

STATE OF MICHIGAN
IN THE COURT OF APPEALS
(On appeal from the Delta County Circuit Court)

BERO MOTORS, INC.,

Docket No. 257675

Plaintiff/Appellee,

vs

GENERAL MOTORS CORPORATION,

Defendant/Appellant.

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APPELLANT GENERAL MOTORS' BRIEF ON APPEAL

(Oral Argument Requested)

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STATEMENT OF ORDER APPEALED

This is a commercial dispute between General Motors Corporation (“GM”) and Bero Motors, a GM dealership in Escanaba, Michigan. Bero Motors claims that GM made and then breached an oral promise guaranteeing Bero Motors, to the exclusion of all other GM dealerships in the region, an assignment of GM’s right of first refusal to acquire Town & Country Motors, another GM dealership. Bero Motors had previously negotiated to acquire Town & Country, but the parties were very far apart on price. Town & Country ultimately was sold to a third party without notice to Bero Motors. Claiming lost profits as a result of the missed opportunity to exercise GM’s right of first refusal, Bero Motors filed this lawsuit.

The case was tried to a jury in February of 2004, before the Honorable Stephen T. Davis of the Delta County Circuit Court. Bero Motors presented two alternative theories of liability: breach of an oral contract and promissory estoppel. GM denied having made a contract and raised two legal defenses.¹ First, the statute of frauds bars enforcement of an oral agreement to assign a right of first refusal to buy real estate. Second, the alleged agreement lacked consideration: Bero Motors gave nothing in exchange for GM’s alleged promise to assign its right of first refusal. GM also contested the promissory estoppel claim on the grounds that (1) GM’s alleged promise to assign its right of first refusal was neither definite nor firm; and (2) in light of the fact that GM had explicitly instructed Bero Motors not to abandon its negotiations to purchase Town & Country, Bero Motors’ abandonment of its negotiations in alleged reliance on GM’s promise was neither intended nor reasonable.

The trial court overruled GM’s legal defenses. After hearing “experts” voice entirely

¹ GM previously had been granted summary judgment on the ground that the parties’ written agreement barred an oral contract. That ruling was reversed by a 2-to-1 decision of this Court. See p 10, *infra*.

speculative and unsubstantiated opinions about lost profits, and after listening to plaintiff's closing argument, in which counsel systematically depicted GM as a "soul-less corporation" (2/24 Tr. 67) and an "arrogant giant" from Detroit (*id.* at 71), the jury found in favor of Bero Motors on the contract claim and awarded damages in the amount of \$3,126,924 – precisely the amount requested by plaintiff's counsel. GM's motion for judgment, a new trial, or alternatively a remittitur was subsequently denied. This timely appeal followed.

STATEMENT OF JURISDICTION

This Court has jurisdiction pursuant to MCL 600.308(1)(a), MSA 27A.308(1)(a), which provides that “all final judgments from the Circuit Court shall be appealable as of right.” The final judgment in this case was entered on August 9, 2004, and GM’s timely appeal was filed on August 27, 2004.

STATEMENT OF QUESTIONS PRESENTED

1. Whether Michigan's statute of frauds, MCL 566.106 (2004), bars a claim for breach of an oral contract to assign a right of first refusal to assets that include real estate.

Appellant answers: Yes

Appellee will answer: No

The Trial Court answered: No

2. Whether a commitment to cooperate with GM's dealer alignment plan that (i) was wholly indefinite as to all essential terms and (ii) predated GM's alleged oral promise to assign the right of first refusal could constitute consideration for that promise.

Appellant answers: No

Appellee will answer: Yes

The Trial Court answered: Yes

3. Whether plaintiff proved a claim for promissory estoppel, even though (i) the alleged promise was neither clear nor definite; (ii) GM specifically told plaintiff to continue negotiating with Bero Motors; (iii) throughout the parties' 25-year relationship, GM's business commitments to Bero Motors had all been made in writing and had been offered only after careful review by senior management; and (iv) Bero Motors gave nothing in exchange for the alleged promise and GM did not benefit from the alleged breach.

Appellant answers: No

Appellee will answer: Yes

The Trial Court: Did Not Answer

4. Whether a new trial is necessitated because plaintiff's counsel, in his summation, systematically inflamed the jury's bias against large corporations not headquartered locally and asserted that GM had an evil intent notwithstanding that GM's intent was not relevant to any of plaintiff's claims.

Appellant answers: Yes

Appellee will answer: No

The Trial Court answered: No

5. Whether the trial court abused its discretion in refusing to disturb a damages award that was based on the opinion of expert witnesses who presented to the jury a damages model that was based on demonstrably false assumptions and pure speculation.

Appellant answers: Yes

Appellee will answer: No

The Trial Court answered: No

STANDARD OF REVIEW

Judgment notwithstanding the verdict should be granted where the evidence was insufficient to establish all essential elements of a cause of action. *Merkur Steel Supply, Inc v Detroit*, 261 Mich App 116, 123-24; 680 NW2d 485 (2004). When deciding a motion for JNOV, the trial court must draw all reasonable inferences in the light most favorable to the nonmoving party and determine whether the evidence presented precludes judgment for the nonmoving party as a matter of law. *Id.* This Court reviews a trial court's decision on a JNOV motion *de novo*. *Id.*

A trial court's decision on a new trial motion is reviewed for abuse of discretion. However, an error of law constitutes an abuse of discretion. Accordingly, this Court reviews *de novo* a motion for a new trial on the ground that the trial court misapplied the law. *Schellenberg v Rochester, Michigan Lodge*, 228 Mich App 20, 28; 577 NW2d 163 (1998). The trial court's evidentiary rulings and its decision not to disturb the jury's damages award are reviewed for abuse of discretion. *Craig v Oakwood Hosp*, 471 Mich 67, 76; 684 NW2d 296 (2004); *Hill v Sacka*, 256 Mich App 443, 462, n 8; 666 NW2d 282 (2003).

STATEMENT OF MATERIAL FACTS AND PROCEEDINGS

1. GM's Plan 2000.

GM is an automobile manufacturer that sells its vehicles to franchise dealerships, which then resell them to the public. In 1995, GM announced its Year 2000 Plan (the "Plan 2000"), a nationwide dealer network plan designed to consolidate and realign its dealerships in a manner that would maximize GM's ability to serve customers. 2/18 Tr. 24-26. The plan designates the dealership locations and acceptable combinations of different product lines ("dualing") that will optimize customer convenience and sales. Under Plan 2000, Pontiac, Buick and GMC vehicles should be sold in combination by a single dealer, as should the Chevrolet, Oldsmobile, and Cadillac product lines. 2/18 Tr. 31. Separately, GM asks its dealers to refrain from selling other manufacturers' vehicles: "General Motors' brands are not commodities and should never be offered to the public from facilities that also offer competing brands." Pl. Ex. 5, p 2. GM informed its dealers about Plan 2000 by letter in October 1995. 2/18 Tr. 29; Pl. Ex. 5.

Throughout most of the 1990s, there were three GM dealerships in Delta County, Michigan: plaintiff Bero Motors, which sold the Pontiac and Buick product lines (as well as Jeep vehicles, which are manufactured by Chrysler); Town & Country Motors, which sold Oldsmobile, Cadillac, and GMC vehicles (plus Toyotas); and Coyne Chevrolet, which sold Chevrolets. 2/18 Tr. 13-15. Thus, this region was "out of alignment" – the allocation of dealerships was not in accord with the structure envisioned by GM's Plan 2000.

GM tasked a group of employees within its North American Operations with bringing all of the company's dealerships into compliance with Plan 2000. Beginning in 1995, groups of those GM employees met individually with each GM dealer in North America to discuss the changes targeted for that dealer's geographic region. On March 12, 1996, GM representatives Jennie Korona and Kenn Bakowski visited each of the GM dealers in the city of Escanaba, in

Delta County. 2/18 Tr. 29-30. They explained that under Plan 2000, the number of dealerships should be reduced from three to two. One of those dealers would sell Pontiac, Buick, and GMC vehicles; the other would sell Chevrolets, Oldsmobiles, and Cadillacs. 2/18 Tr. 29-33; Pl. Exs. 6, 7. Korona and Bakowski explained that GM would be willing to contribute money toward a purchase or sale transaction that would move the region's dealerships into the preferred alignment. 2/18 Tr. 36. The Bero brothers told Korona and Bakowski that they endorsed Plan 2000's provisions and would work with GM to achieve them. 2/18 Tr. 33.

2. The Dealership Agreement Between Bero Motors and GM.

Bero Motors and GM are both sophisticated businesses with particular expertise in automotive sales. Their relationship is defined and governed by a written Dealer Sales and Service Agreement (the "Dealer Agreement") that identifies the duties and obligations between the parties. Pl. Ex. 1. The terms of this agreement are comprehensive. They specifically reserve to GM the right to determine not only the number and location of GM dealers, but also the vehicle lines those dealers sell, in order to achieve a desirable balance of dealerships and vehicle lines in each market:

"Purpose of the Agreement.

Division^[2] has established a network of authorized dealers operating at approved locations to effectively sell and service its products and to build and maintain consumer confidence in Dealer and Division. * * *

This agreement (i) authorizes Dealer to sell and service Division's Products and represent itself as a Division Dealer, (ii) states the terms under which Dealer and Division agree to do business together; (iii) states the responsibilities of Dealer and Division to each other and to customers; and (iv) reflects the mutual dependence of the parties in achieving their business objectives.

² Because GM administers these dealership contracts through its divisions, GM is referred to as "Division" throughout the Dealer Agreement.

Article 4: *Dealer Network Planning*

If Dealer wants to make any change in location(s) or Premises, or in the uses previously approved for those Premises, Dealer will give Division written notice of the proposed change, together with the reasons for the proposal, for Division's evaluation and final decision in light of dealer network planning considerations. No change in location or in the use of Premises, including addition of any other vehicle lines, will be made without Division's prior written authorization." Df. Ex. 1, pp 2-3.

Moreover, the agreement specifically provides that all further dealings between the parties concerning the matters covered by the agreement must be in writing to be enforceable.

"No agreement between Division and Dealer which relates to matters covered herein * * * will be binding unless permitted under the terms of this Agreement or related documents, or approved in a written agreement executed as set forth in Division's Dealer Sales and Service Agreement." Df. Ex. 1, p 20.

3. The Right of First Refusal.

A contractual right of first refusal has been an integral part of the standard automobile dealer agreement for many years. Typically, such a right is combined with a term recognizing the manufacturer's entitlement to reassign its purchase right to a preferred dealer candidate. The right of first refusal and reassignment right are contained in the dealer agreements of all GM dealers. Specifically, that agreement provides, in relevant part:

"12.3 Right of First Refusal to Purchase

12.3.1 Creation and Coverage

If Dealer submits a proposal for change of ownership under Article 12.2, Division will have a right of first refusal to purchase the dealership assets regardless of whether the proposed buyer is qualified to be a dealer. If Division chooses to exercise this right, it will do so in its written response to Dealer's proposal. * * *

12.3.2 Purchase Price and Other Terms of Sale

(a) Bona Fide Agreement

If Dealer has entered into a bona fide written buy/sell agreement, the purchase price and other terms of sale will be those set forth in such agreement and any related documents, unless Dealer and Division agree to other terms. * * *

12.3.4 Assignment

Division's rights under this section may be assigned to any third party ("Assignee"). If there is an assignment, Division will guarantee full payment of the purchase price by the Assignee." Pl. Ex. 11, pp 2-3.

Pursuant to this provision, if GM assigned its right of first refusal to Bero Motors, it would be contractually obligated to guarantee payment of the purchase price so that if Bero Motors defaulted or the deal fell apart, GM would be on the hook for the full amount of the sale.

4. Bero Motors' Negotiations with Town & Country.

Bero Motors was owned by three brothers – Dwayne, Robert, and Larry – along with their father, who had founded the business in 1946 and acquired the GM franchises in 1972. 2/17 Tr. 233-36. Robert was the general manager; Dwayne headed the service and parts departments and the body shop; and Larry oversaw sales and managed the office. *Id.* at 234, 242-43. Bero Motors was a profitable business, but the brothers had long viewed their product line as incomplete. Trucks are very popular in Escanaba and Jeep stopped manufacturing them in the early 1990s. 2/18 Tr. 16-17. The Bero brothers therefore wanted to expand their franchise to include the GMC product line, which includes trucks. See Pl. Ex. 2 (1/24/91 letter); 2/18 Tr. 18. However, GM was unwilling to authorize an additional GMC franchise in Delta County because such a franchise would have competed with the one already held by Town & Country, resulting in depressed prices across the board. 2/18 Tr. 21-24; Pl. Ex. 4.

