case was dismissed by the District Court. The Court of Appeals noted that the failure to follow a district court's local rules is proper ground for dismissal, and then set forth specific factors that the district court was required to consider before granting the dismissal. *Id.* (citing *Warren*, 601 F.2d at 474). These factors included: "(1) the public's interest in expeditious resolution of litigation; (2) the court's need to manage its docket; (3) the risk of prejudice to defendants; (4) the public policy favoring disposition of cases of their merits; and (5) the availability of less drastic sanctions." *Id.* (citing *Henderson v. Duncan*, 779 F.2d 1421, 1423 (9th Cir. 1986)). If the district court did not consider these factors explicitly, the Court of Appeals will review the record independently to determine whether the district court abused its discretion. *Id.*

2) by which the persons or entities intended to harm or restrain trade or commerce among the several States, or with foreign nations; and

3) which actually injures competition.

*Kendall v. VISA U.S.A., Inc.*, 518 F.3d 1042, 1047 (9th Cir. 2008).

The District Court correctly found that Taylor presented no evidence on any of these three requirements (ER 4; 5; 6). As a result summary judgment was correctly entered in favor of VWGoA and the other defendants.

Taylor now alleges that the District Court failed to understand his argument, which is in fact that VWGoA and its dealers violated § 1 of the Sherman Act by conspiring to bar exports by consumers and thus refusing to sell him the two cars he wanted to export to Canada.[3] Taylor's original argument as to the alleged conspiracy between VWGoA and the dealers was wrong, as is his new theory under the same facts as alleged in the second amended complaint and in both his underlying briefs and current appellate brief.[4]

The District Court correctly found that Taylor's claim for antitrust relief failed for three reasons: First, VWGoA does not have sufficient market power to

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[3] Taylor's second amended complaint references VWGoA's parent corporation, Volkswagen AG, and its sister corporation, Volkswagen Canada Inc. Volkswagen Canada is the exclusive distributor of Volkswagen vehicles in Canada. (ER 172). Taylor does not allege a conspiracy between Volkswagen AG, VWGoA, and VW Canada in his second amended complaint. VWGoA and VW Canada are both wholly owned subsidiaries of Volkswagen AG (ER 172) and therefore, incapable of conspiring with each other under § 1 of the Sherman Act. *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 771 (1984).

[4] Taylor will likely argue that he is not asserting a "new" theory or argument on appeal, but merely that his argument was not given proper consideration or context by the District Court. (App. Brf. pp. 1, 3). However, this argument of essentially a conspiracy to "restrain" consumers was not specifically argued nor any evidence provided in the District Court. Taylor is barred from now asserting any such new theories or facts which were not first raised before the District Court.

actually injure competition through the geographic sales limit policy. Second, the geographic sales limit policy does not harm competition, it benefits competition. Third, the geographic sales limit policy is not the product of a conspiracy.

**B. The District Court Correctly Applied a Rule of Reason Analysis**

Section 1 of the Sherman Act is only intended to prohibit unreasonable restraints on trade. *Business Electronics Corp. v. Sharp Electronic Corp.*, 485 U.S. 717, 723 (1988). Taylor's claim that VWGoA's geographic sales limit policy violates § 1 of the Sherman Act has no factual or legal merit because these types of geographic limitations are legal, whether the limit is interpreted to be on the dealers with whom VWGoA has contractual relationships or, as Taylor insists, on the consumer. As correctly noted by the District Court, such policies are not only legal, but in fact, desirable, because they actually promote interbrand competition. (ER 5). Interbrand competition is competition between different manufacturers' products (e.g., between Volkswagen cars and Ford cars). Intrabrand competition is competition between dealers of the same manufacturer's products (e.g., between two Volkswagen dealers located in the same city). The primary concern of antitrust law is to promote interbrand competition. *Id.* at 724.

VWGoA's geographic sales limit policy was correctly found to be a "vertical" restraint because the policy is between a manufacturer and its distributors. A "horizontal" restraint is one between competitors (e.g., between different manufacturers). The restraint challenged by Taylor, the refusal to allow exports, is termed a "non-price" restraint because it does not involve the price of the product. Thus, VWGoA's geographic sales limit policy is a "vertical non-price restraint." *See Int'l Logistics Group, Ltd. v. Chrysler Corp.*, 884 F.2d 904, 906 (6th Cir. 1989). Taylor had no evidence of a horizontal restraint in the District Court (ER 4) and can still not point to any evidence in the record in which there is anything but a vertical restraint between VWGoA and its dealers.

