UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

MARY CATHERINE VAN BORTEL a/k/a KITTY VAN BORTEL, and HOWARD G. VAN BORTEL,

Plaintiffs,

- against -

FORD MOTOR COMPANY,

Defendant.

Honorable Judge David G. Larimer

Case No. 21-cv-6739 (DGL)

MEMORANDUM OF LAW IN SUPPORT OF FORD MOTOR COMPANY'S PRE-ANSWER MOTION TO DISMISS THE AMENDED COMPLAINT

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PRELIMINARY STATEMENT

Defendant, Ford Motor Company (hereinafter "Ford"), by and through its attorneys, Aronson Rappaport Feinstein & Deutsch, LLP, submit this memorandum of law in support of its motion , pursuant to Federal Rule of Civil Procedure 12(b)(6), to dismiss the Amended Complaint, with prejudice, for failure to state a claim upon which relief can be granted.

Plaintiffs, Mary Catherine Van Bortel and Howard G. Van Bortel (hereinafter "Plaintiffs"), have sued Ford for an alleged breach of contract. Plaintiff, Mary Catherine a/k/a Kitty Van Bortel (hereinafter "Kitty Van Bortel") also alleges that Ford violated New York State Executive Law § 296(5)(B). Finally, Plaintiffs assert a third cause of action for "injunctive relief."

As argued, Plaintiffs' Amended Complaint should be dismissed in its entirety with prejudice because it fails to allege a cause of action upon which relief could be granted. Specifically, no contract ever existed between the Plaintiffs and Ford. If the Court were to find a contract was formed, said contract would violate the statute of frauds. Further, Plaintiff Kitty Van Bortel's allegation that Ford violated New York State Executive Law §296(5)(B) should be dismissed because it is premised upon a contract that never existed and the alleged statement attributed to Ford is not discriminatory under the law. Leave to amend should be denied as futile because these fatal flaws cannot be cured.

PROCEDURAL BACKGROUND

Plaintiffs initially filed a complaint in the Supreme Court of the State of New York, County of Monroe. A copy of the first Complaint is annexed as Exhibit A. Before Ford appeared, the Plaintiffs filed an Amended Complaint on December 7, 2021. A copy of the first Amended Complaint is annexed hereto as Exhibit B. On December 13, 2021, Ford removed this matter to this Court pursuant to 28 U.S.C. 1441 and 28 U.S.C. 1332 (Dkt #1). After Removal to this Court,

Plaintiffs extended Ford's time to respond to the Complaint to February 3, 2022 (Dkt# 5).

FACTUAL BACKGROUND[1]

Plaintiffs allege that they collectively own and operate several automobile dealerships in the New York State (see, Exhibit B ¶3). It should be noted, and it is a matter of public record documented on the New York State Department of State Division of Corporations, the individual Plaintiffs do not "own" car dealerships. Specifically, the Van Bortel Ford dealership referenced in the Amended Complaint is owned by a corporate entity, Van Bortel Ford, Inc. Plaintiff, Kitty Van Bortel alleges she is a female automobile dealer who has owned and operated a franchised Ford dealership in the Rochester, New York area for twenty years (see, Exhibit B ¶5).

Plaintiffs allege that "on or about September 8, 2021" Ford area representative Paul Bucek "contacted [Kitty] Van Bortel and informed her that another Ford dealership ("Henderson Ford") was being sold subject to Ford's right of first refusal ("ROFR") (see, Exhibit B ¶9).

Plaintiffs allege that Bucek "promised, offered, and represented to [Kitty] Van Bortel that, if Plaintiffs were interested in purchasing..." Henderson Ford, "…Ford would exercise its right of first refusal and assign the Purchase and Sale Agreement ("PSA") to Plaintiffs" (see Exhibit B ¶10).

Absent from Plaintiffs' Amended Complaint, but incorporated by reference in paragraph 10 and 14, is the indisputable fact that Kitty Van Bortel executed an *actual* document that made clear that the Plaintiffs were only being *considered* "as a *Potential* Assignee of Ford Motor Company's Right of First Refusal…" and that "[n]either this letter nor any efforts you may or may not make to pursue such a transaction shall not, in any way, *obligate either party to the above-*

[1] Solely for the purpose of this pre-answer motion to dismiss, Ford accepts as true the facts contained in Plaintiffs' Amended Complaint.

mentioned transaction" (see Exhibit C September 1, 2021 signed Correspondence, our emphasis added).