Accordingly, over the years the Bero brothers had repeatedly discussed a merger or purchase with their cousin Lyle Berro, who owned Town & Country. Although Berro was enthusiastic about the prospect of a transaction, the parties could not agree on terms. The negotiations began with an informal conversation in May 1995. Pl. Ex. 9. In October of that

year, Lyle Berro wrote a letter to Bero Motors, suggesting that the two dealerships consider a merger. Pl. Ex. 8; 2/18 Tr. 36-38. The Bero brothers, however, wanted to acquire Town & Country outright. Accordingly, they turned down the offer. 2/18 Tr. 38.

The most concrete negotiations between Bero Motors and Lyle Berro took place in May 1996, after the Delta County GM dealers had learned about Plan 2000 and GM's desire to realign the area dealerships. *Id.* at 39. Lyle Berro sent the Bero brothers a letter on May 29, proposing to sell his business to Bero Motors for \$1.2 million. Pl. Ex. 9. After some deliberation, the Bero brothers concluded that although \$1.2 million was a very steep price, the value of the GMC truck franchise made the deal worthwhile. 2/18 Tr. 42-43. When the parties sat down to discuss the particulars, however, the Beros learned that their cousin's offer did not include Town & Country's real estate; Berro wanted \$1.2 million for the dealership's franchises, parts, tools, and customer lists. *Id.* at 44. The Beros believed that price to be substantially inflated. *Id.* at 44-45.

The Bero brothers then retained Dennis Schneider of Schneider Larche & Haapala, a "well-established firm" in Escanaba, to assist them in formulating a counteroffer. *Id.* at 46. Schneider reviewed Town & Country's financial statements, then employed two valuation methodologies, one based on net income and the other based on cash flow, to calculate "the going concern value of Town & Country Motors, including the four franchises currently held, plus provisions for parts inventory and service tools and equipment," but excluding real estate. Pl. Ex. 10. His "computations of reasonable purchase offer * * * indicate[d] a range of between \$275,000 and \$525,000." *Id.*

With this information in hand, on October 15, 1996, the Bero brothers offered Lyle Berro \$700,000 for Town & Country's franchises, parts, and inventory. 2/18 Tr. 48-50. Berro rejected this offer. *Id.* at 52-53. Although Berro remained receptive to another, higher offer (*id.* at 89,

93), Bero Motors never made one (*id.* at 65).

5. The October 29, 1996 Meeting and the Alleged Oral Promise.

Bero Motors' entire cause of action rests on statements allegedly made during a single meeting with two employees of GM's North American Operations, James Dalbec and his supervisor Richard Loughman, who were charged with helping GM's Midwest dealerships meet the goals of Plan 2000. 2/23 Tr. 7. In 1996, Dalbec and Loughman made a series of personal visits to dealerships in their region, including Coyne Chevrolet, Bero Motors, and Town & Country, to discuss Plan 2000. *Id.* at 9-15. Their intent was not to effectuate any particular changes in dealership structure but rather to ensure that the dealers understood GM's long-term goals and to enlist the dealerships' cooperation in reaching them. *Id.* at 7-8.

Dalbec and Loughman met with the Bero brothers on October 29, 1996, two weeks after Town & Country had rejected the Bero brothers' \$700,000 offer. 2/18 Tr. 53-56; 2/23 Tr. 12-14. All three Bero brothers were present. At that meeting, the first topic on the agenda was Plan 2000. According to Robert Bero's own testimony, he unconditionally reaffirmed Bero Motors' commitment to abide by Plan 2000 before anyone had even broached the subject of Bero Motors' desire to purchase Town & Country or the possibility that GM might exercise its right of first refusal to assist in such a transaction. Specifically, in response to the question "Do you recall what was discussed *first*?" Robert Bero testified:

He – Mr. Dalbec discussed Project 2000 [sic]. He wanted to know if we understood the program for the Delta County area, and, you know, how the two dealerships were going to be setup, and I just said we fully understood it and we agreed with the program." 2/18 Tr. 57 (emphasis added).

Only after Robert Bero reaffirmed Bero Motors' commitment to adhere to Plan 2000 did Bero tell Dalbec and Loughman about Bero Motors' interest in Town & Country, Lyle Berro's offer to sell the business for \$1.2 million, Schneider's appraisal, and the Bero brothers' \$700,000

counteroffer. *Id.* at 57-61. Robert Bero testified that Dalbec and Loughman agreed with the Bero brothers that Town & Country's price was "a little on the high side" (*id.* at 60), and that Bero Motors' \$700,000 counter was "a fair offer" (*id.*). Robert Bero further claimed that the brothers voiced their concern that Lyle Berro, disappointed with the \$700,000 offer, would pursue a transaction with someone else. *Id.* at 61. According to the Bero brothers, Dalbec responded that "General Motors would take [its] right of first refusal and we would get an opportunity to match the price" offered by any third party. *Id.* See also 2/20 Tr. 124-25 (Larry Bero's testimony to the same effect); *id.* at 161 (Dwayne Bero's testimony). The GM employees pointed out that if Bero Motors acquired Town & Country, it would have to sell the Oldsmobile and Cadillac franchises to comply with Plan 2000. It would also have to refrain from moving Town & Country's Toyota franchise into its existing showroom. 2/18 Tr. 62. Dalbec told Bero Motors that GM would be willing to contribute money toward a deal that would move Delta County toward an alignment consistent with Plan 2000 (as Bakowski and Korona had explained seven months earlier). 2/18 Tr. 60-61; 2/23 Tr. 14. The Bero brothers agreed that they would seek to sell off those product lines if they succeeded in purchasing Town & Country, and they reiterated the support for Plan 2000 that they had expressed to Korona and Bakowski the previous March and to Dalbec and Loughman at the beginning of the meeting. 2/18 Tr. 57, 62.

Thus, all the witnesses agreed that, in promising to comply with Plan 2000, the Bero brothers were merely *reaffirming* the commitment they had *already* made *before* GM offered the right of first refusal. *Id.* at 62. When directly asked by his own lawyer "[d]id they say you had to do anything in order to get the first right of refusal," Robert Bero testified: "No." *Id.*

Dalbec testified that he never promised that GM would assign its right of first refusal to Bero Motors. 2/23 Tr. 14-16. Indeed, neither he nor Loughman had the authority to make such a

promise. *Id.* at 16. When GM exercises or assigns its right of first refusal, it has to step into the shoes of the potential buyer and guarantee that it will pay the purchase price: a steep burden that it does not assume lightly. *Id.* at 17. Further, under its Dealer Agreement, GM will authorize a dealer to acquire or divest a product line only in writing and after careful consideration. Df. Ex. 1, Art. 12. Thus, GM would not have made a promise to assign a right of first refusal in the informal, off-the-cuff fashion the Bero brothers alleged. 2/23 Tr. 32.

Moreover, all three Bero brothers conceded at trial that, after allegedly promising to assign the right of first refusal, Dalbec *specifically instructed* the Beros to continue negotiating with Lyle Berro rather than to rely on GM. Robert Bero testified that Dalbec had told them to “try to resolve the differences” in price between the parties. *Id.* at 123. Larry Bero testified that Dalbec and Loughman had left the Beros “on [our] own to put a deal together” and “said if we got close [to an agreement], to call.” 2/20 Tr. 138-39. Dwayne Bero testified that Dalbec and Loughman told the brothers that they were “doing the right thing by trying to put a deal together with Town & Country.” *Id.* at 173. Nonetheless, after the October 29 meeting, the Bero brothers *stopped* negotiating with Lyle Berro despite his repeated requests that they make him another offer. 2/18 Tr. 117. They did not tell their cousin that GM had promised them the right of first refusal. Nor did they ever get back in touch with Dalbec or Loughman to request GM’s assistance in putting together a transaction. They simply sat back and waited, passively hoping to get a better deal. *Id.* at 116.

6. Subsequent Events.

In November 1997, more than a year later, Bero Motors learned that Town & Country had been sold to Dagenais Enterprises, another Upper Peninsula dealership. The deal included Town & Country’s real estate, and the purchase price was \$1,150,000. 2/18 Tr. 265-67; Pl. Ex. 23. GM had neither exercised its right of first refusal nor offered that right to Bero Motors.

At Robert Bero's request, James Dalbec returned to Escanaba on December 11 and met with Bero Motors. 2/18 Tr. 78. According to plaintiff, Dalbec told the Bero brothers that he had "dropped the ball" and would try to "straighten out the mess." *Id.* at 79. Dalbec disputed that version of the meeting. 2/23 Tr. 33-34. It is undisputed that at the December 1997 meeting, Bero Motors executed a written agreement that confirmed its understanding that the parties' verbal realignment discussions had been nonbinding:

"The parties understand and acknowledge that all discussions and negotiations are to be considered preliminary and that no agreement between the parties shall be deemed to exist or bind either party unless and until final written documents incorporating the full agreement of the parties have been prepared, have received all necessary management approvals, and have been executed by authorized representatives of the parties. In order to be binding and effective upon GM, any agreement must be in writing and executed by the Dealer Network Investment and Development Regional Director and the Dealer Network Investment and Development Finance Director." Df. Ex. 2; 2/23 Tr. 29-31.

7. Proceedings Below.

In March 1998, Bero Motors sued GM, seeking recovery under four legal theories: breach of oral contract, promissory estoppel, negligence, and breach of fiduciary duty. GM moved for summary disposition of all claims pursuant to MCR 2.116(C)(10). It argued that the provision of the Dealer Agreement requiring that all terms and conditions of the parties' relationship be reduced to writing barred Bero Motors from attempting to enforce the alleged oral promise to assign the right of first refusal. GM also argued that the Dealer Agreement precluded the promissory estoppel claim: a plaintiff cannot bring a promissory estoppel claim to enforce an oral promise that is inconsistent with a written agreement. The trial court granted the motion in full and dismissed the case.

This Court affirmed the dismissal of the negligence and breach of fiduciary duty claims, but reversed and remanded for trial on the other two claims. It held that the subject of the oral promise – GM's right of first refusal to acquire Town & Country – fell outside the scope of the

Dealer Agreement, and that the Agreement therefore did not bar Bero Motors' action to enforce that oral promise.³ *Bero Motors v General Motors Corp*, unpublished opinion per curiam of the Court of Appeals, decided Oct 2, 1991 (Docket No. 224190).

The case went to trial in February 2004. The jury found that GM had breached an oral contract with Bero Motors and awarded damages in the amount of \$3,126,924. The verdict form instructed the jury not to reach the estoppel claim if it found for plaintiff on the breach of contract claim. The trial court entered judgment on April 8, 2004. GM filed a timely motion for judgment notwithstanding the verdict, a new trial, or (in the alternative) a remittitur. The trial court denied that motion on August 9, 2004. This timely appeal followed.

ARGUMENT

I. GM IS ENTITLED TO JUDGMENT ON PLAINTIFF'S CONTRACT CLAIM.

A. The Statute Of Frauds Bars Plaintiff's Claim.

Bero Motors claims that GM breached an oral promise to assign to Bero GM's right of first refusal to purchase Town & Country Motors and all of its assets – including its land. GM's right of first refusal gave GM an interest in or power over land, *i.e.*, Town & Country's land. The claimed oral assignment of that right to Bero Motors thus is unenforceable under Michigan's statute of frauds, which expressly requires written proof of any promise that assigns any interest in or power over real property. This is a pure question of law, which the Court reviews *de novo*. *Forge v Smith*, 458 Mich 198, 204; 580 NW2d 876 (1998).

The statute of frauds provides, in relevant part:

³ Although we raise below in Part I.C the argument that the Dealer Agreement bars Bero Motors' claims, we do so only to preserve it; we respectfully recognize that this Court's ruling on that issue is law of the case. Our challenge that the statute of frauds bars enforcement of the alleged oral agreement, argued below in Part I.A, has not previously been addressed by the Court.

