SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ALBANY: COMMERCIAL DIVISION

DARWISH AUTO GROUP, LLC & DARWISH GENERAL CORP.,

Plaintiffs,

-against-

TD BANK, N.A. & WALID DARWISH,

Defendant,

WALID DARWISH, individually and direct and derivative action on behalf of Darwish Auto Group, LLC, DP RE Holdings, LLC and Darwish General Corp.,

Third Party Plaintiff,

against-

BARRY FRIEDER, MARK MANZO, DAVID YUSKO, MELISSA LACARTER, JOHN DOES 1-10, and JANE DOES 1-10

Third Party Defendants.

Motion Seq. No. 4

Index No.: 905851-22

AFFIDAVIT OF WALID DARWISH IN FURTHER SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION

STATE OF NEW JERSEY)
: ss.
COUNTY OF BERGEN)

WALID DARWISH, being over the age of 18 and duly sworn, deposes and says:

1. I am a named Defendant and Third-Party Plaintiff in the above-referenced matter. I am the shareholder of Darwish General Corp. and the sole member of Darwish Auto Group, LLC (collectively referred to as "Companies"). I have personal and first-hand knowledge regarding this matter.

2. The following are some of the points to consider as I serve as the Shareholder and Member of the Companies: (1) I have an expectation to serve as Dealer Principal, Member Dealer, Operator, Executive Manager, and manager of the Dealerships[1] since those are my contractually-obligated roles at the Dealerships based upon the agreements with the Manufacturers,[2] and I am expected to be permitted to be present at that the Dealerships; (2) I should receive the same compensation I previously received; (3) I should have access to all books, records, and portals; (4) I have never wrongfully taken money or assets; (5) TPDs have misled the Manufacturers by representing to them that I was not obstructed from operations; and (6) TPDs are harming the Companies by reducing their profits and causing employee walkouts.

3. Since they have begun their campaign to squeeze me out, Third Party Defendants ("TPDs") have deprived me of my reasonable expectations as the only shareholder/member. I have been deprived of the access to information. They have changed the *status quo* by removing me from my contractually-obligated role.

4. TPDs claim that I am "still a member of the Governing Bodies" and "receive daily information reports," "ha[ve] access to the books and records of the Dealerships[,]" and am able to participate in the management of the Dealerships. *See* Affidavit of Barry Frieder, ¶¶ 44-45 ("Frieder Aff"). I am able to go to the Dealerships and serve in the role required by the Manufacturers. However, outside of Court, they have prevented me from doing my job.

5. Since July 19, 2023, they have had security guards at the Dealerships and prevented me from entering.

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[1] "Dealerships" are defined in my affirmation in support of the Motion for a Preliminary Injunction, dated July 25, 2023.

[2] "Manufacturers" refers to Nissan, Ford Motor Company, FCA US, LLC (Jeep, Chrysler, Dodge and RAM), Volkswagen of America, Inc., and Mitsubishi Motors, collectively.

6. TPDs have directed Dealership employees not to respond to my text messages and emails requesting information.

I. TPDs HAVE ALTERED THE *STATUS QUO*.

7. TPDs have made unilateral actions, without prior notice, that have altered the *status quo*. For example, I served as the President of the Companies until I received the July 24, 2023 Resolution demoting me to Vice President. There were number of officers added which diluted me. A true and accurate copy of this document is attached hereto as **Exhibit 1**.

8. An August 4, 2023 Resolution has excluded me from being authorized to make any decisions on the Ally Bank agreements. A true and accurate copy of this document is attached hereto as **Exhibit 2**.

9. TPDs do not invite me to meetings or allow me to vote. I receive notice of these decisions after they have already been made.

10. As the Shareholder/Member of the Companies, I served as the Dealer Principal, Member Dealer, Operator, Executive Manager, and manager of the Dealerships since the acquisition of the Dealerships.

11. I previously received reasonable compensation in the amount of $23,076.92 per week before that was unilaterally taken by TPDs.

12. I have also provided TPDs with expenses that I made for the Companies, including legal costs expended in defending the Companies and maintaining their livelihood in the present action.

13. Since the acquisition of the Dealerships, I have served as, and am obligated to be, the point of contact with the Manufacturers.

14. The Manufacturing Agreements require that I have a constant physical presence. For example, the Term Sales and Service Agreement with FCA US, LLC, indicates the following:

> DEALER represents and warrants that at least one of the above-named individuals will be physically present at the DEALER's facility (sometimes referred to as "Dealership Facilities") during most of its operating hours and will manage all of DEALER's business relating to the sale and service of FCA US products. DEALER shall not change the personnel holding the above described position(s) or the nature and extent of his/her/their management participation without the prior written approval of FCA US.
>
> [*See* Ex. 17 to my August 25, 2023 Affidavit.]