Plaintiffs allege that "in reliance on Ford's offer, promise and representations, which were accepted" by Kitty Van Bortel, entered into a nondisclosure agreement with Ford. Plaintiffs refer to this as "i.e. the First Ford Agreement" (see Exhibit B ¶14). Plaintiffs allege that "on or about September 17, 2021, Bucek and Ford representative, Brennen Murray ("Murray"), called [Kitty] Van Bortel, and in breach of the First Ford Agreement" advised Kitty Van Bortel that Ford did not approve the Henderson Purchase and Sale Agreement ("PSA") and "therefore could not assign the PSA to Plaintiffs" (see Exhibit B ¶15).

Plaintiffs allege, "notwithstanding Ford's breach of the First Ford Agreement…" Kitty Van Bortel "reiterated Plaintiffs' interest in purchasing" Henderson Ford and "…proposed the following offer to Ford – in the event that another approvable Ford dealer were to enter into a PSA with Henderson Ford, Ford would exercise its right of first refusal and assign the PSA to Plaintiffs" (see Exhibit B ¶16). Plaintiffs allege that Ford accepted this offer and "verbally promised and represented to [Kitty] Van Bortel that "…Ford would exercise its right of first refusal and assign the PSA to Plaintiffs." Significantly, Plaintiffs own allegation is *not* that Ford would lease or sell property to the Plaintiffs, but rather "assign the PSA." Plaintiffs refer to this as the "Second Ford Agreement" (see Exhibit B ¶17).

Plaintiffs allege that on October 25, 2021, Bucek informed Kitty Van Bortel that Henderson Ford entered into a PSA with another Ford dealer, West-Herr (see Exhibit B ¶18). Plaintiffs further allege "…Bucek informed [Kitty] Van Bortel that, in breach of the Agreements, Ford would not be exercising its right of first refusal and would not assign the PSA to Plaintiffs (see Exhibit B ¶19). Plaintiffs allege that West-Herr is owned and operated by a male dealer (see Exhibit B ¶21).

Kitty Van Bortel alleges that "on or about October 27, 2021, [Kitty] Van Bortel spoke with Ford's Retail Network U.S. Franchise Manager, Edie Lukas…" and "in the course of their conversation, [Kitty] Van Bortel explained how she had fought to establish herself as a successful female dealer." Kitty Van Bortel alleges that in response "Lukas stated that 'minority dealers are not a priority right now' for Ford" (see Exhibit B ¶22).

Based upon the above factual allegations, Plaintiffs allege three causes of action; first, a Breach of Contract, second, as to Plaintiff Kitty Van Bortel only, a Violation of New York State Executive Law § 296(5)(B), and third, the request for a permanent injunction.

Plaintiffs allege that these purported verbal 'Agreements' "constitute valid and enforceable contracts" and that Ford "materially breached the Agreements" (See Exhibit B ¶s28-29). As to the second cause of action as to Plaintiff Kitty Van Bortel only, Kitty Van Bortel alleges that she falls within a protected class of individuals under New York State Executive Law §296 and that Ford was going to also transfer possession of real property. Specifically, Kitty Van Bortel alleges that Ford "…had the 'right of ownership or possession of or the right to sell, rent or lease, land or commercial space" and that Ford allegedly "…discriminated against Van Bortel based upon her gender…" by refusing to "…to exercise its right of first refusal and assign PSAs to Van Bortel.." (see Exhibit B ¶s 48-49).

Lastly, Plaintiffs allege that they will "suffer irreparable injury", have "no adequate remedy at law", and are "…entitled to a permanent injunction…" (see Exhibit B ¶s56-58).

LEGAL STANDARD

A motion to dismiss pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure tests the legal sufficiency of a party's claim for relief. *Zucco v. Auto Zone, Inc.*, 800 F. Supp. 2d 473, 475 (WDNY 2011); *accord Patane v. Clark*, 508 F.3d 106, 111-12 (2d Cir. 2007).

To survive a Rule 12(b)(6) motion, a pleading "must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.' *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)); *see also* Fed. R. Civ. P. 8(a)(2). The court must also draw all reasonable inferences in the non-moving party's favor. *Lanier v. Bats Exch., Inc.*, 838 F.3d 139, 150 (2d Cir. 2016).