Although Taylor asserts that it is inapplicable to a "consumer" restraint case which he now argues is really at issue here, the District Court correctly applied the seminal case of *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36 (1997) in which the U.S. Supreme Court held that vertical non-price restraints are not per se illegal; instead they are subject to the "Rule of Reason" review and analysis. Under the Rule of Reason analysis, "the factfinder weighs all of the circumstances of a case in deciding whether a restrictive practice should be prohibited as imposing an unreasonable restraint on competition." *Id.* at 49. The Supreme Court noted in *Continental T.V.* that the market impact of vertical restrictions is complex because of their potential for simultaneous reduction of intrabrand competition and stimulation of interbrand competition. *Id*. at 51. The Supreme Court discussed the potential benefits of vertical non-price restrictions on interbrand competition as follows:

> Vertical restrictions promote interbrand competition by allowing the manufacturer to achieve certain efficiencies in the distribution of his products. These "redeeming virtues" are implicit in every decision sustaining vertical restrictions under the rule of reason. Economists have identified a number of ways in which manufacturers can use such restrictions to compete more effectively against other manufacturers. [Citation omitted].[5] For example,

[5] "Marketing efficiency is not the only legitimate reason for a manufacturer's desire to exert control over the manner in which his products are sold and serviced. As a result of statutory and common-law developments, society increasingly demands that manufacturers assume direct responsibility for the safety and quality of their products. For example, at the federal level, apart from more specialized requirements, manufacturers of consumer products have safety responsibilities under the Consumer Product Safety Act, [citation omitted], and obligations for warranties under the Consumer Product Warranties Act [citation omitted]. Similar

> new manufacturers and manufacturers entering new markets can use the restrictions in order to induce competent and aggressive retailers to make the kind of investment of capital and labor that is often required in the distribution of products unknown to the consumer. Established manufacturers can use them to induce retailers to engage in promotional activities or to provide service and repair facilities necessary to the efficient marketing of their products. Service and repair are vital for many products, such as automobiles and major household appliances. The availability and quality of such services affect a manufacturer's goodwill and the competitiveness of his product. Because of market imperfections such as the so-called "free rider" effect, these services might not be provided by retailers in a purely competitive situation, despite the fact that each retailer's benefit would be greater if all provided the services than if none did. [Citation omitted].

*Id.* at 54-55. Thus, vertical non-price restrictions can be good for competition in that they have "real potential to stimulate interbrand competition, 'the primary concern of antitrust law.'" *Business Electronics*, 485 U.S. at 724. Thus, in dealing with vertical nonprice restraints, the focus of antitrust concern is the impact of a particular restraint on interbrand competition, rather than its impact on intrabrand competition. *Ryko Mfg. Co. v. Eden Serv.*, 823 F.2d 1215, 1231 (8th Cir. 1986).

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obligations are imposed by state law. [Citation omitted]. The legitimacy of these concerns has been recognized in cases involving vertical restrictions. [Citation omitted]."

The District Court correctly applied *Continental T.V.* Taylor's new theory of a restraint on consumers does not change this analysis and is without legal merit in light of the Rule of Reason analysis and the Supreme Court's finding that the focus is interbrand competition. The District Court correctly found that Taylor has no evidence of any interbrand impact.

### C. VWGoA's Geographic Sales Limit Policy Does Not Violate § 1 of the Sherman Act Because VWGoA Does Not have The Market Power To Affect Interbrand Competition

If VWGoA was to be found liable under the Rule of Reason for vertical non-price restraints, Taylor was required to first prove, as a threshold matter, that VWGoA had substantial market power to create the required impact. *Assam Drug Co., Inc. v. Miller Brewing Co., Inc.*, 798 F.2d 311, 316-317 (8th Cir. 1986); *JBL Enter., Inc. v. Jhirmack Enter., Inc.*, 698 F.2d 1011, 1017 (9th Cir. 1983), *cert. denied*, 464 U.S. 829 (1983); *Murrow Furniture Galleries, Inc. v. Thomasville Furniture Indus.*, 889 F.2d 524, 527-529 (4th Cir. 1989). VWGoA presented evidence that it does not have substantial market power (ER 163) with only a little over 2% share of the U.S. auto market. Accordingly, the District Court found that there can be no liability in this Rule of Reason case.[6] (ER 4).