“No estate or interest in lands, other than leases for a term not exceeding 1 year, nor any trust or power over or concerning lands, or in any manner relating thereto, shall hereafter be created, granted, assigned, surrendered or declared, unless by act or operation of law, or by a deed or conveyance in writing, subscribed by the party creating, granting, assigning, surrendering or declaring the same, or by some person thereunto by him lawfully authorized by writing.” MCL 566.106 (2004).

The applicability of the statute of frauds is not limited to simple contracts for the sale of land. Rather, the rule in this jurisdiction is that “a contract is within the Statute of Frauds if its performance involves a transfer of an *interest* in” or “power over” land. 17 Mich Law & Prac, Statute of Frauds, § 52 (emphasis added). The Michigan Supreme Court has interpreted the concept of an “interest” in or “power over” land broadly. Indeed, invoking the statute of frauds, the Court has refused to enforce an oral promise to form a corporation that would manufacture furniture because the parties had planned to buy land for the furniture plant and eventually be repaid out of the corporation’s capital stock. *McLennan v Boutell*, 117 Mich 544, 545-46; 76 NW 75 (1898). Notwithstanding that the contract at issue did not actually convey an interest in land, the Supreme Court found that the oral contract “was void * * * under the statute of frauds” because “[i]t [was] obvious that the alleged contract *contemplated* the sale and conveyance of real estate.” *Id.* (emphasis added). See also *Whiting v Butler*, 29 Mich 122, 144 (1874) (Campbell, J, dissenting) (“The statute of frauds covers *every imaginable case* where an interest is divested by any act of the party concerned.”) (emphasis added).

This Court has already decided the precise question here: it has specifically held that an agreement to transfer a right of first refusal to acquire land involves an interest in land and must comply with the statute of frauds. In *In re Helen Mooney Trust*, unpublished opinion per curiam of the Court of Appeals, decided Feb 8, 2002 (Docket No. 223943) (Tab 2), the defendant was a trustee who was sued by a beneficiary after he sold a piece of land that was a trust asset. The beneficiary alleged that he had a right of first refusal with respect to that land. This Court held

that the statute of frauds barred the beneficiary's claim and upheld the trial court's summary disposition in favor of the trustee:

“The statute of frauds prevents any interest in land from being created in the absence of a writing. The validity of an agreement to sell real property depends upon the existence of a writing containing all essential terms of the agreement and signed by the party to be charged. In the instant case, it is undisputed that *no writing exists which purports to grant petitioner a right of first refusal for the sale of the Woods. Consequently, petitioner's claim is barred by operation of the statute of frauds.*” *Id.* at *2-*3 (emphasis added).

Like the claim of the plaintiff in *Mooney*, Bero Motors' claim here that it was entitled to exercise an orally conveyed right of first refusal to purchase land is “barred by operation of the statute of frauds” because “it is undisputed that no writing exists which purports to grant [plaintiff] a right of first refusal for the sale.” *Id.*

This Court's decision in *Mooney* is compelled by the plain language of the statute of frauds, which declares that *no “interest in * * * nor any * * * power over or concerning lands * * * shall be * * * assigned * * * unless by * * * writing.”* MCL 566.106 (2004) (emphasis added). A right of first refusal to buy land confers on its holder a right to force an equitable transfer of land to the holder under particular circumstances. A right of first refusal regarding ownership of land thus conveys a “power over” or an equitable “interest in” land. As Maryland's highest court has explained:

“[R]ights of first refusal, which are commonly known as ‘preemptive rights,’ are interests in property and not merely contract rights. This is so because, if the property owner attempts to sell to someone other than the owner of the right of first refusal (the ‘preemptioner’), the latter may have a court of equity enter a decree of specific performance ordering that the property be conveyed to him. Thus, the preemptioner acquires an equitable interest [in land], which will vest only when the property owner decides to sell.” *Ferrero Constr Corp v Dennis Rourke Corp*, 536 A2d 1137, 1139-40 (Md, 1988) (citations omitted).

Notably, the Court's decision in *Mooney* is consistent with the rule in the vast majority of jurisdictions. Nearly every court that has addressed the question has held that conveyance or

assignment of a right of first refusal to acquire land constitutes a conveyance or assignment of an interest in real property and thus is subject to the statute of frauds. *E.g.*, *Ferrero Constr*, 536 A2d at 1139-40 (noting that the “vast majority” of courts have adopted this rule and citing cases); *Hershon v Cannon*, 1993 US Dist LEXIS 689, at *12-*13 (D Md, Jan 21, 1993) (transfer or assignment of a right of first refusal to purchase land conveys an interest in land and is subject to the statute of frauds); *Manir Prop v Res Trust Corp*, 1993 US Dist LEXIS 13582, at *15 (ED Pa, Sept 29, 1993) (same); *Schwanbeck v Federal-Mogel Corp*, 592 NE2d 1289, 1293-94 (Mass, 1992) (same); *Williams v Williams*, 347 NW2d 893, 895 (SD 1984); *Michel v Bush*, 765 NE2d 911, 914 (Ohio Ct App, 2001) (same); *Pickens v Ganley*, 1997 Conn Super LEXIS 1157, at *4 (Conn Sup Ct, Apr 30, 1997) (same); *64 B Venture v Am Realty Co*, 179 AD2d 374, 375 (NY App Div, 1992) (same); *Houtchens v United Bank of Colo Springs*, 797 P2d 814, 815 (Colo Ct App, 1990) (same); *Dunbar v Gonzalez*, 1986 RI Super LEXIS 47, at *9-*10 (RI Sup Ct, June 10, 1986) (same); *Angel v Reider*, 691 P2d 151, 153 (Or Ct App, 1984) (same); *Gothier v Regen Constr Co*, 24 Pa D & C3d 744, 751-52 (Pa Ct Com Pleas, 1983) (same).

The rule that assignment of a right of first refusal is subject to the statute of frauds is not only compelled by the plain language of the statute of frauds and the caselaw in this and virtually every jurisdiction; it is also necessary to accomplish the underlying purposes of the statute of frauds. Those purposes are to prevent fraud in connection with particular types of agreements considered to be important by the legislature and “to prevent disputes over what provisions were included in an oral contract.” *Jim-Bob, Inc v Mehling*, 178 Mich App 71, 82; 443 NW2d 451 (1989). “The purpose of the rule that title may not be created by estoppel is to prevent the uncertainty of titles which would arise if the statute of frauds could be evaded * * *.” *St. Pierre v Estate of St. Pierre*, 381 Mich 48, 65-66; 158 NW2d 891 (1967). Requiring a right of first

refusal over land to be in writing serves those purposes by ensuring that any party who can force a transfer of title to land can prove that power with a written contract. Any other result would introduce enormous uncertainty into the real estate market: on the eve of the closing date for a sale of land, a stranger to the transaction could go into court claiming that the seller had given him an oral right of first refusal and seeking to enjoin the transaction – thereby holding the transaction up in litigation for an extended period. That result – a necessary consequence of the position taken by the plaintiff and endorsed by the trial court – would vitiate the statute of frauds.

Applying the *Mooney* rule here compels judgment for GM. The undisputed facts demonstrate that GM’s right of first refusal involved an interest in land, the alleged assignment of which was subject to the statute of frauds. The dealership agreement between GM and Town & Country conferred on GM an absolute, unqualified “right to purchase the dealership assets,” including its land, should Town & Country ever decide to sell those assets. Pl. Ex. 11, p 3. Thus, GM’s right of first refusal involved an interest in land and plaintiff’s claim fails because the alleged promise to assign that right was oral.

The only argument plaintiff has suggested for the inapplicability of the statute of frauds in this case rests on *Marina Bay Condominiums, Inc v Schlegel*, 167 Mich App 602; 423 NW2d 284 (1988). Plaintiff’s reliance on *Marina Bay* is misplaced. In that case, a prospective condominium buyer entered into an oral option contract with the seller: the buyer agreed to pay the seller \$2,600 for the right to purchase a unit at a specified price within a specified period of time. The sole purpose of the agreement was to give the buyer an opportunity to think about the deal for a few days before making a final decision. The buyer ultimately decided not to exercise the option and refused to pay the \$2,600 fee. The seller sued, citing the parties’ oral agreement. This Court held that an option contract like the one between that buyer and seller was not subject

to the statute of frauds, even though the subject of the option was a piece of real property:

“[A] preliminary contract for the privilege of purchase is not itself a contract of purchase. It involves the privilege of buying property at a fixed price within a specified period of time. An option contract does not create an interest in land. Therefore, it is not subject to the statute of frauds.” *Id.* at 607 (citations omitted).

Plaintiff argued below that the statute of frauds did not apply to GM’s oral promise to assign its right of first refusal because the agreement between GM and Town & Country was an option contract and thus, under *Marina Bay*, it was not subject to the statute of frauds. That argument fails, for several reasons.

First, GM had a right of first refusal, not an option. This Court specifically addressed the applicability of the statute of frauds to a right of first refusal in *In re Mooney*, and determined that an oral agreement to convey a right of first refusal to acquire land is unenforceable. Accordingly, a case that deals only with an option agreement is irrelevant.

Second, the dispute in *Marina Bay* concerned only whether the plaintiff was entitled to a refund of his \$2,600 deposit – the value of the option itself. Here, by contrast, Bero Motors sought and was awarded more than \$3 million in *profits* that it allegedly lost as a result of GM’s failure to honor the oral promise to convey, among other things, a right to acquire land. It is one thing to require a party to pay, or refund, an option fee in the absence of a written contract; it is quite another to require a party to pay lost-profit damages associated with an unconsummated oral agreement to transfer an interest in real property. A claim for lost profits from a hoped-for sale of land, like that at issue here and in *Mooney*, directly implicates the interests underlying the statute of frauds – primarily, ensuring stability in the real estate market – whereas a claim merely

for reimbursement of a option contract deposit implicates such concerns to a far lesser degree.⁴

This action presents precisely the sort of circumstances in which the statute of frauds is most needed. The parties, who have a decades-long history of committing to writing all the terms and conditions of their relationship, disagree about whether any oral promise was made at all. To the extent any such promise was made, it certainly concerned an interest in a piece of land – specifically, valuable real estate that the plaintiff very much wanted.⁵ The Court should follow its decision in *In re Mooney* – and virtually every other decision nationwide addressing the issue (see cases cited *supra*, p 13) – to hold that transfer of a right of first refusal to purchase land is subject to the statute of frauds.

B. There Was No Consideration For GM’s Alleged Promise.

Even if the statute of frauds were inapplicable, plaintiff’s contract claim could not stand. A breach of contract claim can rest only on a valid contract – one characterized by offer, acceptance, and consideration. *Higgins v Monroe Evening News*, 404 Mich 1, 34; 272 NW2d 537 (1978). Here, the third element is conspicuously absent: Bero Motors offered nothing of value in exchange for GM’s promise to assign its right of first refusal. As a result, GM’s one-sided alleged promise is legally unenforceable. “[N]o legal system has ever enforced all promises. * * * Consideration is the glue that binds the parties to a contract together.” Calamari & Perillo, *Contracts* (5th ed), § 4-1, p 172 (citations and quotation marks omitted). See also 1A

⁴ In the only case in which a Michigan court has relied on *Marina Bay* to enforce an oral option agreement, the damages at stake were the out-of-pocket costs paid by the plaintiff. See *Regnier v Payter*, unpublished opinion per curiam of the Court of Appeals, decided May 29, 2003 (Docket No. 233321) (Tab 5) (damages were the amount that plaintiffs had invested in improvements to a residential property that they were renting with an option to buy).

⁵ Indeed, the planned transaction between Bero Motors and Town & Country fell through precisely because the land *was not* included in the deal. Robert Bero testified that “[w]e said we were prepared to pay the one point two million, but we needed the real estate.” 2/18 Tr. 144.

Corbin, Contracts (Revised ed), §180, p 137.

Bero Motors argued at trial that GM's promise to assign its right of first refusal is enforceable because, in exchange for that promise, Bero "agreed to adhere to GM Plan 2000." 2/24 Tr. 7. More specifically, Bero argues that it made two promises that constituted consideration: (i) primarily, its pledge that if it acquired Town & Country it would sell the Oldsmobile and Cadillac product lines to Coyne Chevrolet in order to achieve alignment consistent with GM's Plan 2000; and (ii) secondarily, its promise not to sell Toyotas from the same facility where it would sell GM vehicles. As a matter of law, however, those representations did not constitute consideration for GM's promise, for two reasons: first, the plan to sell off the Oldsmobile and Cadillac lines was utterly indefinite, and second, the undisputed record establishes that Bero Motors promised to comply with Plan 2000 gratuitously, months prior to and without any conceivable intent to induce GM's alleged promise to assign to Bero its right of first refusal.

