



The franchise relationship between Ford, an automobile manufacturer and franchisor, and Darling's, a Ford dealer and franchisee, began in 1989 when the parties entered into a written agreement known as the Ford Service and Sales Agreement ("SSA"). *Darling's*, 2014 ME 7, ¶¶ 2, 4, 86 A.3d 35. In 2000, Ford introduced the Blue Oval Certified ("BOC") program, a customer satisfaction incentive program that offered Ford dealers a 1.25% cash bonus on the retail price of each vehicle the dealer sold. *Id.* at ¶ 5. The BOC program was described in "reference guides" issued between 2001 and 2004. *Id.* The guides identified certification requirements for each year of the program, but did not describe any requirements beyond March 31, 2005. *Id.* In August 2004, Ford made a broadcast on its internal Fordstar television network announcing to dealers that the BOC program would conclude by March 2005 and be replaced by another program. *Id.* On April 1, 2005, Ford discontinued the BOC program. *Id.* In December 2006, Darling's filed a twelve-count complaint before the Maine Motor Vehicle Franchise Board (the "Board"). *Id.* at ¶ 7.

Count X of Darling's Amended Complaint to the Board—the only count at issue—explains that Darling's agreed to modify the SSA to participate in the BOC Program. Exhibit C to Ford's Opposition, Darling's Amended Complaint, ¶ 118. Darling's alleges that Ford's discontinuance of the BOC program constitutes an attempt to modify the SSA without certified written notice in accordance with 10 M.R.S.A. § 1174(3)(B) of the Business Practices Between Motor Vehicle Manufacturers, Distributors and Dealers Act ("Dealers Act").<sup>1</sup> *Id.* at ¶ 119. Darling's claims it was harmed by this conduct and requests "an award of damages equal to the loss of the financial remuneration wrongfully removed from Darling's contract without complying with 10 M.R.S.A. § 1174(3)(B). *Id.* at ¶ 121.

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<sup>1</sup> Unless otherwise noted, all references and citations to statutory sections are to the Dealers Act.

The Parties argued their dispute before the Board, this court, and the Law Court. In *Darling's*, the Law Court resolved all issues in Darling's Amended Complaint except for the question of what damages are owed to Darling's. In particular, *Darling's* held: (1) the SSA and the BOC program were part of the overall franchise agreement that existed between Ford and Darling's (§ 27); (2) compliance with section 1174(3)(B)'s notice requirement is mandatory, and Ford's failure to provide said notice violated the statute (§ 31); (3) the presumption contained in section 1189-B(2) in favor of factual findings by the Board is consistent with, and does not unduly burden, the right to trial by jury (§ 40); (4) the Board's award of one civil penalty for Ford's violation of the Dealers' Act, was proper (§§ 49-50); and (5) the Board lacked jurisdiction to award damages to Darling's under the Dealers Act (§§ 46-48). Consistent with the fifth determination, the Law Court vacated the Board's award of \$145,223.08 in damages to Darling's and remanded the matter to this court "for a determination of damages." (*Id.* at §§ 48, 50.) As of July 9, 2014, when oral argument was held, Ford has not provided notice in accordance with section 1174(3)(B) to Darling's for business reasons. July 9, 2014 Oral Argument at 34:02-35:08.

## DISCUSSION

Parties may obtain discovery regarding any non-privileged matter that is relevant to the subject matter involved in the pending action. M.R. Civ. P. 26(b)(1). Similarly, parties may generally put forth "relevant evidence." M.R. Evid. 402. "Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. M.R. Evid. 401. Here, the question presented to the court is whether the "good cause" evaluation is relevant to the jury's determination of Darling's damages. For the reasons

discussed below, the court finds the “good cause” determination—along with discovery and evidence related thereto—is not relevant. Therefore, we grant Darling’s motion.