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[6] The rationale for this rule is that "[t]he absence of market power in the interbrand market implies that the defendant is in competition with firms that sell products regarded by the consumer as close substitutes for the defendant's. The defendant therefore will lose most or all of its sales if its retail price exceeds its competitors' retail price for any reason, including a lack of intrabrand competition that drives its costs of distribution up. To put the point slightly differently, if a firm lacks market power, it cannot affect the price of its product; that price is determined by the market." *Assam*, 798 F.2d at 316. "Firms lacking market power, if they wish to survive, cannot adopt restraints that have anticompetitive effects. Thus such firms cannot have an effect on interbrand competition. Consequently, a finding of no market power precludes any need to further balance the competitive effects of a challenged restraint." *Id.*

"Only if a manufacturer so dominates a market as to exert substantial monopoly or market power –'the power to raise prices significantly above the competitive level without losing all of one's business'- is there any danger of harm to competition from an interbrand vertical restriction. [Citation omitted]. Absent significant market power, a vertical restriction is reasonable as a matter of law." *O.S.C. Corp. v. Apple Computer, Inc.*, 601 F.Supp. 1274, 1291 n.8 (C.D. Cal 1985); *aff'd* 792 F.2d 1464 (9th Cir. 1986).

For example, the plaintiffs in *Assam, supra*, were two retail stores that sold beer in South Dakota. 798 F.2d at 312. The plaintiffs did not purchase their Miller beer from their local Miller distributor because another more distant distributor offered lower prices. *Id.* at 313. Miller instituted a new policy that only allowed its distributors to sell Miller beer in specified geographic locations. *Id.* As a result of the new policy, plaintiffs could no longer buy Miller beer from the cheaper distributor and had to pay the higher prices demanded by their local distributor. *Id.* The plaintiffs sued claiming that Miller's geographic sales limitation on its distributors violated antitrust laws.[7] *Id.* The trial court granted summary judgment for Miller and the Court of Appeal affirmed finding that Miller's market share of 19.1% was insufficient for antitrust liability. *Id.* at 319.

The antitrust claim in *Assam* is essentially identical to Taylor's antitrust claim here which was also correctly rejected. The plaintiffs in *Assam* complained that Miller violated antitrust law by not allowing them to buy cheaper beer from a more distant distributor. Taylor here makes the same complaint -- that VWGoA violated antitrust law by not allowing him to purchase a cheaper car from a more

[7] The complaint was asserted under South Dakota's antitrust laws. However, South Dakota's antitrust laws are so similar to § 1 of the Sherman Act that Federal antitrust case law is applicable in construing them. *Assam*, 798 F.2d at 313-314.

distant dealer. In both instances, the market share was found to be insufficient for antitrust liability.

Taylor has consistently admitted that VWGoA's market share is only 2.7%. (ER 179; App. Brf. p. 13). In fact, VWGoA's market share for the relevant time period has fluctuated from 0.36% to a high of 2.07% and currently is at 1.68%. (ER 163). VWGoA's 2.07% market share is substantially less than the 19.1% market share that the court in *Assam* found was insufficient as a matter of law in granting summary judgment there. As the District Court ruled "[a]t those levels, [VWGoA's] market share is insufficient to affect interbrand competition. See e.g., *JBL Enterprises., Inc. v. Jhirmack Enterprises, Inc.*, 698 F.2d 1011, 1017 (9thCir. 1983)." (ER 5). *See also Ryko Mfg. Co.*, 823 F.2d at 1232 (market share of 8-10% insufficient for liability); *Northwest Power Prod., Inc. v. Omark Indus., Inc.*, 576 F.2d 83, 91 (5th Cir. 1978) (market share of 25% insufficient for liability); *O.S.C. Corp.*, 601 F.Supp. at 1291 n.8 (no liability where Apple's market share was up to 20% and substantial competition existed).[8]

Taylor has no evidence or case law to dispute this finding. The District Court correctly found that without the required significant market share, VWGoA, like Miller in *Assam,* is entitled to summary judgment.

### D. VWGoA's Geographic Sales Limit Policy Was Correctly Found Reasonable And Promotes Interbrand Competition.

Even if VWGoA had monopolistic market power (which it does not), in order for there to be liability under § 1 of the Sherman Act, Taylor was still required to prove that VWGoA's geographic sales limit policy results in an

[8] The U.S. Department of Justice has established a "safe harbor for the use of vertical restraints by any firm having ten percent or less of the market." Department of Justice, Vertical Restraint Guidelines, § 4.1, 50 Fed.Reg. 6263, 6269 (1985).