But "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Empire Merchants, LLC v. Reliable Churchill LLLP*, 902 F.3d 132, 139 (2d Cir. 2018) (quoting *Iqbal*, 556 U.S. at 678). Dismissal is appropriate when "it is clear from the face of the complaint and matters of which the court may take judicial notice, that the plaintiff's claims are barred as a matter of law." *Conopco, Inc. v. Roll Intl*, 231 F.3d 82, 86 (2d Cir. 2000). The Supreme Court has further instructed that "[d]etermining whether a complaint states a plausible claim for relief...requires the...court to draw on its judicial experience and common sense...[w]here the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged—but it has not shown—that the pleader is entitled to relief." *Ashcroft*, 556 U.S. at 679.

Further, a plaintiff should not be permitted to amend a complaint where leave to amend a would be futile or where the amended complaint would not survive a motion to dismiss. See *Vicioso v. Pisa Bros., Inc.*, 1998 U.S. Dist. LEXIS 9729 (S.D.N.Y. July 1, 1998); see, e.g., *Tocker*

v. Philip Morris Cos., Inc., 470 F. 3d 481, 491 (2d Cir. 2006). Amendment of a complaint is futile where the problem with the claim is substantive and consequently cannot be cured by better pleading. See *Cuoco v. Moritsugu*, 222 F.3d 99 (2d Cir. 2000).

In determining a party's obligations under a contract, "the initial interpretation of a contract is a matter of law for the court to decide." *Ellington Credit Fund, Ltd. v. Select Portfolio Servicing, Inc., 837 F. Supp. 2d 162, 189 (S.D.N.Y. 2011)* (quoting *K. Bell & Assocs., Inc. v. Lloyd's Underwriters, 97 F.3d 632, 637 (2d Cir. 1996))*.

ARGUMENT

A. PLAINTIFFS FAIL TO STATE THE EXISTENCE OF AN ACTUAL CONTRACT AND THEREFORE THE CLAIM MUST BE DISMISSED

A contact cannot be formed without the essential elements; "there must be an offer, acceptance, and consideration, as well as a showing of 'a meeting of the minds, demonstrating the parties' mutual assent and mutual intent to be bound.'" *Brodie v. New York City Transit Auth*., 2000 U.S. Dist. LEXIS 6144, No. 96 Civ. 6813, 2000 WL 557313, at * 3 (S.D.N.Y. May 5, 2000) (quoting *Renner v. Chase Manhattan Bank*, 1999 U.S. Dist. LEXIS 978, No. 98 Civ. 926, 1999 WL 47239, at * 15 (S.D.N.Y. Feb. 3, 1999). Plaintiff ultimately has the burden to prove the existence of an enforceable agreement and must establish the above elements. *See Kowalchuk v. Stroup, 61 A.D.3d 118, 121, 873 N.Y.S.2d 43 (N.Y. App. Div. 1st Dep't 2009)*.

Under New York law, a claim for breach of contract requires that "'the complaint must allege: (i) the formation of a contract between the parties; (ii) performance by the plaintiff; (iii) failure of defendant to perform; and (iv) damages.'" *Nick's Garage, Inc. v. Progressive Cas. Ins. Co., 875 F.3d 107, 114 (2d Cir. 2017).* Further, a complaint must "allege the essential terms of the parties' purported contract in nonconclusory language, including the specific provisions of the contract upon which liability is predicated." *Sirohi v. Trustees of Columbia Univ., 162 F.3d 1148*

(2d Cir. 1998) (citing *Sud v. Sud, 211 A.D.2d 423, 424, 621 N.Y.S.2d 37, (N.Y. App. Div. 1st Dep't 1995))* (internal quotation marks omitted).