**1. The Plain Language, Structure, and Purpose of the Dealers Act Demonstrate that the “Good Cause” Determination Cannot Take Place Absent Compliance with Section 1174(3)(B)’s Notice Requirement.**

The parties do not dispute that Darling’s damages are tied to the 1.25% BOC incentive on all new Ford vehicles sold after April 1, 2005. July 9, 2014 Oral Argument at 33:19-34:01. Indeed, Ford conceded at oral argument that Darling’s is entitled to some amount of damages based on the 1.25% payment and that the primary question is when Darling’s damages stop, or stopped accruing. *Id.* The parties are also in agreement that the purpose of compensatory damages is to return Darling’s to the position it would have occupied had the harm not occurred. Darling’s Reply ISO Mot. to Bar, 9; Ford’s Opp. to Mot. to Bar, 3-4. Where the parties differ, however, is the nature of the harm at issue and the analysis to carry out when determining Darling’s damages.

Ford argues that in order to determine the extent of Darling’s damages, we must determine what would have happened had Ford complied with section 1174(3)(B)’s notice requirement. Ford’s Opp. to Mot. to Bar, 5-6. In particular, Ford argues we must ask: (1) whether Darling’s would have filed a protest under section 1174(3)(B) if Ford had satisfied that section’s notice requirement, and (2) whether Darling’s would have won the protest. *Id.* at 9. Whether Darling’s would have won a protest under section 1174(3)(B) turns on whether Ford had “good cause” for discontinuing the BOC program. *See* 10 M.R.S.A. § 1174(3)(B). If Ford had “good cause” for discontinuing the BOC program, then it could have modified the SSA by discontinuing the BOC program. *Id.* Absent “good cause,” Ford could not discontinue the BOC without violating section 1174(3)(B) and breaching the SSA. *Id.*; 10 M.R.S.A. § 1182 (“Any

contract or part thereof or practice thereunder in violation of any provision of this chapter shall be deemed against public policy and should be void and unenforceable”).

Darling’s argues that section 1174(3)(B) provides clear procedural steps in order to invoke a protest and that Ford cannot skip the first step—providing statutory notice—and then argue that a subsequent step should be considered when determining damages. Darling’s Mot.to Bar, 5-6.

When interpreting a statute, courts “first examine the plain meaning of the statutory language, seeking to give effect to the legislative intent, and construe that language to avoid absurd, inconsistent, unreasonable or illogical results.” *Melanson v. Belyea*, 1997 ME 150, ¶ 4, 698 A.2d 492 (internal citations omitted). “In construing a statute, [courts] consider not only the plain language, but the whole statutory scheme of which the section at issue forms a part so that a harmonious result, presumably the intent of the legislature, may be achieved.” *Guaranty Fund Management Services v. Workers’ Compensation Bd.*, 678 A.2d 578, 581 (Me. 1996) (internal quotation omitted). Courts may “not read additional language into a statute.” *Blue Yonder, LLC v. State Tax Assessor*, 2011 ME 49, ¶ 10, 17 A.3d 667.

a. The Plain Language of Section 1174(3)(B) Indicates the “Good Cause” Determination Cannot Occur Absent Statutory Notice.

Section 1174(3)(B) provides, in pertinent part, that in order to enact a modification that “substantially and adversely” affects a dealer’s rights, the franchisor/manufacturer must provide “90 days’ written notice by certified mail of the proposed modification” to the dealer. 10 M.R.S. § 1174(3)(B). This notice requirement is strictly construed. *Darling’s*, 2014 ME 7, ¶ 30, 86 A.3d 35. Even actual notice provided to the dealer through alternative means does not satisfy section 1174(3)(B)’s notice requirement. *Id.* at ¶ 31. Once notice is provided in accordance with section 1174(3)(B), a dealer has 90 days to file a protest with the Board requesting a

determination of whether the franchisor/manufacturee has “good cause” to enact the proposed modification. 10 M.R.S.A. § 1174(3)(B). The Board must schedule a hearing and decide whether there is “good cause” for the proposed modification within 180 days from the date the protest is filed. *Id.* While the Board is resolving the protest, the proposed modification may not take effect. *Id.* In the face of a protest, a franchisor/manufacturee cannot enact the proposed modification absent “good cause.” *See id.*

The plain language of Section 1174(3)(B) demonstrates that the “good cause” evaluation only arises after (1) the manufacturer/franchisee complies with the statute’s notice requirement and (2) the dealer files a protest with the Board. *Id.* If either step is missing, the “good cause” determination does not take place and the proposed modification cannot go into effect. *See id.* The court will not read additional language into section 1174(3)(B). *Blue Yonder, LLC*, 2011 ME 49, ¶ 10, 17 A.3d 667. This includes Ford’s suggestion that the court can determine “good cause” absent compliance with the section 1174(3)(B)’s notice requirement.