"unreasonable restraint on competition." *Cont'l T.V.*, 433 U.S. at 49. The District Court found no such evidence. (ER 5).

In deciding if a restraint is unreasonable, the court must compare the negative effects of the restriction with all its positive effects on interbrand competition. *Graphic Prod. Distrib., Inc. v. ITEK Corp.*, 717 F.2d 1560, 1571-1573 (11th Cir. 1983); *K&R Leasing Corp. v. Gen.l Motors Corp.*, 551 F.Supp. 842, 844 (N.D. Ill. 1982).

The Supreme Court in *Continental T.V.* noted that one of the most frequently cited statements of the rule of reason is that of Mr. Justice Brandeis in *Chicago Board of Trade v. United States*, 246 U.S. 231, 238 (1918) which reads:

> The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition. To determine that question the court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts.

*Cont'l T.V.*, 433 U.S. at 50 n.15.

The only evidence presented to the District Court showed that VWGoA's geographic sales limit policy is intended to preserve the integrity of Volkswagen's distribution network and to maximize customer satisfaction by ensuring that new vehicles meet the certification and operational standards to which they were designed. (ER 158). Taylor argued against this analysis, but did not present any

evidence or testimony to counter this evidence which is persuasive on this issue and in accordance with controlling law.

The Supreme Court in *Continental T.V.* noted that "[a]s a result of statutory and common law developments, society increasingly demands that manufacturers assume direct responsibility for the safety and quality of their products" and that vertical nonprice restrictions are a legitimate means to accomplish these pro-consumer ends. 433 U.S. at 55 n.23; *see also Assam*, 798 F.2d at 315. While Taylor's second amended complaint in this action is aimed solely at exports from the United States to Canada, VWGoA's geographic sales limit policy applies to exports to any country. Volkswagen vehicles are manufactured in several different countries including Germany, Brazil and Mexico and shipped all over the world. (ER 159). Volkswagen vehicles are designed and manufactured so that they comply with the specific safety and operational laws of the countries to which they are shipped. (ER 158). If a vehicle designed and manufactured for one country is ultimately exported to a third country, there is a substantial danger that the vehicle will not comply with the local safety and environmental laws. A VWGoA customer who purchased a grey market vehicle imported from another country would be very disappointed and angry to learn that his car does not comply with local safety and operational laws and required expensive modifications. In addition, VWGoA could face product liability lawsuits in locations it does not do business if the safety features on a particular exported car did not meet local requirements.

Furthermore, Volkswagen vehicles are allocated worldwide based on numerous complex operational factors. Movement of vehicles in the grey market between countries can cause serious problems for Volkswagen's distribution system. For example, when Volkswagen introduced the Toureg SUV, there was an issue with third parties purchasing Touregs in the United States from retail dealers

and shipping them to China. This raised the specter of there being more Touregs in China than Volkswagen's dealer network there was capable of servicing. Obviously a car owner that cannot get his car properly serviced is an unhappy customer. The export of Touregs from the United States to China also raised the specter of shortages of Touregs in the United States at a time that VWGoA was engaged in a massive advertising campaign to market the vehicles. It would have caused substantial damage to VWGoA's image and subsequent sales if it was heavily advertising a car that customers could not buy because of shortages.

Taylor did not present any evidence in the District Court to counter VWGoA's argument that preventing exports outside of the United States also protects VWGoA's dealer network from the vagaries of price fluctuations due to currency exchange rates. For example, a dealer near a border could see all of its business disappear overnight if there was a sudden increase in the exchange rate resulting in Volkswagen vehicles across the border becoming substantially cheaper in terms of U.S. dollars. It is essential to VWGoA's business to have a nationwide network of dealers available to sell and service Volkswagen vehicles. (ER 158). Volkswagen's customers expect there to be nearby and convenient dealerships to purchase new vehicles and to service vehicles they already own. In order to keep the dealership network functioning, it is essential that the dealers have a reasonably stable business platform on which to operate. (ER 158). VWGoA would suffer immeasurable loss if all of its dealers near the Canadian border in cities such as Seattle, Detroit, and Buffalo went out of business because currency fluctuations dried up all of their business. As the Supreme Court noted in *Continental T.V.*, "[s]ervice and repair are vital for many products, such as automobiles and major household appliances. The availability and quality of such services affect a manufacturer's goodwill and the competitiveness of his product." 433 U.S. at 55.