1. Bero Motors' Promise Was Insufficiently Definite To Constitute Consideration.

A contract can consist of mutual promises. *Garlok v Motz Tire & Rubber Co*, 192 Mich 665, 672; 159 NW 344 (1916). But in order for either party's promise to constitute consideration, it must be sufficiently definite and specific for the parties – and, failing that, the courts – to determine what performance is required. A valid contract requires a meeting of the minds, *i.e.*, "mutual assent" as to all material terms. See, *e.g.*, *Kamalath v Mercy Mem Hosp Corp*, 194 Mich App 543, 548-49; 487 NW2d 499 (1992). Where the essential terms are missing, there can be no enforceable contract. *Nichols v Seaks*, 296 Mich 154, 159; 295 NW 596 (1949). The "promises and performance to be rendered by *each party* [must be] set forth with reasonable certainty"; if they are not, the contract will "fail for indefiniteness." *Id.* at 159-60

(emphasis added) (citing authorities).

The only thing “reasonably certain” about the promise Bero alleges it made in exchange for GM’s alleged assignment of the right of first refusal is that it was too *uncertain* to enforce and hence cannot constitute adequate consideration. Bero Motors claims that, in exchange for GM’s promise to assign the right of first refusal, it agreed to sell the Oldsmobile and Cadillac franchises to Coyne Chevrolet. But according to the Bero brothers, the parties never discussed, let alone agreed upon, any time frame in which Bero Motors would accomplish either transaction. Further, the parties never agreed about what Bero Motors would do if Coyne did not want to buy the franchises, or did not want to pay the Bero brothers’ asking price. Would Bero Motors be required to sell the franchises for a below-market price to satisfy its representation to GM? Or would Bero instead be permitted to hold out for an exorbitant asking price, and if Coyne was unwilling to pay it, to keep its Oldsmobile and Cadillac franchises despite its alleged promise to GM to eliminate non-GM brands? Would Bero Motors be required to sell the non-conforming franchises immediately or could it wait a year, ten years, twenty years? If Coyne refused to buy the franchises at a reasonable – or any – price, would the Beros be obligated to try to sell the franchises to other dealerships, if that was possible?⁶

The absence of *either* a price term *or* a time term *or* any specification about terms Bero Motors could impose as a condition of sale might not necessarily, standing alone, be fatal. But the absence of *all three* critical terms renders Bero’s alleged promise to sell off its non-conforming franchises far too indefinite to enforce – and hence, far too indefinite to constitute consideration. As the Michigan Supreme Court has explained, “where the parties have left open

⁶ This was hardly an unlikely scenario, as it turned out. The evidence at trial demonstrated that the proprietors of Coyne Chevrolet were not interested in expanding their business; they ultimately sold it in 1998. 2/23 Tr. 35.

some matters to be determined in the future, enforcement is not precluded *if* there exists a method of determining the terms of the contract either by examining the agreement itself or by other usage or custom that is independent of a party's mere wish, will and desire." *State Bank of Standish v Curry*, 442 Mich 76, 89; 500 NW2d 108 (1993) (footnote omitted) (emphasis added). Here, there exists no "method of determining" the price term, or the time term, or the circumstances under which performance would not be required. *Id.* See also Restatement Contracts, 2d, § 33, cmt f ("[P]romises may be indefinite * * *. The more important the uncertainty, the stronger the indication is that the parties do not intend to be bound; minor terms are more likely to be left to the option of one of the parties or to what is customary and reasonable"); *Schwanbeck v Federal-Mogul Corp*, 592 NE2d 1289, 1292-93 (Mass, 1992) (memorandum between parties to sell a portion of defendant's company was "too indefinite * * * to constitute a firm offer" because the price of the sale was to "include an undisclosed amount of stock at an undetermined value with unspecified attributes").⁷

The problem is perhaps best illustrated by this question: what could GM have done if Bero had failed to sell off the Cadillac and Oldsmobile dealerships within several years after acquiring Town & Country because Coyne's price was slightly lower than that which Bero was asking? Any court asked by GM to enforce that promise would have no means of ascertaining either (i) whether the parties had intended that the dealerships had to be sold within that time

⁷ This is not a situation in which a court could simply fill in the missing terms by invoking the canon that a contract will not be read to require an "impossibility." See *Knox v Knox*, 337 Mich 109, 120; 59 NW2d 108 (1953) ("A contract will not be presumed to have imposed an absurd or impossible condition on one of the parties, but will be interpreted as the parties must be supposed to have understood the conditions at the time."). Of course, it would be "possible" for Bero Motors to accept an asking price lower than what it might desire in order to meet its commitment to GM to sell off its Cadillac and Oldsmobile dealerships; but is that what Bero Motors' alleged contract with GM required? The parties never discussed it.

frame or (ii) whether Bero was required to accept a price lower than it wanted. The promise incorporated no standards by which performance or nonperformance could be assessed.

The Michigan cases dealing with the enforceability of an “agreement to agree” – in which the parties agree that they will enter into a contract at a later date – are instructive. In *Professional Facilities Corp v Marks*, 373 Mich 673; 131 NW2d 60 (1964), the Michigan Supreme Court explained that such contracts are enforceable only where the terms of the future agreement are sufficiently definite that performance can be measured:

“It is well recognized that it is possible for parties to make an enforceable contract binding them to prepare and execute a subsequent agreement. * * * [H]owever, * * * if the document or contract that the parties agree to make is to contain any material term that is not already agreed on, no contract has yet been made; and the so-called ‘contract to make a contract’ is not a contract at all.” *Id.* at 679 (citations and quotation marks omitted).

Here, GM and Bero Motors had left indefinite not just one, but *all* of the “material terms” of their alleged agreement that Bero Motors would enter into a contract at a later date with some unidentified party for the sale of the Cadillac and Oldsmobile franchises. The parties never discussed what price would be deemed sufficient to require Bero to make the deal; what time frame Bero had to reach a deal; or what other terms Bero could impose as a condition of selling, absent which it might nonetheless be deemed to have satisfied its alleged commitment to GM. Indeed, the willingness of the proposed counter-party to enter into any deal at all was entirely uncertain. In sum, as in *Marks*, “the alleged contract attached to the declaration, upon which suit was based, is not a contract at all.” *Id.* See also *Heritage Broadcasting Co v Wilson Comm’ns, Inc*, 170 Mich App 812, 819; 428 NW2d 784 (1988) (“To be enforceable, a contract to enter into a future contract must specify all its material and essential terms and leave none to be agreed upon as the result of future negotiations.”). Because Bero Motors’ compliance with its vague “promise” – if it can even be called such – could never have been measured by the parties or a

court, it could not, as a matter of law, constitute consideration for GM's assignment of the right of first refusal.

2. Bero Motors' Counter-Promises Did Not Constitute A Legal Detriment.

A promise is not supported by consideration unless the promisee has assumed a legal detriment or obligation *in exchange for* the other's promise:

“Valid consideration for a contract cannot be presumed merely because two parties receive benefit from each other. Rather, a bargained-for exchange is required. The essence of consideration, therefore, is legal detriment that has been bargained for and exchanged for the promise. The two parties must have agreed and intended that the benefits each derived be the consideration for a contract.” *Higgins*, 404 Mich at 20-21.

The element of *intended inducement* is key: the promisee's detriment must be intended to induce the promise; and the promise likewise must induce the detriment:

- “(a) The promisee must suffer legal detriment; that is, do or promise to do what he is not legally obligated to do; or refrain from doing or promise to refrain from doing what he is legally privileged to do. * * *
- (b) The detriment must induce the promise. In other words, the promisor must have made the promise because he wishes to exchange it at least in part for the detriment to be suffered by the promisee. * * *
- (c) The promise must induce the detriment.” Calamari & Perillo, *supra*, § 4-2, p 187 (citations and footnotes omitted).

The counter-promise identified by Bero as consideration is characterized by neither of the latter two elements of inducement, which we will discuss in reverse order.

a. GM's Promise Did Not Induce Bero's Alleged Detriment: Bero Pledged To Support And Abide By Plan 2000, And To Divest The Misaligned Franchises, Before GM Made Any Promise.

Where the promisee's unconditional commitment *predates* that of the promisor, by definition that commitment did not “induce” the promise and cannot constitute consideration for the promise. “[P]ast consideration is not consideration.” Calamari & Perillo, *supra*, § 4.3, p

177. See also *Rose v Lurvey*, 40 Mich App 230, 234-35; 198 NW2d 839 (1972); *Lesnik v Estate of Lesnik*, 403 NE2d 683 (Ill Ct App, 1980); 1A Corbin, *supra*, §180, p 137.

Here, it is undisputed that Bero Motors had pledged – unconditionally and enthusiastically – to abide by and support the principles embodied in Plan 2000 *prior to* the October 29, 1996 meeting at which Dalbec allegedly promised the right of first refusal. The Bero brothers had first made their pledge to abide by Plan 2000 at their meeting with Bakowski and Korona in March 1996, seven months earlier. Plan 2000 requires Bero Motors to sell off its Cadillac and Oldsmobile franchises, as the Bero brothers were aware. The Bero brothers then reiterated their pledge to abide by Plan 2000 at the outset of their meeting with Dalbec and Loughman *before* the subject of Town & Country even arose without stating that this pledge was conditioned on anything. 2/18 Tr. 57-61. The record therefore simply does not permit an argument that the Bero brothers’ promise to comply with Plan 2000 by selling off the Oldsmobile and Cadillac lines if Bero acquired Town & Country was *induced by* GM’s alleged subsequent promise to assign to Bero its right of first refusal: GM’s alleged promise came *after* – in fact, many months after – the Bero brothers had already committed to comply with Plan 2000.

b. Bero’s Alleged Detriment Did Not Induce GM’s Promise: Dalbec Did Not Promise The Right Of First Refusal In Order To Get Bero To Comply With Plan 2000.

A gratuitous promise, like GM’s alleged promise to assign its right of first refusal to Bero Motors, cannot give rise to a binding legal obligation: an informal promise that is not made in exchange for anything is unenforceable. *Danby Township v Beebe*, 147 Mich 312, 317; 110 NW 1066 (1907). A promise is not enforceable unless the “promisor has manifested an offering state of mind looking to an acceptance rather than a gift-making state of mind. A gratuitous promise is not made with an offering (exchanging) state of mind and any detriment that ensues did not induce the promise.” Calamari & Perillo, *supra*, § 4.1, p 176. Gratuitous promises are

unenforceable regardless of whether the parties are private individuals or commercial entities. *Id.* at 173. The offhand promise to assign GM’s right of first refusal attributed to Dalbec by the Bero brothers is a classic example of such a gratuitous promise: Dalbec sought, and received, nothing in exchange for it. As Robert Bero conceded at trial, GM did not “say [Bero] had to do anything in order to get the first right of refusal.” 2/18 Tr. 62.

Further, even if plaintiff’s previously declared willingness to comply with Plan 2000 was part of Dalbec’s *motivation* for offering the right of first refusal, that motivation would not constitute consideration. As this Court has explained, “[t]he motive which prompts one to enter into a contract and the consideration for the contract are distinct and different things.” *Rose*, 40 Mich App at 235 (citations and quotation marks omitted). To be consideration, a promise must not merely be motivated by another’s promise; it must be “*bargained for*” in exchange. *Id.* (emphasis added). Because, as Robert Bero conceded, Bero’s promise was not a bargained-for detriment – because GM did not “say [Bero Motors] had to do anything in order to get its right of first refusal” (2/18 Tr. 62) – it did not constitute legal or equitable consideration.

* * *

In sum, plaintiff’s argument that its commitment to comply with Plan 2000 was the “consideration” for GM’s promise of the right of first refusal is nothing but an after-the-fact legal theory concocted in an attempt to establish the elements of a breach of contract claim. Plaintiff’s legal theory cannot be squared with the undisputed factual record regarding the sequence of the alleged commitments at issue. As a matter of law, plaintiff failed to prove consideration, and the Court should render judgment for GM on the contract claim.