This interpretation is also consistent with the Law Court’s emphasis on the strict construction of section 1174(3)(B)’s notice requirement. *Darling’s*, 2014 ME 7, ¶¶ 30-31, 86 A.2d 35. If strict compliance with the notice requirement is necessary, it follows that the statutory process initiated by providing that notice cannot proceed absent the requisite notice.<sup>2</sup> It is also consistent with the prospective nature of the statute. Section 1174(3)(B) focuses on prospective modifications to franchise agreements, not the damages arising from an unlawfully enacted modification.

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<sup>2</sup> This interpretation is consistent with the Law Court’s finding that Ford’s failure to provide *Darling’s* the notice required by section 1174(3)(B) “prejudiced *Darling’s* by *depriving it of the opportunity* provided by section 1174(3)(B) to file a protest and request a determination by the Board as to whether Ford had good cause for the modification.” *Darling’s*, 2014 ME 7, ¶ 30, 86 A.3d 35 (emphasis added).

The cases Ford cites in support of its analysis that the “good cause” evaluation must take place are inapposite in light of *Darling’s*. Ford’s Opp. to Mot. to Bar, 8. *Ganley v. Mazda Motor of Am., Inc.* states that Ohio courts have “repeatedly held that a manufacturer’s procedural slips are not fatal under the [Ohio] Dealers Act[.]” 2010 WL 697360, \*\*7 (6th Cir. Mar. 2, 2010). Similarly, *Chrysler Corp. v. Bowshier* held that the Ohio equivalent of the Board erred in determining that a manufacturer’s failure to comply with a 30-day notice requirement regarding an intent to sell or transfer a franchise was dispositive in a protest case because the ultimate issue was whether good cause existed to refuse the sale or transfer. 2002 WL 465118, \*4-5 (Ohio Ct. App. Mar. 28, 2002). While Ohio courts may treat procedural slips with leniency, under the Maine Dealers Act, the Law Court interpreted section 1174(3)(B)’s notice requirement strictly. *Darling’s*, 2014 ME 7, ¶¶ 30-31, 86 A.3d 35. In particular, *Darling’s*, held section 1174(3)(B)’s notice requirement was mandatory, and must be met even when the dealer has actual knowledge of the proposed modification. *Ibid.* Accordingly, whether Ford had “good cause” to terminate the BOC program is not relevant to determining *Darling’s* damages because Ford has not satisfied the statutory prerequisite of proper notice.

b. Importing “Good Cause” into Determining *Darling’s* Damages Absent Statutory Notice is Contrary to the Legislature’s Intent in the Dealers Act.

The Dealers Act was crafted out of a desire to “protect dealers from actions by manufacturers that were perceived as abusive and oppressive” in light of “[t]he disparity in bargaining power between automobile manufacturers and their dealers.” *Acadia Motors, Inc. v. Ford Motor Co.*, 844 F.Supp. 819, 827-28 (D. Me. 1994); *aff’d in part, rev’d in part on other grounds*, 44 F.3d 1050 (1st Cir. 1995). Section 1174(3)(B) was drafted, in part, to impose a strict notice requirement that manufacturers highlight modifications to a franchise that “substantially and adversely” affect the dealer’s rights, obligations, investment or return on

investment. *Darling's*, 2014 ME 7, ¶ 30, 86 A.3d 35. Allowing Ford to adjudicate the question of “good cause” absent compliance with section 1174(3)(B)’s notice requirement, would run counter to the Dealers Act’s goal of protecting dealer’s from manufacturer abuses by reducing the cost for manufacturers of not complying with section 1174(3)(B) and by reducing the incentive for manufacturers to provide dealers with clear notice of proposed substantial and adverse modifications to franchise agreements. Because the court is required to give effect to the legislative intent when interpreting a statute, “good cause” is not relevant to determining Darling’s damages absent the requisite notice. *Melanson*, 1997 ME 150, ¶ 4, 698 A.2d 492.

c. The Law Court’s Remand to This Court Indicates “Good Cause” is Not Relevant to Determining Darling’s Damages.