"'Few principles are better settled in the law of contracts than the requirement of definiteness. If an agreement is not reasonably certain in its material terms, there can be no legally enforceable contract.'" *GEM Advisors, Inc. v. Corporacion Sidenor, S.A.*, 667 F. Supp. 2d 308, 326 (S.D.N.Y. 2009) (quoting *Missigman v. USI Ne., Inc*., 131 F. Supp. 2d 495, 506 [S.D.N.Y. 2001]). "The consideration to be paid under a contract is a material term." *Id.*

Accordingly, contract formation requires that essential terms are stated in a clear definite manner, such that their intentions are ascertainable to a reasonable degree of certainty to bind either party. See, *Kunica v. St. Jean Fin*., 1998 U.S. Dist. LEXIS 11867, *15, *15 (quoting *Candid Prod. v. International Skating Union*, 530 F. Supp. 1330, 1333-34 (S.D.N.Y. 1982)); see also *Volunteers of Am. of W. N.Y., Inc. v. Rochester Gas & Elec. Corp.*, 2014 U.S. Dist. LEXIS 95547, *33, 2014 WL 3510495 (citing *Muhlstock v. Cole*, 245 A.D.2d 55, 58, 666 N.Y.S.2d 116 (1st Dep't 1997)). Thus, there can be no relief granted where a complaint fails to allege the essential material terms, such as consideration, in a clear definite manner. This rule applies to both written and oral contracts.

The Second Circuit has developed four factors to aid in determining if both parties intended to be bound by an oral contract. The factors are: "(1) whether there has been an express reservation of the right not to be bound in the absence of a writing; (2) whether there has been partial performance of the contract; (3) whether all of the terms of the alleged contract have been agreed upon; and (4) whether the agreement at issue is the type of contract that is usually committed to writing." *Volunteers of Am. of W. N.Y., Inc. v. Rochester Gas & Elec. Corp.*, 2014 U.S. Dist. LEXIS 95547, *33, 2014 WL 3510495 (quoting *Winston v. Mediafare Entertainment Corp*., 777 F.2d 78, 80 (2d Cir. 1985)).

As demonstrated in the above *Kunica* matter, alleging the existence of an oral contract also requires specifics with respect to the purported terms and conditions of the same. The *Kunica* case pertained to an alleged oral agreement to purchase securities. The Plaintiff in *Kunica*, alleged terms and conditions regarding exactly who would purchase a secured loan, the purchase price, the assignment of existing loan documents, increasing the line of credit, eliminating the service fee, waiving prepayment penalties, and what the consideration for the agreement would be. Despite the level of detail alleged in *Kunica* (which does not exist in this case) the court stated that the terms and conditions alleged were *insufficient* to establish that an enforceable oral contract had been formed because there were specificities missing from many of the terms and conditions. See, *Kunica v. St. Jean Fin*., 1998 U.S. Dist. LEXIS 11867, *15, *15-*17.

In this case, Plaintiffs' Amended Complaint does not come close to *Kunica's* level of detail (which was not enough to satisfy the standard). Here, Plaintiffs fail to allege any specifics regarding the necessary element of consideration to be exchanged, or any other essential terms of the alleged oral contract. Plaintiffs merely allege there was a verbal agreement between the Plaintiffs and Ford in reference to Ford exercising a ROFR in the sale of Henderson Ford (see Exhibit B ¶s 10, 16, and 17). Other than Plaintiffs allegations of a verbal agreement, the Complaint is void of any of the critical terms pertaining to the agreement (i.e., sale price of the dealership, timing, assignment of assets, liabilities, alleged transfer of real property, etc.).

Significantly, the verbal agreement alleged to form the basis of the purported contract is also silent as to the actual performance by the Plaintiffs, if any. Other than Van Bortel alleging that she "reiterated Plaintiffs' interest in purchasing the Henderson Ford Dealership…" (see Exhibit B ¶16) the Amended Complaint fails to allege any 'performance by the plaintiff' to support the existence of a purported contract. There are no allegations concerning further steps made in

reliance of the perceived contract except the reiteration of an "interest" in purchasing an automobile dealership. Even if true, that allegation falls woefully short of establishing an actual contract between two parties. *See Nick's Garage, Inc.*, supra at 114.

In fact, Plaintiffs' factual allegations, construed as true, defeat the Plaintiffs' claim that a contract existed. Glaringly absent from the "agreement" that Plaintiffs contend existed are any allegations concerning the liabilities that Plaintiffs supposedly agreed to assume. Specifically, when Ford exercises its ROFR, it *assigns* the right to purchase to a person who *assumes* the liability of the *sales agreement in place*. Under Plaintiffs' claim, Plaintiffs agreed to assume an open-ended set of liabilities that a) did not exist because there was no such agreement in place, and b) would mean that Plaintiffs agreed to pay an unspecified price for the dealership. For example, a potential buyer could have offered tens or hundreds of millions of dollars for the dealership and Plaintiffs, under Plaintiffs' alleged agreement, would have been bound to pay whatever price was later set.