C. The Dealer Agreement Bars Any Action To Enforce An Oral Promise.

GM recognizes that the Court’s prior ruling on this issue is law of the case but seeks to preserve the argument for appeal. GM incorporates by reference its prior briefs and reiterates its

position that the Dealer Agreement, which declares that “[n]o agreement between Division and Dealer which relates to matters covered herein * * * will be binding unless * * * approved in a written agreement executed as set forth in Division’s Dealer Sales and Service Agreement,” precludes Bero Motors’ claim of an oral contract or promise. Pl. Ex. 2, p 20. As Judge Whitbeck wrote in his dissenting opinion, “[T]he dealer agreement does not specify that it concerns only Bero Motor’s business dealings concerning the Buick and Pontiac vehicle lines. * * * [T]he contract read as a whole” indicates “that Bero Motors and General Motors intended to bind themselves to the terms of the dealer agreement in their dealings with each other so long as the dealer agreement was effective.” *Bero Motors v General Motors Corp*, unpublished opinion per curiam of the Court of Appeals, decided Oct 2, 1991 (Docket No. 224190).⁸

II. PLAINTIFF DID NOT PROVE THE ELEMENTS OF A PROMISSORY ESTOPPEL CLAIM.

If the Court grants judgment to GM on the contract claim, it need not remand for a new trial on Bero Motors’ alternative claim of promissory estoppel, which the jury did not reach.⁹ The Court need not remand because, under any construction of the evidence, Bero Motors failed to prove this claim.

Imposing liability on a theory of promissory estoppel is disfavored in Michigan law. “The doctrine of promissory estoppel should be applied only where the facts are *unquestionable* and the wrong to be prevented is *undoubted*.” *Int’l Container Servs, Inc v Walbro Corp*,

⁸ Because the terms of the Dealer Agreement bar enforcement of an oral promise on *any* theory, they also preclude Bero Motors’ promissory estoppel claim, which is discussed in the next section.

⁹ GM requested a verdict form that would have required the jury to make a finding as to each claim. The trial court denied that request and instead instructed the jury not to reach the estoppel claim in the event that it found for plaintiff on the oral contract claim.

unpublished opinion per curiam of the Court of Appeals, decided Nov 6, 2001, at *4 (Docket No. 220202) (Tab 3) (emphasis added). That standard clearly is not met in this case. An estoppel claim has four elements: (1) a clear and definite promise; (2) an intent or expectation on the part of the promisor to induce action or forbearance of a definite and substantial character by the promisee; (3) actual and reasonable reliance; and (4) circumstances that require enforcement of the promise in order to avoid injustice. *Barber v SMH (US), Inc*, 202 Mich App 366, 376; 504 NW2d 791 (1993). Plaintiff's evidence met *none* of these indispensable requirements.

A. GM's Alleged Promise Was Neither Clear Nor Definite.

GM's alleged promise to assign its right of first refusal to Bero Motors was insufficiently clear and definite to support a promissory estoppel claim. As noted above, the dealership agreement between GM and Town & Country allowed GM to assign its right of first refusal – but if it did so, it was contractually required to guarantee the purchase price. Bero Motors did not allege or prove that the parties ever discussed any financial or temporal limitations on that very open-ended promise. Under the Bero brothers' version of events, therefore, when GM allegedly assigned its right of first refusal to Bero Motors, it agreed to back the Bero brothers in *any* deal that Town & Country might choose to strike with a third party.¹⁰ Such a vague and indefinite promise – one lacking any agreement or even outside limitations as to time or price – cannot support an estoppel claim. See, e.g., *Fredenberg v Lyon Lake, M.E. Church*, 37 Mich 476, 478 (1877) (“Estoppels never arise from ambiguous facts; they must be established by those

¹⁰ Thus, according to the Bero brothers' version of events, if the Dagenais dealership had agreed to acquire Town & Country for an outrageously high sum, and the Bero brothers elected to exercise GM's right of first refusal at that price level and then defaulted or backed out, GM would be liable to Town & Country for that sum. Aside from the improbability that GM would ever have agreed to assume such a limitless risk (for no benefit, see *infra*, p 30), such a promise, even if GM had made it, is simply too indefinite to be enforceable under a promissory estoppel claim. See cases cited in text above.

which are unequivocal, and not susceptible of two constructions.”); *Leila Hospital & Health Center v Xonics Med Sys, Inc*, 948 F2d 271, 275 (CA 6, 1991) (applying Michigan law).

B. GM Did Not Expect Or Intend To Induce Reliance.

Bero Motors’ only claim of reliance is that it refrained from negotiating further with Lyle Berro to buy Town & Country because it believed that if another party were to make an offer, GM would allow Bero to exercise GM’s right of first refusal. But the Bero brothers’ own trial testimony establishes that GM did not intend to induce Bero Motors to act in that fashion. To the contrary: all three Bero brothers testified that Dalbec specifically told them to *continue* negotiating with their cousin to work out a deal. In choosing not to respond to Lyle Berro’s repeated requests for an offer in “reliance” on GM’s alleged promise, Bero Motors thus acted *contrary* to GM’s instructions. It is irrelevant whether Bero’s decision not to “bid against itself” (as plaintiff’s counsel put it at trial (2/24 Tr. 12)) was economically rational. The point is that GM could not have *expected or intended* reliance directly contrary to its instructions. Because the undisputed facts establish that GM did not intend or expect to induce the actions that Bero Motors took in reliance on GM’s alleged promise, plaintiff’s estoppel claim must fail. See, e.g., *Trans-World Int’l, Inc v Smith-Hemion*, 972 F Supp 1275, 1278 (CD Cal, 1997).

C. Plaintiff Did Not Reasonably Rely On The Alleged Promise.

For two reasons, any reliance that Bero may have placed on the alleged oral promise to assign GM’s right of refusal was wholly unreasonable. First, as just discussed, it is undisputed that Dalbec specifically *told* the Bero brothers *not* to rely on the promise, but rather to continue negotiating with Berro to work out a deal with him. A promisor’s specific command not to rely on a promise renders any reliance unreasonable as a matter of law. See, e.g., *Uebelacker v Concom Sys, Inc*, 549 NE2d 1210, 1218 (Ohio Ct App, 1988) (where plaintiff was on written notice that employer could terminate employment upon two weeks’ notice, he could not rely on

employer's oral promise that he could be terminated only for just cause).

Second, the course of dealing between the parties demonstrates that it would have been wholly unreasonable for Bero Motors to believe that Dalbec's purported oral promise to assign GM's right of first refusal – essentially, an oral guarantee that Bero would be permitted to acquire another dealership – would be enforceable. “In determining whether a requisite promise existed,” such that reliance on that promise would be reasonable, “the appellate court is to objectively examine the words and actions surrounding the transaction in question as well as the nature of the relationship between the parties and the circumstances surrounding their actions.” *Novak v Nationwide Mutual Ins Co*, 235 Mich App 675, 686-87; 599 NW2d 546 (1999). Here, an examination of the decades-long relationship between Bero Motors and GM demonstrates that Bero Motors could not reasonably have relied on an oral promise to assign a right of first refusal.

Bero Motors knew that GM was exceptionally careful and deliberative with regard to any changes in the alignment and distribution of its franchises. The Bero brothers had been asking GM for a GMC franchise for more than ten years and GM had consistently declined those requests, which it had the power to do under the Dealer Agreement. 2/18 Tr. 16-22; Pl. Exs. 2, 3, 4. Thus, it would have been utterly unreasonable for Bero Motors to believe that GM would, on the spur of the moment, make a binding commitment to put Bero Motors in a preferential position relative to its competitors with regard to the purchase of another GM franchise.

Relatedly, throughout the parties' relationship, all of their dealings had always been reduced to writing. Bero Motors first entered into its Dealer Agreement with GM in 1972; the parties have renewed that agreement every five years since then. 2/18 Tr. 124-25. The Agreement has always contained a clause stating that any agreement to change or modify the parties' contractual relationship must be in writing. *Id.* Moreover, on December 11, 1997, the

parties executed another, separate written agreement that likewise confirmed Bero's understanding that all realignment discussions with GM would be non-binding unless and until they were reduced to writing. Df. Ex. 2. At trial, Robert Bero testified that in all of his dealings with GM, the terms and conditions of all commitments between the parties had always been set forth in writing – "for many, many years, this is the way [we've] done business." 2/18 Tr. 126.

An equally consistent aspect of the parties' decades-long course of dealing was GM's insistence that only specific, designated members of its senior management could make decisions binding on the company. The Dealer Agreement specifically required that, in addition to being in writing, any contract to change the parties' relationship be executed by specifically-designated senior representatives of both companies. The identified representatives did not include Dalbec and Loughman, who were comparatively low-level employees. *Id.* at 124-25. Bero Motors' understanding of that requirement is confirmed in the December 1997 agreement. Df. Ex. 2.

Thus, Bero Motors could not justifiably have thought that an unwritten, informal promise made by a low-level GM employee to assign GM's right of refusal to acquire another dealership would be binding. Given the parties' history of dealings, Bero's alleged reliance on such a promise was unreasonable and cannot support an estoppel claim.

D. No Injustice Will Result From A Decision Not To Enforce The Alleged Promise.

The final element of a promissory estoppel claim is injustice: the plaintiff must prove that if the court does not enforce the oral promise, a "substantial hardship" will result. *State Bank of Standish v Curry*, 442 Mich 76, 83 n 4; 500 NW2d 104 (1993). The "matter of avoidance of injustice" is a question of law. *Id.* at 85 n 6 (citation and quotation marks omitted). Bero Motors proved no injustice here. To the contrary: it is simply trying to get something for nothing. In the fall of 1996, the negotiations between the Bero brothers and their cousin at Town

& Country had fallen apart because the parties were far apart on price: Lyle Berro wanted \$1.2 million for the dealership without the real estate, and the Bero brothers thought those assets were worth a little more than half that amount. After meeting with Dalbec and allegedly learning that GM would assign its right of first refusal to them, the Bero brothers ignored Dalbec's instructions that they continue to negotiate with Town & Country. Instead, they sat back and waited to see whether another party would be able to bargain Lyle Berro down to a lower price. Where, as here, a plaintiff could have helped himself and did not, promissory estoppel need not "be invoked to avoid injustice." *Posluns v Auto Owners Ins Co*, unpublished opinion per curiam of the Court of Appeals, decided May 20, 2003, at *4-*5 (Docket No. 232806) (Tab 4).

Further, Bero Motors gave up nothing in exchange for its alleged right to exercise GM's right of first refusal. Any damages that it incurred are the direct result of the Bero brothers' own failure to follow GM's instructions to continue negotiating with Lyle Berro. And there is no claim of unjust enrichment here: GM gained literally nothing as a result of the alleged conduct at issue. Specifically, GM benefited neither from its alleged initial promise to the Bero brothers to assign its right of first refusal to Bero Motors, nor from its later decision not to disrupt the sale to the Dagenais dealership. The alleged initial promise gave GM nothing it did not already have: with or without the Bero brothers' promise to conform to the Plan 2000 in the event Bero Motors purchased Town & Country, GM always had the power under the Dealership Agreement to require such conformance as a condition of approving any purchase agreement Bero Motors might have reached with Town & Country. Had Bero Motors declined to conform its facility to Plan 2000, GM could simply have exercised its right of first refusal to nix any proposed deal between Bero Motors and Town & Country. Thus, GM's alleged inducement of the Bero brothers' promise conferred no new benefit on GM. As for benefit from the ultimate sale of

Town & Country, any profits associated with the transaction were reaped by the Dagenais dealership, not by GM. Because there was “no indication that defendant * * * derived any benefit from the purported promise,” a promissory estoppel remedy is not appropriate or necessary to prevent injustice. *Scribner v Charter Township of Independence*, unpublished opinion per curiam of the Court of Appeals, decided Jan 22, 2002, at *26 (Docket No. 222510) (Tab 6).

Finally, GM could not have kept its alleged promise to Bero Motors without harming the interests of its other dealers, including Town & Country. GM owed a duty of confidentiality to Town & Country, which it would have had to breach in order to let Bero Motors know that Town & Country had struck a deal with the Dagenais brothers. 2/23 Tr. 24-25.

For all these reasons, the fact that GM did not alert Bero Motors to the transaction and give it a chance to exercise GM’s right of first refusal to the detriment of another dealer worked no “injustice” that would justify a resort to promissory estoppel.

III. THE INFLAMMATORY AND IMPROPER RHETORIC EMPLOYED BY PLAINTIFF’S COUNSEL DURING CLOSING ARGUMENT DEPRIVED GM OF A FAIR TRIAL.