Darling’s argues that the Law Court considered the entire statutory framework of the Dealers Act and then specifically remanded this case to the present court. Darling’s Reply ISO Mot. to Bar, 8. As such, Darling’s argues the Law Court did not intend for there to be a “good cause” adjudication because if it did, the Law Court would have remanded the matter to the Board. *Id.*

The Board was established as a forum “with specific expertise in the motor vehicle industry” in order to promptly resolve “complex and time-consuming litigation.” *Darling’s*, 2014 ME 7, ¶ 39, 86 A.3d 35 (quoting L.D. 1294, Summary (121st Legis. 2003)). For example, the majority of Board members must have experience as franchisees or franchisors. *See* 10 M.R.S. § 1187(1). In accordance with the Board’s expertise, the Dealers Act provides that all findings of fact by the Board are presumed correct unless rebutted by clear and convincing evidence. 10 M.R.S. § 1189-B(2); *see also Darling’s*, 2014 ME 7, ¶ 39, 86 A.3d 35 (the Dealers Act “reflects a legislative judgment that the factual determinations of an administrative board --



one with expertise in the specialized area of motor vehicle franchise relationships – are sufficiently reliable as to require a heightened standard of proof before they are disregarded”).

Evaluating “good cause” under section 1174(3)(B) requires a highly fact specific determination. In particular, relevant factors include:

- (1) The reasons for the proposed modification;
- (2) Whether the proposed modification is applied to or affects all motor vehicle dealers in a nondiscriminatory manner;
- (3) Whether the proposed modification will have a substantial and adverse effect upon the motor vehicle dealer’s investment or return on investment;
- (4) Whether the proposed modification is in the public interest;
- (5) Whether the proposed modification is necessary to the orderly and profitable distribution; and
- (6) Whether the proposed modification is offset by other modifications, beneficial to the motor vehicle dealer.

10 M.R.S.A. § 1174(3)(B)(1)-(6). Accordingly, the deference provided to the Board’s findings of fact and the fact-intensive nature of the “good cause” evaluation, make clear that the legislature intended the Board, not the courts, to evaluate “good cause” in the first instance.

The Law Court’s decision to remand the case to this court, and not the Board, indicates “good cause” is not relevant to determining Darling’s damages. In *Darling’s*, the Law Court provided in-depth analysis of the different functions and jurisdiction of the Board vis-à-vis the Superior Court under the Dealers Act. 2014 ME 7, ¶¶ 16-22, 41-49, 86 A.3d 35. As part of that analysis, *Darling’s* determined that the Board lacked jurisdiction over actions seeking damages and that its earlier damages determination “is not to be treated as a factual finding subject to the presumption of correctness established by section 1189-B(2).” *Id.* at ¶¶ 46-47. In light of the Law Court’s in-depth analysis of the different functions and jurisdiction of the Board and the Superior Court, it stands to reason that the Law Court would have specified the “good cause” question should be remanded to the Board—the only body qualified to evaluate “good cause”—if it were relevant to determining Darling’s damages. While we do not base our decision on the

Law Court's implicit statement that "good cause" is not relevant to determining Darling's damages, *Darling's* is, at the least, consistent with this interpretation.<sup>3</sup>

**2. Ford's Arguments That "Good Cause" is a Necessary Step in Determining Darling's Damages Are Not Persuasive In Light of the Text, Structure and Purpose of the Dealers Act.**

Ford raises a number of arguments as to why "good cause" is a relevant, and indeed necessary step in determining Darling's damages. As discussed below, however, none of Ford's arguments account for the plain import of the Dealers Act's language, structure, and purpose that the "good cause" evaluation does not arise absent compliance with section 1174(3)(B)'s notice requirement.