In addition, significantly absent from Plaintiffs' Amended Complaint, but incorporated by reference in paragraphs 10 and 14, is the indisputable fact that Van Bortel executed an *actual* document that made clear that the Plaintiffs were only being *considered* "as a *Potential* Assignee of Ford Motor Company's Right of First Refusal…" and that "[n]either this letter nor any efforts you may or may not make to pursue such a transaction shall not, in any way, *obligate either party to the above-mentioned transaction"* (see Exhibit C September 1, 2021 signed Correspondence, our emphasis added).[2] Plaintiffs' own allegations contradict and fall far short of establishing that there was ever an actual contract formed, and therefore, on that basis alone, the Amended Complaint should be dismissed in its entirety.

[2] When addressing a Rule 12(b)(6) motion, the court is limited to reviewing the four corners of the complaint, any documents attached to that pleading *or incorporated in it by reference*, any documents that are "integral" to the plaintiff's allegations even if not explicitly incorporated by reference, and facts of which the court may take judicial notice. *See, e.g., Roth v. Jennings, 489 F.3d 499, 509 (2d Cir. 2007)* (our emphasis added).

Further, even if the Court were to infer the existence of a contract, despite the fatal flaws of Plaintiffs' claims as plead, Plaintiffs' claims would still be doomed as the purported contract would be in violation of the Statute of Frauds.

B. PLAINTIFFS BREACH OF CONTRACT SHOULD BE DISMISSED BECAUSE THE ALLEGED CONTRACT IS VOID UNDER THE STATUTE OF FRAUDS

Plaintiffs have effectively pled themselves out of court by alleging causes of action that cannot exist together. Here, Plaintiffs' claim the existence of an oral contact. That alleged oral contract, however, requires the existence of an underlying writing sufficient to satisfy New York's Statute of Frauds and Plaintiffs' failure to allege the existence of said writing dooms their claim.

The statute of frauds is codified in New York General Obligations Law § 5-701. *Mitchell v. Faulkner*, No. 10 Civ. 8173 (LAP), 2013 U.S. Dist. LEXIS 6088, *11-*12 (S.D.N.Y. Jan. 14, 2013), *aff'd* 531 Fed. Appx. 136 (2d Cir. 2013) (Summary Order); *Zeising v. Kelly*, 152 F. Supp. 2d 335, 343-44 (S.D.N.Y. 2001). The purpose of the law is to "'to prevent fraud in the proving of certain legal transactions particularly susceptible to deception, mistake and perjury.'" *Foster v. Kovner*, 44 A.D.3d 23, 840 N.Y.S.2d 328, 331 (N.Y. App. Div. 2007)

Van Bortel alleges that Ford "…had the 'right of ownership or possession of or the right to sell, rent or lease, land or commercial space" (see Exhibit B ¶ 48-49). If the Court were to accept that Plaintiffs sufficiently alleged the elements of a claim for breach of an oral contract under New York law, Plaintiffs' breach of contract claim must be dismissed for noncompliance with New York's statute of frauds because it relates to and predicated upon a real property transaction. *See* N.Y. Gen. Oblig. Law § 5-703(1).

Plaintiffs' own allegations invoke the statue of frauds. Specifically, Plaintiffs allege the sale of the Henderson Ford Dealership "…concerned not only the sale of the Henderson Ford Dealership, but also the right to purchase, rent or lease, land or commercial space" (see Exhibit B ¶47). Under New York's Statute of Frauds, oral contracts, relating to real property that are unaccompanied by a writing memorializing the essential terms of the agreement are void. *See, e.g., Roulley v. Inex Co.*, 677 F.2d 14, 15 (2d Cir. 1982) (statute of frauds applied to loan secured by deed of trust on real estate); *Hanson v. Hanson*, No. 18-cv-695 (KPF), 2019 U.S. Dist. LEXIS 30493, 2019 WL 935127, at *6 (S.D.N.Y. Feb. 26, 2019) (granting motion to dismiss on New York statute of frauds grounds where purported contract involving an interest in real property was not memorialized in a writing).