The “right to an impartial jury” is guaranteed by the federal and state constitutions. See, e.g., US Const, Am XIV; *McDonough Power Equip, Inc v Greenwood*, 464 US 548, 549, 554 (1984); *Poet v Traverse City Osteopathic Hosp*, 433 Mich 228, 252-53; 445 NW2d 115 (1989). A jury that is animated by passion, prejudice, or bias is, by definition, not “fair and impartial”: “There can be no justice in a trial by jurors inflamed by passion [or] warped by prejudice.” *Groppi v Wisconsin*, 400 US 505, 511 n 12 (1971) (quoting *Crocker v Justices of Super Ct*, 94 NE 369, 376-77 (Mass, 1911)). See also *United States v Haupt*, 136 F2d 661, 671 (CA 7, 1943) (right to trial by jury “comprehends a fair determination free from passion or prejudice”).

The Michigan Supreme Court has made clear that arguments designed to appeal to the

jury's bias against large and powerful corporations are "always improper" and, when emphasized and egregious, "require reversal." *Reetz v Kinsman Marine Transit Co*, 416 Mich 97, 100-01; 330 NW2d 638 (1982). In *Reetz*, the Court granted a new trial because in summation the plaintiff's lawyer had "constantly stress[ed] the corporate nature, wealth, power, and insensitivity" of the defendant. *Id.* at 110. See also, e.g., *Honda Motor Co v Oberg*, 512 US 415, 432 (1994) (noting the danger "that juries will use their verdicts to express biases against big businesses, particularly those without strong local presences"); *State Farm Mut Auto Ins Co v Campbell*, 538 US 408, 417-18 (2003) (same); *TXO Prod Corp v Alliance Resources Corp*, 509 US 443, 464 (1993) (plurality opinion) (expressing concern about "prejudice against large corporations"). Such argument is particularly prejudicial when it appeals to "sectional or local prejudice" against an out-of-town corporation. See *New York Cent R Co v Johnson*, 279 US 310, 319 (1929) (observing that trial comments that a defendant corporation was from out of town "tend[ed] to create an atmosphere of hostility toward petitioner and a * * * corporation located in another section of the country [and] have been so often condemned as an appeal to sectional or local prejudice as to require no comment"); *Cleveland v Peter Kiewit Sons' Co*, 624 F2d 749, 758-59 (CA 6, 1980) (rhetoric that was "intended to inform and emphasize that [defendant] had its corporate residence in another state * * * undoubtedly served to leave the intended, indelible impression upon the minds of jurors").

That is precisely what occurred here. As in *Reetz*, Bero Motors' lawyer punctuated his closing argument with improper comments "stressing the corporate nature, wealth, power, and insensitivity" (416 Mich at 100-01) of "slick" (2/24 Tr. 26), "giant" (*id.* at 71), and "soul-less" (*id.* at 67) out-of-towner (*id.* at 69) GM. This rhetoric was not limited to an isolated remark or a veiled innuendo. To the contrary: it was an explicit litany, an incessant drumbeat of

impermissible arguments.

For example, urging the jury to disbelieve GM's witnesses' testimony, counsel aligned himself with the local jury in an "us vs. them" stance against the "slick" corporate representatives from Detroit. Referring to GM's witnesses' testimony, counsel said: "I may be from Iron River, we may be a bunch of loggers over there, but we know how to work pretty hard, too. You're going to have to get up pretty early in the morning before you're going to try to fool us with that kind of slick story." 2/24 Tr. 26-27. "A handshake might mean one thing in the U.P. to General Motors; it may mean something else to them down in Detroit. * * * What it means in Detroit is irrelevant to making a decision in a courtroom in the State of Michigan or any other state for that matter." *Id.* at 68. Counsel also told the jury that GM's employees were trying to "fool[]," "manipulate[]," and "crush[]" "people" – presumably the jurors themselves – "with quick and fast and slippery testimony." *Id.* at 27.

Counsel attacked the purported immorality of a big corporation that thought its size would allow it to get away with immoral conduct: "would we teach any of our children to conduct themselves in business like [GM]? * * * Is that the morality that we've built up * * * in this community?" *Id.* at 26. He inveighed: "I don't think the system ought to work that way and I pray to God that you don't either. Because if that's the way it works, nobody's going to come to court anymore, we're going to give up on it. The heck with it. You go in and say or do anything, and if you're big enough and powerful enough, you'll get away with it." *Id.* at 27.

Counsel goaded the jurors to dislike GM, telling them that the reason GM hadn't presented its own "proof of damages" was that it did not think the jurors were "**big enough** to award those kind of damages in this case. I think you are." *Id.* at 75 (emphasis added).

Plaintiff's counsel also riddled his argument with speculation regarding, and malignment

of, GM's motives – even though its motives are utterly irrelevant in this contract case in which no punitive damages were (or could be) sought, and even though an intentional breach of contract is no more wrongful than a negligent or accidental one. He claimed, with no record basis whatsoever, that GM breached its promise to Bero Motors because it had decided to “abandon GM Plan 2000 in Delta County” and “go with the Dagenais” because “they were the largest car dealer in the Upper Peninsula and * * * they were well capitalized, they have a lot of money.” *Id.* at 24. Counsel closed his rebuttal argument with an impassioned David-and-Goliath argument, railing about GM's corporate size, arrogance and “intentional” misconduct:

“Well, I think [GM] more than dropped the ball. ***I think it was an intentional choice.*** They made the choice and they made the choice because they thought they could get away with it because they envisioned at one point or another that they could come into court and try to get by with the arguments they've raised in this case, ***and they're a little arrogant. When you're the giant, you don't think the little –***” *Id.* at 71 (emphasis added).

At that point, defense counsel moved for a mistrial. *Id.* The trial court denied the motion, thus emboldening plaintiff's counsel to continue his inappropriate attack on GM's motives:

“This case has been represented to you as sour grapes. It isn't sour grapes. This case is about crushed grapes. Beros' rights got crushed by General Motors. * * * [T]his case is about General Motors making a conscious choice not to keep its promise; to abandon its promise; to abandon the GM Plan 2000 in the community; and go a different direction, make a choice financially driven.” *Id.* at 74.

Although the court later gave a generic instruction directing the jury not to consider the corporate status of either Bero Motors or GM,¹¹ the damage had been done. The trial court also

¹¹ See 2/24 Tr. 81 (“3.05. The corporation plaintiff and the corporation defendant in this case are entitled to the same fair and unprejudiced treatment as an individual would receive under like circumstances, and it is your duty to decide the case with the same impartiality you would use in deciding a case between individuals.”).

denied GM's motion for a new trial pursuant to MCR 2.116(C)(1)(e).

Plaintiff's arguments were particularly improper and prejudicial in this case because the inflammatory "send a message" rhetoric had *no* legitimate relevance to the questions that were put to the jury. This is a simple breach of contract case. There is no claim for punitive damages, nor any basis for one; there is not even a claim that GM acted tortiously. The only questions before the jury were whether GM had breached an enforceable agreement and, if so, the amount of damages that resulted from the breach. Compensatory damages are designed solely "to redress the concrete loss that the plaintiff has suffered by reason of the defendant's wrongful conduct." *State Farm*, 538 US at 416 (citations and quotation marks omitted); *Milwaukee & St. Paul R Co v Arms*, 91 US 489, 492 (1875) (it would be "a great departure from the principle on which damages in civil suits are awarded" for the compensatory damages to be even slightly "more than an adequate pecuniary indemnity for a wrong suffered"). Plaintiff's accusations that GM acted intentionally, accusations of corporate arrogance, suggestions of immorality, contentions that GM was a slick company trying to pull one over on the jurors, and repeated arguments that representatives of an out-of-town corporation operated under different standards of morality than do the "locals" on the Peninsula, had nothing to do with any of those issues; their sole purpose was to invoke prejudice against GM.

Just last July, the Michigan Supreme Court held that such arguments, which represent an endeavor "to divert the jury from its true task – that of appropriately compensating the plaintiff for any losses suffered as a result of the defendant's violation of the [law] – and instead [seek] to inflame passion and to incite the jury to punish the defendant even while disclaiming that [counsel is] seeking punitive damages," are grossly improper. *Gilbert v DaimlerChrysler Corp*, 470 Mich 749, 770-71; 685 NW2d 391 (2004). As in *Gilbert*, plaintiff's counsel here

“deliberately tried to provoke the jury by supplanting law, fact, and reason with prejudice, misleading arguments, and repeated *ad hominem* attacks against defendant based on its corporate status.” And as in *Gilbert*, “[g]iven the undeniable role of this inflammatory rhetoric, the trial court erred in denying defendant’s motion for a new trial.” *Id.* at 770-71. See also *Reetz*, 416 Mich at 111-12; *Steudle v Yellow & Checker Cab & Transfer Co*, 287 Mich 1, 11-12; 282 NW 879 (1938) (new trial required when there was “a deliberate course of conduct on the part of counsel for plaintiff aimed at preventing defendant from having a fair and impartial trial”).

Importantly, the test for when improper counsel argument warrants a new trial does not require the challenger to show that the argument *did* bias the jury. Rather, the test is only whether the inappropriate commentary created a *risk* that the improper comments influenced the jury. As the Michigan Supreme Court explained: “An appellate court should not require that an appellant demonstrate affirmative prejudice to his cause. If on the record an appellate court is not able to say that the jury was not diverted from the merits, nor could [it] say that the mischief done was cured by the judge’s efforts, then a new trial should be ordered.” *Wayne County Road Comm’rs v GLS LeasCo, Inc*, 394 Mich 126, 139; 229 NW2d 797 (1975). That standard clearly is more than met here. The transcript of plaintiff’s closing provides a textbook example of precisely the kind of argument that, as the Michigan Supreme Court has repeatedly held, creates a serious risk of prejudice to the defendant and requires reversal. *Id.* See also *Reetz*, 416 Mich at 111-12; *Gilbert*, 470 Mich at 770-71.

Although the court cursorily asked the jury to disregard the counsel’s remarks and eventually gave the jury a generic instruction not to treat either Bero Motors Corporation or GM badly because of its corporate status, those instructions could not possibly un-ring the bell of plaintiff’s counsel’s inflammatory argument, because by that time “the damage had been done –

[] counsel’s inflammatory rhetoric had its intended effect.” *Gilbert*, 440 Mich at 776. See also, e.g., *People v Messenger*, 221 Mich App 171, 179 n 3, 561 NW2d 463 (1997) (“Although jurors are presumed to follow instructions, some errors cannot be cured with an instruction. * * * [I]f you throw a skunk into the jury box, you cannot instruct the jury not to smell it[.]”) (citation omitted); *Steudle*, 287 Mich at 12 (“the course of misconduct was so persistently followed that a charge of the court in an effort to obviate the prejudice would have been useless”).

In sum, the trial court abused its discretion in failing to order a new trial on this ground.

IV. THE DAMAGES AWARD CANNOT STAND.

Even if GM did breach an enforceable promise to Bero Motors – which, as shown above, it did not – the jury’s \$3.1 million damages award could not stand. The only evidence of damages that Bero Motors introduced was the testimony of “experts” Bruce Hutler and Craig Nelson, who presented a damages model that relied entirely on inapposite and speculative factual assumptions, which Hutler and Nelson made no effort to verify. Hutler and Nelson concluded that the total amount of profit lost by Bero Motors as a result of GM’s failure to assign the right of first refusal was \$3,126,934. 2/19 Tr. 77. The jury awarded precisely that amount.

The speculative nature of plaintiff’s damages evidence requires reversal, for two reasons. First, GM is entitled to judgment because plaintiff neither proved its lost profits with “reasonable certainty” nor demonstrated that the lost profits were within GM’s contemplation at the time of the alleged agreement, as required by Michigan law. See *Riverside Coal Co v United Mine Workers of America*, 410 F2d 267 (CA 6, 1969) (applying Michigan law). Second, at a minimum, GM is entitled to a new trial on damages because the trial court abrogated its gatekeeper role by allowing Hutler and Nelson to present a baseless damages model.