As was also referred in *O.S.C. Corp. v. Apple Computer,* 792 F.2d at 1468, manufacturers may lawfully ensure that their distributors earn sufficient profits to pay for product service programs. Taylor admits in his complaint that, if cross-border purchases were allowed, the dealer on the wrong side of the currency imbalance could see all of its business disappear forcing the dealer out of business. (ER174). Thus, Taylor admits that what he seeks will cause substantial harm to consumers.

There are thus substantial pro-competition reasons for VWGoA's geographic sales limit policy. The only negative identified by Taylor with VWGoA's geographic sales limit policy is the alleged increase in prices to consumers from the reduction in intrabrand competition for which the District Court notes there is still no evidence. (ER 5). As the Supreme Court noted in *Business Electronics*:

> [A]ll vertical restraints … have the potential to allow dealers to increase "prices" and can be characterized as intended to achieve just that. In fact, vertical nonprice restraints only accomplish the benefits identified in [*Continental T.V.*] because they reduce intrabrand competition to the point where the dealers profit margin permits provision of the desired services.

*Business Electronics*, 485 U.S. at 728. Thus, the mere fact of a potential increase in price by itself was correctly ruled insufficient. Taylor must, but still does not, show something more than an increase in price. In the absence of some reason other than price, the substantial degradation to Volkswagen's worldwide distribution network was more than enough to pass a Rule of Reason analysis and summary judgment was properly granted for VWGoA.

### E. VWGoA's Geographic Sales Limit Policy Does Not Violate § 1 of the Sherman Act Because It Is The Result of Unilateral Conduct

For there to be liability under § 1 of the Sherman Act there must be some combination or conspiracy. Taylor's claim for relief fails because there is no combination or conspiracy here for which the District Court noted there was no evidence of any such conspiracy. (ER 6). Taylor's asserts without legal citation and no evidence that VWGoA and its dealers have committed an "illegal act." (App. Brf. P. 17). However, all case law and evidence support VWGoA's actions in requiring contracts with a legal geographic sales limit policy. There is no case law that finds such policies "illegal" as asserted by Taylor. In fact, the Supreme Court has ruled the exact opposite of Taylor's position.

The evidence in the record reflects that VWGoA's geographic sales limit policy is the result of a unilateral decision by VWGoA. (ER 158). VWGoA did not negotiate the terms of the geographic sales limit policy with the three defendant dealers. The three defendant dealers were required to agree to the geographic sales limit policy or they would not have been allowed to sell new Volkswagen vehicles. (ER 158-159). A manufacturer generally has a right to deal, or refuse to deal, with whomever it likes, as long as it does so independently. Unilateral conduct by a manufacturer is not sufficient to establish a conspiracy, and Taylor cannot overcome this burden merely by alleging that a manufacturer announced a restrictive policy to its dealers and then implemented enforcement of that policy. A conspiracy will not be found where, as here, a dealer involuntarily complies with a manufacturer's restrictive policy in order to avoid termination.[9] *Int'l Logistics*,

[9] The existence of the Dealership Agreements between VWGoA and the three defendant dealers does not alter this analysis. "[W]here the conduct challenged by the plaintiff is subject to Rule of Reason analysis, the existence of a contract between a party who announces his terms and a party who acquiesces in them does

884 F.2d at 907; *Intercont'l Parts, Inc. v. Caterpillar, Inc.*, 260 Ill.App.3d 1085, 1095 (1994).

For example, *International Logistics*, *supra*, involved a claim that Chrysler's policy of selling "Power Master" engines at a lower price for foreign consumers violated § 1 of the Sherman Act. In an effort to remain competitive in the market, Chrysler sold Power Master engines for export at unit prices which were substantially below the domestic unit price. Plaintiffs were engaged in the business of buying and reselling Chrysler replacement parts. Plaintiffs purchased Power Master engines from Chrysler ostensibly for export at the lower price. However, instead of exporting the engines, Plaintiffs sold the engines to a sister company which in turn sold them to domestic Chrysler dealers at prices substantially below Chrysler's prices to its domestic dealers. Chrysler made numerous efforts to induce Plaintiffs to conform with Chrysler's Power Master export program and to desist from reselling the discounted export units to domestic dealers. Plaintiffs refused to comply with Chrysler's export program and Chrysler thereafter refused to sell any more Power Master engines to Plaintiffs.