15. Article Four of Nissan's Dealer Term Sales & Service Agreement, provides similar language:

> <u>Executive Manager.</u> Seller and Dealer agree that the retention by Dealer of qualified management is of critical importance to the successful operation of Dealer and to the achievement of the purposes and objectives of this Agreement. This Agreement has been entered into by Seller in reliance upon, and in consideration of, the personal qualifications, expertise, reputation, integrity, experience, ability and representations with respect thereto of the person named as Executive Manager in the Final Article of this Agreement and on Dealer's representation to seller and agreement that the person identified as Executive Manager shall be Dealer's executive manager, shall have full managerial authority for Dealership Operations, and shall continually provide his or her personal services in operating the dealership and will be physically present at the Dealership Facilities.

A true and accurate copy of Nissan's Dealer Term Sales and Service Agreement is attached hereto as **Exhibit 3**.

16. While I had maintained constant presence in the Dealerships, TPDs have prevented me from being in the Dealerships since taking over and have deprived me of my ability to satisfy my obligations set forth in the Manufacturer Agreements.

17. I had administrative access to the used car inventory system, which allowed me to merchandize vehicles, set vehicles for wholesale, fix wholesale prices, see notes for appraisal, track vehicles from the beginning to their sale, view all changes made to cars, and review all reports for the vehicles.

18. On August 13, 2023, my access to the used car inventory was altered to sales person. I am only able to see the prices of the different vehicles that are being sold. A true and accurate copy of the email indicating this change in my access is attached hereto as **Exhibit 4**.

19. TPDs are also preventing employees from communicating with me to stop me from being apprised of the operations.

20. TPDs have instructed employees not to share daily reports with me. For instance, when the Dealerships first started, I created a report template that would compile all of the Dealerships' daily performance in the sales department and track month to date car sales, profits made, and any customer service matters. Data from each of the Dealerships would be compiled into this template and I would receive the Group Nightly Reporting Daily.

21. The week that TPDs took over the Dealerships, the General Managers for the Dealerships began withholding daily reports. Without receiving these updates, I am unable to track the Dealerships' profitability and address any issues with the Dealerships that may arise.

22. Further, prior to the takeover of the Dealerships, I would text all of the General Managers for the Dealerships asking about appointments scheduled and appointments confirmed for the day.

23. By August 12, 2023, the General Managers for all ten (10) Dealerships stopped providing me with appointment updates. A true and accurate copy of the text messages are attached hereto as **Exhibits 5 through 7**.

24. TPDs have also falsely claimed to non-parties that I resigned. A true and accurate copy of the email is attached hereto as **Exhibit 8**.

25. In other instances, TPDs have worked together to defraud non-parties into believing I have been able to serve unobstructed as the Dealer Principal and the Dealer Operator. For

instance, there was a meeting with Nissan where they wanted me to act as if I was an unobstructed operator. True and accurate copy of the relevant emails are attached hereto as **Exhibits 9 and 10**.

26. I refused to mislead Nissan. Then, TPDs had a manager attend the meeting and pretend to Nissan that I was not being obstructed as operator.

27. TPDs have also used force to prevent me from serving in my contractually-obligated role. I still remain listed as being solely responsible for the aspects of the Dealerships such as the New York State New and Used Car Dealer Licenses, New York License Service Departments, and New York Inspection Departments, along with paying and reporting New York state sales taxes. For example, I do not know if New York state sales tax for the month of June, which was required to be paid by July 20, 2023, and for the month of July, which was required to be paid by August 20, 2023, has actually been paid because TPDs are not providing me with that information.

II. TPDs WILL CONTINUE TO HARM THE DEALERSHIPS' RELATIONSHIPS WITH MANUFACTURERS.

28. I am the only person approved by the Manufacturers to serve as the Dealer Principal, Member Dealer, Operator, Executive Manager, and manager.

29. On August 4, 2023, Volkswagen filed an action seeking to rescind the Dealer Agreement, or alternatively, preventing any individual other than me from exercising ownership or control. A true and accurate copy of the Complaint filed by Volkswagen is attached hereto as **Exhibit 11**.

III. TPDs ARE DESTROYING THE DEALERSHIPS.

30. The following are examples of the lengths TPDs have taken to destroy the Dealerships:

a. TPDs have reduced the price of the majority of used vehicles that the Dealerships had in stock to below wholesale.

b. TPDs have advertised used vehicles for sale for lower than the vehicles can be replaced for inventory.

c. The amount of write downs has severely harmed the Dealerships by reducing the equity in used cars which reflects the reduction in working capital by $2,311,478.91.

A true and accurate copy of the documents are attached hereto as **Exhibit 12**.