A. Because Plaintiff Introduced No Competent Evidence Of Damages, GM Is Entitled To Judgment.

Under Michigan law, an award of lost profits is available only where “they can be seen as within the contemplation of the parties at the time of the execution of the contract, spring from the breach thereof, and are subject to determination with a reasonable degree of certainty as opposed to being conjectural or speculative.” *Fister v Henschel*, 7 Mich App 590, 595-96; 152 NW2d 555 (1967) (citations omitted). Both the fact and the amount of the lost profits must be shown with reasonable certainty. See *Joerger Enters, Inc v Gordon Food Servs*, 224 Mich App 167, 175; 568 NW2d 365 (1997). The “jury should not be allowed to speculate or guess [with regard to] the amount of loss of profits.” *Id.* at 176. See also *Fera v Village Plaza, Inc*, 396 Mich 639, 643; 242 NW2d 372 (1976); *Nat’l Pharm Servs, Inc v Harrison Community Hosp*, 67 Mich App 286, 293-94; 241 NW2d 76 (1976); *Kezeli v River Rouge Lodge*, 195 Mich 181, 188; 161 NW 838 (1917). The reasons for this heightened burden of proof when a plaintiff seeks lost profits are plain. Because predictions of the future rest on probabilities, not actualities, lost profits claims are inherently susceptible to abuse by litigants who can exaggerate the probabilities with little fear of contradiction by known facts. Even slightly undue optimism can produce a grossly excessive award.

Here, Bero Motors failed to introduce any reliable evidence demonstrating that it suffered the enormous lost profits it claimed as a direct result of GM’s failure to assign to it the right of first refusal. Nor did it show that the lost profits were within GM’s contemplation at the time of the alleged agreement. Accordingly, GM is entitled to judgment.

1. Bero Motors Failed To Prove Lost Profits With Reasonable Certainty.

To be reliable, a projection of lost profits must take into account real market factors and rest upon hard evidence. Hutler and Nelson’s damages model does neither. Instead, it “adds

vague estimation and gross extrapolation to unsupported presumption. At every step, [it] is fraught with speculation.” *Oiness & Sun Prods Group, Inc v Walgreen Co*, 88 F3d 1025, 1029 (CA Fed, 1996). Hutler and Nelson developed a model that purported to calculate the amount of profit that Bero Motors would have reaped as a result of owning the GMC franchise from 1998 through 2010, when they assumed the business would be sold. Hutler and Nelson calculated the number of new GMC units sold by assuming, without foundation, that Bero Motors’ market penetration for GMC vehicles would be exactly the same as its historical market penetration for Pontiacs and Buicks. They then applied the gross profit percentage for four non-comparable, unidentified dealerships in other markets to calculate the gross profits on those vehicles. They further assumed that by selling those additional new units, Bero Motors would be able to achieve a proportional increase in sales of used vehicles of all kinds; sales of finance and insurance contracts; service business; body shop business; and parts and accessories sales. Then, relying entirely on information obtained from the Bero brothers themselves, and without checking either comparables or industry data, the experts low-balled the additional expenses that would be associated with those gross profits in order to calculate net profit for each of those years. Hutler and Nelson next applied a 60 percent “probability adjustment” for the years 2004 through 2010, which reflected their assessment that there was a 40 percent risk that those future profits would not be realized.

Nearly every one of these assumptions was based on either pure speculation or demonstrably false data. The key assumptions were based on every imaginable source – including the Bero brothers’ own assertions – *except* either Town & Country’s historical performance, which Hutler flatly refused to consider, or the financial data of true comparables. 2/19 Tr. 51. That alone suffices to render the experts’ testimony inadmissible. See, *e.g.*, *Advent*

Sys Ltd v Unisys Corp, 925 F2d 670, 682 (CA 3, 1991) (expert may not use speculative data in estimating lost profits “when actual performance data for that same time span are available”); *Joerger*, 224 Mich App at 175-77. But, as shown below, there is far more. The problem was not merely that the experts’ conclusions were not reasonably certain; rather, the problem was that their conclusions were almost certainly *wrong*.

a. Plaintiff’s Experts Based Their Determination Of Lost Profits On Invalid Assumptions That Were Contradicted By The Historical Record And Unsupported By Any Evidence.

A financial model’s output is only as good as its input: faulty assumptions and questionable raw data inexorably lead to unreliable results. In this case, every element of the model developed by Hutler and Nelson was infected by conjecture, speculation, and sheer guesswork. In formulating their assumptions, the “experts” failed to develop a reliable set of *any* comparable companies for use as benchmarks. Nor did they consider Town & Country’s historical financial data. Rather, they relied entirely on naked assertions made by the Bero brothers and on vague, unverifiable data that they gleaned from out-of-state dealerships that happened to be clients of their firm. The product of their analysis, therefore, is unworthy of any credence, let alone sufficiently “certain” to support the jury’s \$3.1 million lost profits award.

Initial Outlay of Funds. The model rested on the simplistic and implausible assumption that after acquiring Town & Country for \$1.15 million, Bero Motors would have retained the GMC truck franchise, which Hutler valued at \$350,000, and then would have sold the rest of the business for \$800,000. 2/19 Tr. 142-43, 154-56. In other words, Hutler assumed that Bero Motors would have been able to cherry-pick Town & Country’s most profitable line of business and drop the rest with no financial downside. Even assuming that the \$350,000 valuation was correct, it is highly unlikely that Bero Motors could have sold off Town & Country’s land, tools, and the remaining three (less-profitable) franchises without incurring any costs.

More fundamentally, there is a serious disconnect between Hutler's assumption that the GMC line would have cost Bero Motors \$350,000 and his conclusion that it would generate \$3.1 million in new profits. One would not expect the lost-profit valuation to be nearly ten times the sale valuation. After all, as Hutler reluctantly conceded, one's calculation of what a product line is worth is based on a prediction of the profits it will generate. 2/19 Tr. 167-68. See also Kolaski & Kuga, *Measuring Commercial Damages Via Lost Profits Or Loss Of Business Value: Are These Measures Redundant Or Distinguishable?*, 18 J L & Com 1, 13 (1998), discussed at p 47 *infra*. This vast differential renders Hutler's entire model suspect.

Moreover, as we next show, none of the data points that formed the basis for his model was derived from either Town & Country itself or any comparably situated dealership:

Revenue Volume – New Trucks. In order to estimate the number of new GMC units that Bero Motors would have sold each year, Hutler looked to the number of GMC vehicles registered in Delta County from 1998 to 2003 – and aggressively assumed that Bero would have sold 102 percent of those vehicles (*i.e.*, that it would have sold all of the trucks registered in Delta County plus some registered in other counties). 2/19 Tr. 144.¹² This percentage was derived from Bero Motors' market penetration for the Pontiac and Buick product lines. He intentionally did not consider the number of GMC trucks that Town & Country and/or the Dagenais dealership had *actually* sold during that time frame. *Id.* at 51, 145-47. Accordingly, the assumption did not reflect the level of local competition for **GMC truck sales** – which obviously could have differed substantially from the level of competition for Pontiac and Buick sales and would have affected the market penetration that Bero Motors could achieve.

¹² For the years from 2004 through 2010, Hutler simply took the average of new trucks sold per year during the historical period.

Revenue Volume – Service and Ancillary Sales. Again without considering the results of true comparables, historical data from Town & Country, or any industry studies or any other data, Hutler simply “assumed” that the growth of Bero Motor’s ancillary sources of revenue (*i.e.*, service, sales of finance and insurance contracts, body shop work, and parts and accessories) would correspond directly to the growth in new vehicle sales he had assumed would occur from the addition of the GMC line. Hutler used Bero Motors’ sales history to calculate the “ratio” of new-car revenue to each ancillary source of revenue. He then concluded that by selling 77 new GMC units in 1998, for example, Bero Motors would have also sold an additional 80 used vehicles, and would have handled an additional 2,644 service repair orders. Pl. Ex. 50, pp 3, 5-6.

In calculating service revenue and used-car sales for the 1998 to 2010 period, Hutler chose not to review Town & Country’s operating reports for 1996 and 1997, even though they were available to him. 2/19 Tr. 140-41, 148. Hutler’s data was based *entirely* on the self-serving assertion of his clients, the Bero brothers, that the GMC line would have generated far more service revenue in their hands than it had under Lyle Berro’s management. See *id.* at 138, 141-42. Hutler made no effort to gather any facts in support of that bold declaration; he readily conceded that the only confirmation he received was the opinion of a few unidentified individuals who believed that Bero Motors had a better “reputation” than did Town & Country. *Id.* at 140-42. Reliance on the plaintiff’s unconfirmed assertions renders an expert’s model infirm as a matter of law. See *Lithuanian Commerce Corp, Ltd v Sara Lee Hosiery*, 179 FRD 450, 460 (D NJ, 1998) (expert’s reliance on client’s statement that it had “outperformed some other distributors” on certain measures could not support aggressive assumptions in lost profits model); *Williams v Rene*, 72 F3d 1096, 1102 (CA 3, 1995) (“warping” of underlying assumptions caused by overgeneralizations about company’s performance rendered expert’s

model inadmissible); *American Bearing Co, Inc v Litton Indus, Inc*, 540 F Supp 1163, 1173 (ED Pa, 1982) (granting new trial where damages expert’s “estimated market shares were based on his oft repeated assumption that American Bearing was offering a better product, with better service, at a lower price,” but “[t]he only support in the record for any of these assumptions is the testimony of” plaintiff’s president that the company generally outperformed its competitors).

Gross Profit Per New Truck Sold. Two of the most important assumptions in the experts’ damages model were (i) the estimated price of each new truck sold, which they speculated would start at \$25,000 in 1998, grow to \$30,416 in 2003, and then grow at a rate of 4 percent per year thereafter; and (ii) the gross profit percentage associated with those sales, which the experts pegged at a consistent 5.75 percent. All of those figures were based entirely upon data from four out-of-state dealerships that were never demonstrated to be remotely similar to Town & Country in any relevant respect. Nelson Dep. 11-12, 21-23 (attached to Defendant’s Motion in Limine to Exclude Expert Testimony); Pl. Ex. 50, p 2. Despite GM’s objections to Hutler’s reliance on data from dealerships that even Hutler never suggested were actually comparable, the trial court never required Hutler to produce information about those other dealerships – an erroneous evidentiary ruling¹³ that was highly prejudicial to defense counsel’s ability to evaluate and challenge the experts’ analysis. See 2/19 Tr. at 75, 94.

Hutler and Nelson selected these particular dealerships because they happened to be other clients of their firm rather than because they bore any alleged similarity to Bero Motors in terms of location, sales, or clientele. Hutler and Nelson failed to adduce any evidence that the four dealerships were comparable in any respect to the Town & Country dealership whose lost

¹³ See, e.g., MRE 703 (“The facts or data in the particular case upon which an expert bases an opinion or inference shall be in evidence.”); Dubin & Weissenberger, *Michigan Evidence: 2004 Courtroom Manual*, pp 263-64.

operating profits they were attempting to estimate. Nelson Dep. 12. However, we do know that only two of the dealerships even included GMC franchises! *Id.* at 11. See also 11/10/03 Tr. 17-18. The third dealership sold only Chevrolet vehicles and the fourth sold only Chrysler, Dodge, and Jeep vehicles. Nelson Dep. 11. Further, none of the dealerships was even located in Michigan. *Id.* at 10. Thus, the so-called “comparables” were not even comparable to one another, and none of them was comparable to Bero Motors. Accordingly, the data that they provided was highly misleading. See, e.g., *Great Lakes Div of Nat’l Steel Corp v Ecorse*, 227 Mich App 379, 391; 576 NW2d 667 (1998) (to be useful in valuation analysis, “comparables” must be adjusted to reflect differences between the properties: “if the analysis of a comparable sale is flawed, the valuation for the subject property is also flawed”). Where testimony about lost profits relies on the results of other companies that are not true comparables, that testimony is too speculative as a matter of law. *Joerger*, 224 Mich App at 176-77; *Lithuanian Commerce Corp*, 179 FRD at 460 (where expert “based his conclusion on a direct comparison between logically distinct sets of customers” and relied on “comparables” that were subject to costs and taxes different from those that faced the subject company, lost-profits calculation was overly speculative). Those infirmities in turn rendered the experts’ determination of gross profits – a key figure – entirely speculative. 2/19 Tr. at 91.