Plaintiffs filed suit against Chrysler for, among other relief, violating § 1 of the Sherman Act. The District Court granted Chrysler a directed verdict and the Court of Appeal affirmed that verdict:

> To satisfy the imposed burden of proof, appellants were required to preponderate the evidence to support a conclusion that Chrysler did not act independently in formulating and implementing its Power Master marketing policies. [Citation omitted]. The record in the case at bar disclosed that the marketing policies which

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not, without more, give rise to an inference of concerted action under § 1." *Toscano v. PGA Tour, Inc.*, 70 F.Supp.2d 1109, 1115 (E.D. Cal 1999).

> Chrysler attached to its Power Master engine were unilaterally formulated and uniformly implemented as to all distributors of Power Master engines with the proviso that Chrysler would reject all purchase orders from distributors who refused to comply with the marketing conditions. Current legal precedent supports the conclusion that a conspiracy may not evolve under circumstances where a dealer or distributor involuntarily complies to avoid termination of his product source.
>
> Moreover, under the scenario of this case, there were no legal restraints against Chrysler's unilateral acts because Chrysler needed no acquiescence from its dealers or its distributors in formulating marketing conditions for its Power Master unit which is exclusively manufactured; consequently, no basis existed which attached credibility to a conclusion of conspiracy. There can be no conspiracy "where the actor imposing the alleged restraint does not ... need the acquiescence of the other party or any quid pro quo from him." [Citation omitted]. ***Department of Justice guidelines addressing vertical restraints have approved the argument that it is inappropriate to consider intrabrand restraints as "agreements" to conspire and manufacturers are permitted to unilaterally impose appropriate restraints without giving rise to a cognizable antitrust violation***.

*Int'l Logistics*, 884 F.2d at 907. (Emphasis added).

Similarly, in *Intercontinental Parts, supra,* Caterpillar instituted a geographic sales limit policy which prohibited its domestic dealers from selling replacement parts to resellers who intended to export the replacement parts out of the United States. An exporter who had been purchasing parts from Caterpillar's domestic dealers filed suit under the Illinois Antitrust Act which contains the same or similar language as the Federal antitrust laws. *Id.* at 1091. The trial court granted summary judgment for Caterpillar and the Court of Appeal affirmed holding:

> Plaintiff asserts that Caterpillar's replacement parts policy constituted a conspiracy between Caterpillar and its dealers to limit supply and to increase prices for those parts. The trial court found, however, that Caterpillar's export parts policy was wholly unilateral and a reaffirmation of a previously existing rule. The court further found that the dealers' acquiescence in the policy was insufficient to establish a conspiracy.

*Id* at 1094. Here, as in *International Logistics* and *International Parts* because VWGoA unilaterally imposed its geographic sales limit policy, there is no conspiracy on which to base antitrust liability. The District Court ruled correctly in light of the only evidence presented to it as well as in line with controlling case law which Taylor cannot distinguish or refute.

## CONCLUSION

VWGoA has a long standing legally enforceable geographic sales limit policy in which its dealers are not to sell vehicles for export outside of the United States. The only evidence before this Court as was before the District Court

supports the finding that there is as a matter of law no violation of § 1 of the Sherman Act. The District Court correctly analyzed the facts and law and ruled in summary judgment for VWGoA and the dealers. The summary judgment should be affirmed based on that same facts and law as there are no material questions of fact or any change in the substantive law. VWGoA and its dealers have acted in a lawful fashion. Judgment should be accordingly affirmed.

Dated: July 9, 2009

Respectfully submitted,

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**CERTIFICATE OF COMPLIANCE**

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C) and Ninth Circuit Rule 32-1, I certify that this Brief of Defendants-Appellees complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 5,545 words, excluding parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

I further certify that this brief complies with the typeface requirement of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared using Time New Roman 14-point font, a proportionately spaced typeface.

Dated: July 9, 2009

Respectfully submitted,

By s/ Jeri Rouse Looney

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## STATEMENT OF RELATED CASES

Pursuant to Circuit Rule 28-2.6, Defendant/Appellee Volkswagen Group of America, Inc. does not know of any related cases pending before this Court.

Dated: July 9, 2009

Respectfully submitted,

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## CERTIFICATE OF SERVICE

USCA Case No. 00-35343

I hereby certify that on July 9, 2009, I electronically filed the foregoing with the Clerk of the Court of the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

By: s/ Jeri Rouse Looney
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