31. On August 8, 2023, I was told that prior to the write downs being finalized that I would receive a copy to review and comment on before the number was finalized. However, I never received an opportunity to comment before they occurred. I sent a follow-up email on August 12, 2023 regarding my review of the write downs and received no response. In actuality, the write down of the vehicles was completed in July 2023 without my input. This was obviously done to harm the Companies. A true and accurate copy of the email exchange is attached hereto as **Exhibit 13**.

32. By writing down the price of the used vehicles, TPDs are selling vehicles and showing a fictitious profit. It is obvious that TPDs are there to harm and or destroy the Dealerships. This business model is not sustainable. It is a formula to destroy the businesses.

33. Since TPDs have obstructed me, the total amount of Contracts in Transit has increased from $712,996.17 on July 19, 2023 to $1,641,985.78 on August 22, 2023. In one month since, the amount that the Dealerships are collectively owed has increased $928,989.61 in the Contracts in Transit. A true and accurate copy of relevant documents are attached hereto as **Exhibit 14**.

34. In one month, TPDs have also tanked new car sales:

a. While was operating, the Dealerships were collectively averaging sales of 185 new cars per month for the ten (10) months leading up to TPDs' wrongful invasion.

b. For the month of August, as of August 24, 2023, the Dealerships have only sold 74 new cars and are projected to sell a total of 96 new cars this month.

A true and accurate copy of relevant documents are attached hereto as **Exhibit 15**.

35. TPDs' obstruction has also led to the Dealerships' profitably to decrease. Since February 2023, the Dealerships have been profitable, with the net profit income as follows:

a. February 2023 - $179,249.47

b. March 2023 - $334,557.46

c. April 2023 - $277,051.23

d. May 2023 - $255,925.69

e. June 2023 - $152,537.23

After TPDs obstructed me, the Dealerships suffered a ($258,785.74) loss in July 2023. A true and accurate copy of relevant documents attached hereto as **Exhibit 16**.

36. TPDs have no interest in maintaining and operating these Dealerships. Rather, TPDs are marketing all of the Dealerships for sale without my authority.

37. TPDs have also worked with Trudy Austin ("Austin") to use my email address and passwords to Manufacturer portals without my authority. A true and accurate copy of the email is attached hereto as **Exhibit 17**.

38. Employees have expressed dismay towards working with TPDs. While I was obstructed, the entire staff of one Dealership stormed out. Only one sales person remains at the Dealership.

39. Upon information and belief, in one month, 31 of the Dealerships' employees have left. A true and accurate copy of a list of all employees who have left the Dealerships is attached hereto as **Exhibit 18**.

40. If I am not permitted to return to my contractually-obligated duties soon, there may be no more businesses.

IV. REVIEWS PERFORMED BY TPDs OF THE DEALERSHIPS.

41. I worked in good-faith with TPDs so they would have access to the documents required to be provided under the prior stipulation.

42. TPDs were provided access to: (1) Dealertrack – Dealer Management System – Administrators; (2) Dealertrack – Finance and leasing bank applications; (3) Ally Floor Plan; (4) DealerOps – Reporting Software; (5) V-Auto – Vehicle Management System; (6) DealerSocket CRM; (7) all TD Bank Accounts; (8) Paychex – Full Access (employee payroll, medical and dental insurance policies and cost, payroll taxes, employees' personal information including weekly payroll reports, job titles, and etc.); (9) the Package Group; (10) FedX; (11) Worldpay; (12) Cyber Security; (13) The Box; (14) ADESA Auto Auction; (15) Manheim Auto Auction (Wholesale); (16) Remote Access Desktop on all of the computers; (17) Service and Parts Warranty Claims – AWN; (18) All the reports for Rebates; (19) Contracts in Transit; (20) all Account Receivables and Account Payables; (21) all General Ledgers; (22) all Manufacturer Financial Statements; (23) all Expenses; (24) all Inventory; and (25) the ability to produce checks.

43. The Dealership staff were instructed to inform TPDs if that if they needed any more access to speak with me.

44. TPDs were receiving additional information from Trudy Austin and Aubrey Laquidari during the relevant time period.

45. We had a successful meeting on February 23, 2023 via Microsoft Teams to discuss the progress of the Dealerships.

46. In regards to the "in-person review" that took place in April 2023, I was not provided any notice. A large number of people, including Manzo and Frieder, arrived at the Dealerships which caused harm and disruption since they failed to coordinate their visit.

47. During this "in-person review," there were demands for documents from employees beyond the scope of the prior stipulation.

48. This surprise visit scared employees and created a distraction. Employees speculated that the individuals were from the government, while others speculated that the Dealerships were in jeopardy. A surprise visit is not productive.