**a. Ford Argues "Good Cause" Must Be Evaluated Because it Flows From the Statutory Violation Ford Committed.**

Ford argues that Count X of Darling's Amended Complaint is a limited action that was brought solely under section 1174(3)(B). Ford's Opp. to Motion to Bar, 5. As such, Ford argues that its violation was the failure to comply with section 1174(3)(B)'s notice requirement and that Darling's damages must be determined pursuant to the process established in that section. *Id.* at 6-8. Ford further argues that the Law Court already rejected Darling's argument that Ford violated the statute each time Darling's sold a vehicle and did not receive a 1.25% BOC incentive payment from Ford. *Id.* at 6. In support, Ford cites to the Law Court's affirmation of the Board imposing a single civil penalty against Ford because "Ford only modified the franchise without providing notice once (at least for the purposes of this dispute), it violated section 1174(3)(B) once...." *Darling's*, 2014 ME 7, ¶ 50, 86 A.3d 35. Darling's replies that Count X

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<sup>3</sup> We note that because the Law Court remanded the case to this court for a damages determination, it must have implicitly determined that even though Darling's improperly sought damages from the Board, Count X of its Amended Complaint successfully made out a claim for damages pursuant to Section 1173 of the Dealers Act.

did not seek a remedy for the violation of a statutory right, but instead sought damages based on Ford's unlawful, unilateral modification of the SSA. Darling's Reply ISO Mot. to Bar, 2.

"The purpose of a complaint in modern notice pleading practice is "to provide defendants with fair notice of the claim against them." *Hamilton v. Greenleaf*, 677 A.2d 525, 527 (Me. 1996). With this purpose in mind, it is clear that Darling's sought damages based on Ford's modification—and breach—of its franchise agreement with Darling's. This is because Count X of Darling's Amended Complaint is premised on Ford violating section 1174(3)(B) by modifying Darling's SSA through its discontinuance of the BOC program and seeks "an award of damages equal to the loss of the financial remuneration wrongfully removed from Darling's contract [by Ford] without complying with 10 M.R.S.A. § 1174(3)(B)." Exhibit C to Ford's Opposition, Darling's Amended Complaint, ¶¶ 119, 121. Therefore, while Ford is correct that Count X is premised on a violation of section 1174(3)(B), the result of that violation—which Darling's seeks to remedy—was a breach of contract (i.e. the SSA). Based on this language, it cannot be said—and Ford has not claimed—that it was unaware of the scope of damages Darling's seeks. Indeed, Ford conceded that Darling's damages would be based on the 1.25% incentive payments under the BOC. July 9, 2014 Oral Argument at 33:19-34:01.

Furthermore, even if Count X was a limited cause of action under section 1174(3)(B), this would not make "good cause" relevant. The fact remains that Ford did not provide the requisite notice necessary to trigger the "good cause" determination under section 1174(3)(B). Similarly, it is irrelevant that the Law Court characterized Ford's actions as a single violation when affirming the Board's civil penalty. *See Darling's*, 2014 ME 7, ¶¶ 49-50, 86 A.3d 35. It is common knowledge that a one-time violation of a statute or a single breach of contract—when not cured—can result in multiple or continuing damages. Accordingly, regardless of how Ford's

violation is characterized, the “good cause” evaluation is not relevant to determining Darling’s damages because Ford has not provided the requisite notice under section 1174(3)(B).

b. Ford Argues the “Good Cause” Evaluation Must be Performed in Light of Case Law Performing a Similar “Trial Within a Trial” Analysis.

As discussed above, Ford’s central argument is that in order to compensate Darling’s we must begin with the counterfactual scenario wherein Ford provided the requisite notice to Darling’s under section 1174(3)(B). Ford’s Opp. to Mot. to Bar, 7. We must then ask whether Darling’s would have filed a protest, and whether it would have won. *Id.* In other words, we would have to hold a trial within a trial. Ford cites a plethora of case law in which courts have carried out a trial within a trial when establishing causation and/or damages. *Id.* at 9-12. None of these cases, however, involved a scheme analogous to section 1174(3)(B) in which the trial within a trial could only take place following satisfaction of a strict gate-keeping requirement like section 1174(3)(B)’s notice provision. *See Snow v. Villacci*, 2000 ME 127, ¶ 16, 754 A.2d 360 (negligence claim wherein trial within a trial focused on lost earning opportunity); *Gulesian v. Northeast Bank of Lincoln*, 447 A.2d 814, 817 (Me. 1982) (misrepresentation claim turning on whether plaintiff could have prevented wife from accessing funds); *Wright v. St. Mary’s Medical Center of Evansville, Inc.*, 59 F.Supp.2d 794 (S.D. Ind. 1999) (breach of contract and negligence claims turning on whether third-party claim would have succeeded); *Hallingby v. Hallingby*, 693 F.Supp.2d 360, 368-69 (S.D.N.Y. 2010) (involving breach of settlement agreement and private annuity contract)<sup>4</sup>; *Mattco Forge, Inc. v. Arthur Young & Co.*, 52 Cal.App.4th 820 (1997) (legal