An oral contract is all the Plaintiffs allege existed between the Plaintiffs and Ford. Since that alleged oral contract allegedly concerned the "…right to purchase, rent or lease, land or commercial space" (see Exhibit B ¶47), said alleged oral agreement is void under the statute of frauds and Plaintiffs' breach of contract claim should be dismissed with prejudice.

C. PLAINTIFF VAN BORTEL'S CLAIM THAT FORD VIOLATED NEW YORK STATE EXECUTIVE LAW § 296(5)(b) SHOULD BE DISMISSED BECAUSE VAN BORTEL'S SOLE CONNECTION TO AN ALLEGED DISCRIMINATORY ACT IS PREMISED UPON A CONTRACT THAT CANNOT LEGALLY EXIST AND AN ALLEGED ACT THAT IS NOT DISCRIMINATORY UNDER THE LAW

It must be noted that the Plaintiffs, Mr. Howard G. Van Bortel and Mary Catherine Van Bortel's fatally flawed breach of contract claim forms the *only* basis for Plaintiff Mary Catherine Van Bortel's alleged discrimination claim. As stated above, Mary Catherine Van Bortel alleges that "…Ford would exercise its right of first refusal and assign the PSA to Plaintiffs" (see Exhibit B ¶16). Significantly, Plaintiffs own allegation is *not* that Ford would lease or sell property to the

Plaintiffs, but rather "assign the PSA." Based solely upon an alleged verbal agreement for the purchase of a dealership, which according to Plaintiff Van Bortel's complaint, included the transfer of land by Ford, Van Bortel alleges that she was denied the purchase of the dealership because she is a woman.

Further, as is a matter of public record, Plaintiffs do not own a Ford dealership in their individual capacity. Specifically, Van Bortel Ford is owned by a corporate entity, Van Bortel Ford, Inc. (see, Exhibit D, Entity Information from the NYS Department of State Division of Corporations). This is an important, indisputable fact because any alleged transfer of a purchase sales agreement would be to a corporate entity and not an individual.

New York State Executive Law *§296(5)(B*), however, was enacted to prevent discrimination against *individuals* and not corporations.

Under *§ 296(5)(B)*, NYHRL provides that:

> It shall be an unlawful discriminatory practice for the owner, lessee, sub-lessee, or managing agent of, or other person having the right of ownership or possession of or the right to sell, rent or lease, land or commercial space . . . [t]o refuse to sell, rent, lease or otherwise deny to or withhold from any ***person*** . . . land or commercial space because of the . . . sex, age, . . . [or] marital status . . . of such *person* . . . ; [or] [t]o discriminate against any *person* because of . . . sex, age, . . . [or] marital status . . . in the terms, conditions or privileges of the sale, rental or lease of any such land or commercial space; or in the furnishing of facilities or services in connection therewith.
> *See, N.Y. Exec. Law § 296(5)(b)(1)-(2)* (our emphasis added).

NYHRL defines "commercial space" as:

> [A]ny space in a building, structure, or portion thereof which is used or occupied or is intended, arranged or designed to be **[**31]** used or occupied for the manufacture, sale, resale, processing,

> reprocessing, displaying, storing, handling, garaging or distribution of personal property; and any space which is used or occupied, or is intended, arranged or designed to be used or occupied as a separate business or professional unit or office in any building, structure or portion thereof.
> *See, N.Y. Exec. Law § 292(13).*

Plaintiff Van Bortel alleges that "Ford has engaged in conduct, as alleged herein, that constitutes unlawful discriminatory practices and unlawful discrimination on the basis of Van Bortel's gender…" (see Exhibit ¶44). Plaintiff Van Bortel has not alleged, nor can she, the existence of any actual agreement with Ford in which Ford promised to exercise its ROFR and assign the transaction to her. In fact, the one document that is incorporated by reference in Plaintiffs' Amended Complaint is the September 1, 2021 signed correspondence that specifically documented that the Plaintiffs were only being *considered* "as a *Potential* Assignee of Ford Motor Company's Right of First Refusal…" and that "[n]either this letter nor any efforts you may or may not make to pursue such a transaction shall not, in any way, *obligate either party to the above-mentioned transaction"* (see Exhibit C our emphasis added).