Expense Structure. Hutler and Nelson assumed that Bero Motors would incur minimal additional expenses in connection with the GMC product line – despite the fact that it would, according to them, be selling approximately 200 more used and new vehicles every year and handling an enormous amount of ancillary business. For example, without considering the service data of the four incomparable “comparables” they had chosen, or any historical data from Town & Country or Dagenais, or even any industry data or publications, they simply chose to

assume that Bero Motors would have had to hire only two additional service technicians. 2/19 Tr. 114-16; Pl. Ex. 50, p 9. They also estimated, based on a voice-mail message from an unidentified accountant at their firm who had information about “one or two” unidentified dealerships in unidentified locations in unidentified states (Nelson Dep. 41-42), that Bero Motors could acquire and develop additional showroom space at a cost of \$75 per square foot – without considering the price of real estate and construction costs in Escanaba or even Michigan generally (*id.*). See also 2/19 Tr. 189, 230; Pl. Ex. 50, p 11. Incredibly, they further assumed, based solely on Bob Bero’s suggestion, that Bero Motors would not need *any* additional space to service and repair the additional **2,500 to 3,500** vehicles per year that they had speculated might be attracted to Bero Motors’ servicing by its acquisition of the GMC dealership. Pl. Ex. 50, p 5. Nor did they check the available data on the relationship between sales volume and service area size. 2/19 Tr. 149. Similarly, the experts assumed, again based entirely on Bob Bero’s suggestion, that Bero Motors would need only one additional salesperson, one body shop technician, and one general administrative position to handle the voluminous extra work they imagined the addition of the GMC franchise might bring. 2/19 Tr. 116-18; Pl. Ex. 50, pp 9-10.

In making these low-ball assumptions about the costs associated with the enormous sales of GMC vehicles they speculated the GMC franchise would bring, Hutler and Nelson once again neglected to look at the cost structure of any true comparables; indeed, they did not even consider the cost structure of the four non-comparable dealerships that they had considered for purposes of estimating gross profits. And, once again, they chose not to review Town & Country’s available historical data. 2/19 Tr. 51, 139-41. In fact, that data showed that Town and Country had turned only a tiny profit – \$23,313 before taxes – in 1996 (Pl. Ex. 52), and that it had taken a *loss* of \$44,347 before taxes in the first ten months of 1997, before it was sold to

Dagenais. Df. Ex. 12. See also 2/18 Tr. 215 (Robert Bero's concession that "Lyle had a – was having a little problem at the time," in that he "was not making any money").

While the Bero brothers would doubtless attribute Town & Country's historically poor performance to their cousin's allegedly inferior management skills, case law establishes that an expert must at least take historical operating profits into *account* in determining the profits that the business would generate once sold, and then justify any deviations. See, e.g., *Joerger*, 224 Mich App at 176 (where business had historically earned revenues of \$1,500 to \$1,600 per customer per month, expert's model that was based on "projected monthly sales of \$5,000" per customer was too speculative); *Advent Sys*, 925 F2d at 682; *Yentsch v Texaco, Inc*, 630 F2d 46, 59 n 19 (CA 2, 1980). Hutler's failure even to consider historical expense data rendered his testimony too speculative as a matter of law. See *Lithuanian Commerce Corp*, 179 FRD at 460; *Williams*, 72 F3d at 1102; *American Bearing Co*, 540 F Supp at 1173.

b. The Experts' Conclusions Were Contradicted By Plaintiff's Own Contemporaneous Assessments Of Town & Country's Value.

The gross exaggerations inherent in the experts' valuation become even more apparent when their figures are compared with Bero Motors' own contemporaneous determination of Town & Country's worth. In 1996, Bero was exceptionally interested in purchasing Town & Country and was willing to pay Lyle Berro's asking price of \$1.2 million. Df. Ex. 7; 2/19 Tr. 161. When they learned that that price did not include Town & Country's real estate, the Bero brothers commissioned a valuation of the business without the land; their expert told them that the business was worth between \$275,000 and \$525,000. Df. Ex. 8. The Bero brothers added a premium to those figures based on their estimate of how much they wanted the GMC truck line and offered \$700,000; Town & Country rejected the offer. 2/19 Tr. 160-61. This case thus presents the unusual situation in which *the plaintiff has already made its own valuation of the*

property at issue, based on the evaluation of an expert, and that sum was *far less* – eighty percent less – than the sum his litigation experts asserted and the jury awarded. That disparity alone demonstrates the irrationality of the experts’ valuation, because the sale value of any business is derived from the buyer’s expectation as to future profits: “The value of a business, or any asset for that matter, is generally considered to be the net present value of all future benefits (*i.e.*, cash flows) that the owner may expect to derive from it.” Kolaski & Kuga, *supra*, at 13. See also, *e.g.*, *Galveston, Harrisburg & San Antonio Ry Co v Texas*, 210 U.S. 217, 226 (1908) (Holmes, J) (“[T]he commercial value of property consists in the expectation of income from it.”). Accordingly, “the present value of any claim for lost profits (valued as of the same date) *cannot exceed the value of the business as of the date of loss.*” Kolaski & Kuga, *supra*, at 19 (emphasis added).

In sum, the damages analysis presented at trial by Bero’s purported experts was wholly lacking in reliability; in fact, it was little more than rank speculation. See, *e.g.*, *Phillips v Deihm*, 213 Mich App 389, 402; 541 NW2d 566 (1995); *McDonald v. Stroh Brewery Co*, 191 Mich App 601, 607; 478 NW2d 669 (1991). By eschewing all of the available “real world” data and choosing instead to rely on unsupported suppositions and incomparable “comparators,” the damages experts failed to assess Bero Motors’ lost profits with any “reasonable degree of certainty.” *Joerger*, 224 Mich App at 175. Accordingly, GM is entitled to judgment.

2. The Award Of Lost Profits Was Not Within GM’s Contemplation At The Time Of The Alleged Agreement.

Bero Motors likewise failed to show that the award of lost profits was within GM’s contemplation at the time of the alleged agreement – that is, that it would have been reasonably foreseeable to GM that, if it did not give Bero Motors an opportunity to exercise GM’s right of first refusal, it could be sued and held liable for more than \$3 million in damages. Under

Michigan law, “the damages recoverable are those damages that arise naturally from the breach, or which can reasonably be said to have been in contemplation of the parties at the time the contract was made.” *Lawrence v Will Darrah & Assocs*, 445 Mich 1, 13; 516 NW2d 43 (1994) (citations and quotation marks omitted). See also *Dewitt Bldg Co v Auto-Owners Ins Co*, unpublished opinion per curiam of the Court of Appeals, decided June 12, 2003, at *3 (Docket Nos. 235536, 236945) (Tab 1). In reviewing the reasonableness of a contemplation of consequential damages under the circumstances, the court applies an objective standard of foreseeability. *Lawrence*, 445 Mich at 13.

Bero Motors has failed to meet that standard. First of all, as discussed in Part II.B *supra*, GM had no reason to expect or intend that Bero Motors would view its alleged offhand remark about the right of first refusal as a binding commitment. Even if we assume for these purposes that it *did* constitute such a commitment, plaintiff adduced no evidence suggesting that when GM offered to assign its right of first refusal, it contemplated that it was taking on legal responsibility for all profits that Bero Motors might, in a perfect world, reap from a GMC franchise over a twelve-year period. Second, the purely speculative nature of the experts’ analysis rendered the experts’ conclusions totally unpredictable. The jury’s breathtaking \$3.1 million award was based on the highly optimistic Hutler-Nelson model, unchecked by any historical realities of this or any other comparable GMC dealership. GM could not reasonably have predicted that Dalbec’s alleged offhand remark would result in such a verdict. Accordingly, the award cannot stand.

B. The Admission Of Hutler’s And Nelson’s Testimony Violated MRE 702 And Necessitates A New Trial.

At a minimum, the admission of this speculative expert testimony on damages necessitates a new trial. To be admissible, expert testimony must be based upon solid evidence and derived from sound methods. See, e.g., *Kumho Tire Co, Ltd v Carmichael*, 526 US 137, 147-48 (1999);

Daubert v Merrell Dow Pharms, Ins, 509 US 579, 589 (1993); *Gilbert v DaimlerChrysler Corp*, 470 Mich 749, 779; 685 NW2d 391 (2004). The trial court “must act as a ‘gatekeeper’” in order to fulfill its “‘special obligation’ [to] ensure accurate and unbiased decision-making by the trier of fact.” *Mukhtar v Cal State Univ, Hayward*, 299 F3d 1053, 1063 (CA 9, 2002), *amended by* 319 F3d 1073 (CA 9, 2003) (quoting *Kumho Tire*, 526 U.S. at 147). The court’s performance of this “gatekeeping” role “is particularly important considering the aura of authority experts often exude”; that aura often “lead[s] juries to give more weight to their testimony.” *Id.* at 1063-64. See also *People v Hubbard*, 209 Mich App 234, 240-41; 530 NW2d 130 (1995).

Michigan Rule of Evidence 702 “particularize[s] the kind of gatekeeper inquiry the trial court is required to make.” *Gilbert*, 470 Mich at 779 n 44. It provides:

“If the court determines that scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise if (1) the testimony is based on sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.”

Thus, MRE 702 requires that the trial court “ensure that *each aspect* of an expert witness’s proffered testimony – including the *data underlying* the expert’s theories and *methodology* by which the expert draws conclusions from that data – is reliable.” *Gilbert*, 470 Mich at 779 (emphasis added). The trial court abrogated its gatekeeper role by allowing Hutler and Nelson to present a baseless damages model.

The trial court’s gatekeeper role “applies to *all stages* of expert analysis.” *Id.* at 782 (emphasis in original). This means that not only the data underlying expert testimony, “but also the manner in which the expert interprets and extrapolates from those data,” is subject to the court’s “searching inquiry.” *Id.* It is axiomatic that an expert’s conclusion must be firmly grounded in the evidence. *Id.* See also *Craig v Oakwood Hosp*, 471 Mich 67, 84; 684 NW2d

296 (2004). There is no place in an expert’s testimony for speculation. See *Craig*, 471 Mich at 84 (trial court erred in permitting expert to testify about a theory based only on his “own hypothetical” factual underpinnings that were unsupported by real-world facts). See also *McDonald*, 191 Mich App at 607 (valuation of job-placement program based on speculation was “properly stricken”). This rule is particularly important where, as here, the remedy sought is lost profits, which (as discussed at pp 37-38, *supra*) are inherently speculative. *Joerger*, 224 Mich App at 175 (trial court properly excluded proposed expert testimony regarding lost profits because it lacked adequate foundation and “amounted to rank speculation”).

As described in detail in Part IV.A *supra*, and as GM asserted repeatedly and in a timely fashion below,¹⁴ both the raw data that Hutler and Nelson considered and the extrapolations and assumptions that they drew from that data lacked any foundation in the evidentiary record. In awarding precisely the amount recommended by Bero Motors’ experts, the jury necessarily considered “proof” that was really speculation. Because there is no way of knowing what the jury would have done had it not been exposed to this improper damages model and instead viewed a model based on historical profits or real comparables, the case must be remanded for a retrial on damages. *Ogooshevitz v Sampson*, 211 Mich 180, 184; 178 NW 642 (1920); *Board of Jackson County Road Comm’rs v O’Leary*, 326 Mich 570; 40 NW2d 729 (1950).¹⁵

¹⁴ See Mot. in Limine to Exclude Testimony of Plaintiff’s Experts and Economic Loss Report, pp 3-6; Mot. in Limine to Preclude Reference to Other Dealerships as Comparables, p 3; Mot. in Limine to Preclude Evidence of Future Economic Loss, pp 2-5; 2/19 Tr. 50-52, 56-57, 94, 215-17, 229-30; Mot. for JNOV, New Trial, or Remittitur, pp 8-11.

¹⁵ At trial, GM objected to the court’s decision to give SJI2d 53.03, which provides that the jury must apply a five percent present value reduction. Under Michigan law, the five percent statutory discount rate applies to all *personal injury* claims. MCL 600.6306(2). But there is no comparable requirement for commercial claims. *Nation v WDE Elect Co*, 454 Mich 489, 492; 563 NW2d 233 (1997). Accordingly, the court erred in giving the pattern instruction and thereby

(cont’d)

CONCLUSION

For the foregoing reasons, the judgment should be reversed with instructions to enter judgment for General Motors on all counts. In the alternative, a new trial should be ordered.

Respectfully submitted.

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taking this issue away from the jury. If the Court remands for a new trial, SJI2d 53.03 should not be given to the jury.