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<sup>4</sup> Despite Ford’s reliance on *Hallingby*, this case counsels against carrying out a trial within a trial here. In *Hallingby*, the Husband procured annuities providing monthly payments to Husband after he retired. *Id.* at 362. Husband designated his first wife (“Ex Wife”) as the survivor annuitant who would receive the payments after Husband’s death. *Id.* Husband retired and the annuities vested. *Id.* The annuities restricted Husband’s ability to name the survivor annuitant for any reason after the annuities vested. *Id.* Husband and Ex Wife divorced. *Id.* at

malpractice claim affirming use of trial within a trial inquiry for legal malpractice claims); *Jones v. O'Brien Tire and Battery Service Center Inc.*, 871 N.E.2d 98, 102-03 (Ill. App. Ct. 2007) (spoliation of evidence case turning on whether plaintiff would have declined to settle and prevailed at trial); *Goldberg v. Boone*, 912 A.2d 698 (Md. Ct. App. 2006) (medical malpractice case turning on alleged failure to disclose); *Thomas v. Bethea*, 718 A.2d 1187 (Md. Ct. App. 1998) (legal malpractice claim affirming use of trial within a trial inquiry); *Oliver v. Stimson Lumber Co.*, 993 P.2d 11, 21 (Mont. 1999) (spoliation of evidence case turning on whether plaintiff would have won underlying suit were the evidence available); *Kranendonk v. Gregory & Swapp, PLLC*, 320 P.3d 689 (Ut. Ct. App. 2014) (legal malpractice claim laying out proper standard for “trial-within-a-trial” determination). Accordingly, while the court does not dispute that a trial within a trial can be an appropriate test to resolve questions of causation and damages, it is not appropriate here, in light of the text, structure, and purpose of the Dealers Act, which makes compliance with section 1174(3)(B)’s notice requirement a mandatory prerequisite before commencing a “good cause” evaluation.

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363. Ex Wife entered a settlement agreement stating that she had no right to the annuities payments. *Id.* Husband married New Wife and submitted a change-of-beneficiary request to the annuities provider, MetLife, to replace Ex Wife with New Wife as the survivor annuitant. *Id.* Metlife declined the request. *Id.* Husband passed away and shortly thereafter New Wife sued Ex Wife for breach of contract and unjust enrichment because Ex Wife received annuities payments. *Id.* *Hallingby* held that Ex Wife breached the settlement agreement by retaining the annuities, but that New Wife was unable to establish she or the estate suffered actual damages because New Wife did not prove Metlife would have honored the Settlement Agreement and made the payments to New Wife or the estate. *Id.* at 368-39. Instead, the court explained that MetLife may have determined Ex Wife’s waiver of rights to payments under the annuities would have transformed the annuity to a life annuity that extinguished upon Husband’s death. *Id.* In other words, the court found damages were uncertain because New Wife did not present sufficient evidence demonstrating what MetLife would have done had Ex Wife performed under the Settlement Agreement and if New Wife had sent a change of beneficiary designation. *Id.* This is the inverse of the situation presented in our case because Ford, who is seeking to carry out a trial within a trial, is the party who prevented the necessary underlying information from becoming sufficiently certain by not providing notice as required by section 1174(3)(B).

c. Ford Argues This Court Already Determined Section 1174(3)(B) Does Not Mandate the Damages Darling's Demands.

Ford argues that in an Order dated February 1, 2012, this court determined that section 1174(3)(B) does not compel the court to award a 1.25% BOC incentive payment on every Ford vehicle Darling's sells until and unless Ford issues certified-mail notice and a protest can be heard. Ford's Opp. to Mot. to Bar, 13. Darling's responds that the language relied on in the Order by Ford is dicta and, in any event, was reversed by the Law Court in *Darling's*. Darling's Reply ISO Mot. to Bar, 12-14.