In the current case, there are no allegations, and there cannot be, regarding the existence of a proposed sale agreement between Henderson Ford and Plaintiffs, a landlord/tenant arrangement or what the terms of the lease would be with Plaintiffs (Mr. Howard G. Van Bortel and Mary Catherine Van Bortel) or that land or a lease would even necessarily transfer with the sale of the Henderson Dealership.[3]

[3] It should be noted that Ford Motor Company was not and is not the title owner of the land that was transferred in the sale of the Henderson Dealership. In addition, the real estate on which a dealership sits is not necessarily purchased in conjunction with a proposed sale of a dealership, especially if the sale is made in conjunction with a relocation of the dealership.

In addition to the fact that the alleged discrimination claim is premised upon a nonexistent contract, Plaintiff Van Bortel's sole factual allegation, which she alleges serves as the basis of her discrimination claim is that "on or about October 27, 2021, Van Bortel spoke with Ford's Retail Network U.S. Franchise Manager, Edie Lukas…" and "in the course of their conversation, Van Bortel explained how she had fought to establish herself as a successful female Ford dealer." Allegedly, in response to Plaintiff Van Bortel's statement, Ms. Lukas responded that "…'minority dealers are not a priority right now' for Ford." (See Exhibit B ¶22). This vague statement, while disputed, even if true, cannot and does not form the basis of alleged discrimination because a) the entire factual predict is based upon an alleged agreement that, as argued above, never existed and b) such a statement falls far short of the factual predict that could ever support a claim that Plaintiff Van Bortel was discriminated against because of her sex.

In *DiPilato v. 7-Eleven, Inc.,* 662 F. Supp. 2d 333, 2009 U.S Dist. LEXIS 76369*,* the Court found that the defendant Rule 12(b)(6) motion should be granted in part and denied in part based upon the allegation that Plaintiff was specifically told that her franchise, "application should be denied because a single female over the age of forty (40) would not be suitable for such a franchise." See, *DiPilato v. 7-Eleven, Inc.,* 662 F. Supp. 2d 333, 2009 U.S Dist. LEXIS 76369. Here, Plaintiffs simply make no allegation that a discriminatory reason was given for the decision not to exercise a ROFR that may have resulted in the transfer of the land on which the Ford dealership is located.

Simply put, Plaintiff Van Bortel has not and cannot make any such allegations in this case. Therefore, the New York State Executive Law ¶296(5)(B) cannot apply to the facts as alleged by Plaintiff, her tenuous discrimination claim should fail as a matter of law, and any attempt to amend should be denied as futile. As noted above, the premise for this entire Amended Complaint is based

upon an alleged contact that never existed and could not exist without being in writing. Plaintiff Van Bortel's claim falls for short of the pleading standard and as matter of law should be dismissed.

D. THE PLAINTIFFS FAIL TO MEET THE LEGAL STANDARD FOR INJUNCTIVE RELIEF

Plaintiffs' third cause of action for "injunctive relief" seeks a "…permanent injunction" (see Exhibit B ¶56). An injunction is a remedy and not a separate cause of action. *Christe v. Hotels.com L.P.*, 756 F. Supp. 2d 382, 407-08 (S.D.N.Y. 2010) (dismissing claims for injunctive and declaratory relief).

Further, the cause of action for "injunctive relief" merely duplicates Plaintiffs' substantive counts and should be rejected for the same reasons that render the Plaintiffs' substantive claims deficient as a matter of law. *Id.* To obtain a permanent injunction, "a plaintiff must succeed on the merits and show the absence of an adequate remedy at law and irreparable harm if the relief is not granted." *Melnitzky v. HSBC*, No. 06 Civ. 13526 (JGK), 2007 WL 195239, *2 (S.D.N.Y. Jan. 24, 2007) (quoting *Roach v. Morse*, 440 F.3d 53, 56 (2d Cir. 2006)). "Irreparable harm is an injury that is not remote or speculative but actual and imminent, and for which a monetary award cannot be adequate compensation." *Tom Doherty Assocs., Inc. v. Saban Entertainment*, 60 F.3d 27, 37 (2d Cir. 1995) (internal quotation marks omitted).

CONCLUSION

For all the forgoing reasons, Ford respectfully submits that the Court should dismiss the Amended Complaint with prejudice and without leave to renew.

Dated: New York, New York
February 3, 2022

Respectfully submitted,
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