The "law of the case" provides that a trial justice should not overrule or reconsider the decision of another justice in subsequent proceedings involving the same case, "unless corrected by appellate review." *Monopoly, Inc. v. Aldrich*, 683 A.2d 506, 510 (Me. 1996). "However, not every statement made or word written by a judge while rendering a decision automatically becomes the law of the case." *McConaghy v. Sequa Corp.*, 294 F.Supp.2d 151, 160 (D. R.I., 2003). In order to constitute "law of the case" an "issue must be actually decided on the merits[.]" *Id.* (citation omitted). "Thus, by definition, dicta cannot constitute law of the case." *Id.* (citing *Bull HN Information Systems, Inc. v. Hutson*, 229 F.3d 321, 326 n. 3 (1st Cir. 2000)). Dicta constitutes "[o]pinions of a judge which do not embody the resolution or determination of the specific case before the court." *Id.* (quoting Black's Law Dictionary 454 (6th Ed. 1990); *see also Legault v. Levesque*, 107 A.2d 493, 496 (Me. 1954) (Obiter dictum is "an assertion of law not necessary to the decision of the case").

In the February 1, 2012 Order, this court noted that "actual notice, good cause and waiver are arguably significant to the damages issues raised by both Ford and Darling's." Exhibit F to Ford's Opposition, 2/1/2012 Order, 4. This court further explained that section 1174(3)(B) is silent on the damages to which Darling's is entitled and that the statute "does not explicitly

require the Board to award Darling's damages in an amount equal to the 1.25% incentive payment on every vehicle sold by Darling's after April 1, 2005." *Id.* The court then explained that "in the absence of a specific statutory prescription for the calculation of damages, the Board presumably has the discretion to consider a variety of pertinent factors" when determining Darling's damages. *Id.* at 5-6. Accordingly, the court determined that as long as "the Board does not act in an arbitrary manner, and provided that the Board's determination is supported by substantial evidence on the record, the Board is afforded the discretion to assess the damages that it finds are related to the violation." *Id.* at 6. However, because the Board's basis for its damages determination was unclear, the court remanded the matter to the Board for further findings in support of its damages award. *Id.* at 7.

The foundation of the preceding statements—the Board's presumed discretion in assessing damages—was overruled by *Darling's*, which held that the Board was not empowered to award damages and that the Board's factual findings thereon were not subject to a presumption of correctness. 2014 ME 7, ¶¶46-48, 86 A.3d 35. Accordingly, the preceding statements do not constitute "law of the case." Furthermore, while it remains true that section 1174(3)(B) does not "mandate a particular damage calculation," it is equally true that section 1174(3)(B) does not prohibit awarding damages based on the BOC payments for each vehicle Darling's sold after April 1, 2005. Exhibit F to Ford's Opposition, 2/1/2012 Order, 5-6. Instead, section 1174(3)(B) is silent on damages. *Id.* Finally, while section 1174(3)(B) is silent on damages, the parties have agreed that the purpose of damages in the present case under section 1173 is to return Darling's to the position it would have occupied had Ford not modified the SSA by discontinuing the BOC program without complying with section 1174(3)(B). Darling's Reply

ISO Mot. to Bar, 9; Ford's Opp. to Mot. to Bar, 3-4. The damages resulting from this modification is a question trusted to the fact-finding abilities of the jury.

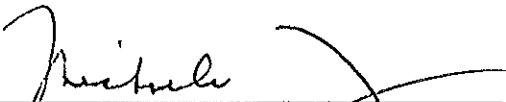
**CONCLUSION**

The plain language, structure, and purpose of the Dealers Act, and section 1174(3)(B) in particular, demonstrate that the "good cause" determination under section 1174(3)(B) cannot take place absent compliance with section 1174(3)(B)'s notice requirement. Accordingly, because Ford has not provided notice under section 1174(3)(B), whether it had "good cause" for discontinuing the BOC program is not relevant to determining Darling's damages.

The entry will be: Darling's motion to bar discovery, argument, and evidence regarding "good cause" pursuant to 10 M.R.S.A. § 1174(3)(B) is GRANTED.

Pursuant to M.R. Civ. P. 79(a), the Clerk is hereby directed to incorporate this Order by reference in the docket.

Dated: July 30, 2014

  
Justice Michaela Murphy  
Business and Consumer Docket

Entered on the Docket: 7-30-14  
Copies sent via Mail  Electronically