49. TPDs planned to have another "in-person review" on July 17, 2023. *See* Affidavit of Michael S. Horn, Esq. ("Horn Aff.") dated July 25, 2023, ¶ 21. However, TPDs sent me a Memorandum on July 19, 2023, indicating I had been terminated. Horn Aff., Ex. 22. As such, I was not part of any "in-person review" conducted in July 2023.

V. ACTIONS AS DEALER PRINCIPAL, MEMBER DEALER, OPERATOR, EXECUTIVE MANAGER, AND MANAGER.

50. Under my supervision, the Dealerships were profitable each month since February 2023. *See* Ex. 16 at 1 through 5.

51. While I was unobstructed, the employees seemed happy and enjoyed working. For example, I distributed turkeys to every employee of the Dealerships. A true and accurate copy of the Facebook post is attached hereto as **Exhibit 19**.

52. TPDs have used some comments made by certain employees that left their employment to attack me but those employees were not helping the Companies.

53. For example, John Torrese ("Torese") was selling vehicle service contracts to consumers and instead of posting the costs as a cost for the product, he was posting it as a profit. This led staff to pick up almost $200,000 in fictitious profits. I had intended to fire Torese for his actions, but he sent his resignation.

54. Torese had requested another Dealership employee's, Marcus Payne, salary be increased. While I agreed to increase his salary, Payne failed to sell cars and made above what he was earning. On the day he resigned, Payne actually owed the Dealership money.

55. I also discovered after Rent McNett ("McNett") left that he was wrongly paid for an unpaid vacation he had taken in March 2023. In April 21, 2023 email, the General Manager Rich Artigiani, had instructed to pay McNett his entire salary. A true and accurate copy of the email is attached hereto as **Exhibit 20**.

56. Additionally, TPDs misuse appropriate business transactions by claiming misappropriation. I have never misappropriated funds.

57. In regards to the $3,750,000.00 five-year advance by Ford, it was an advance against future packs. For the repayment, the Ford Dealerships were required to pay back Ford $375,000.00 each six months through the sale of vehicle service contracts and ancillary products. These funds have not been misappropriated. They remain in a proper account to pay back the advance.

58. As to True-Up payments in February 2023, the Ford Dealerships failed to sell $375,000 in packs. Ford took True-Up payments in the amount of $129,035.00.

59. Further, I am not using the $900,000.00 advance that was provided by Stellantis. The money was designated for a remodeling project and placed in the bank account associated with Wally's Chrysler Jeep Dodge Ram of Amsterdam. My understanding is that Chrysler staff

will be taking the advance back. A true and accurate copy of the email exchange is attached hereto as **Exhibit 21**.

60. I have not required the Manufacturers to bypass the Dealerships with factory incentive. Those payments are sent to the Dealer Principal. The funds are from competitions that the Manufacturers have between Dealer Principals. If a Dealer Principals wins the competition, the award goes to the Dealer Principal to be distributed.

61. The Cash Authorization Forms for Ford Protect/Lincoln Protect Journey to Success indicate the Dealer Principal approves how the award is distributed. *See* Frieder Aff., Ex. R.

62. For example, on July 13, 2023, Wally's Ford of Nelliston won the Ford Protect/Lincoln Protect Journey to Success 2023 Snag Some Cash Inventive for a $780.00 award. *See* Frieder Aff., Ex. S. I have never received that check.

63. I formed a reinsurance company, Wally's Reinsurance Company, Ltd. and bank accounts to hold the reinsurance money. It is normal for Dealer Principals to create such reinsurance companies outside of the United States. I told individuals from the Potamkin Group that I was setting up the company before they financed the transaction.

64. The $1,414,739.91 for reinsurance is not accessible to me. The bank accounts were set up to hold funds as reserve accounts against any future claims by consumers.

65. The reinsurance money earns out over time taking upwards of ten (10) to eleven (11) years given the time it takes for the purchase of warranties to expire.

66. The only amount actually accessible is the interest accrued in the bank accounts, which totals around <u>$20,000</u> which remains in the account. For example, the June 2023 statement reflects a total yearly paid interest on this account of $13,833.82. *See* Frieder Aff., Ex. V2. The

June 2023 statement indicates $62,607.31 of the funds in this account have already been used to pay claims made by consumers against the warranties. *See id.*

67. Funds from other packs sold go directly back to the Dealerships, not me, and paid on the parts statement and wired back to the Dealerships through the parts account to the Dealership bank accounts. A true and accurate copy of the email is attached hereto as **Exhibit 22**.

68. In regards to employees' pay, employees received competitive compensation. While staff were initially paid on front-end profits and back-end profits, including financing cars and vehicle service contracts and ancillary products, no other Dealerships in the area paid employees on back-end profits. To save money, I cut the back-end to align with the market and adjust to the profitability. For front-end profits, sales and service personnel and managers were paid a higher percentage and this promoted front-end sales.

69. Based on the above, I respectfully request that the Court grant the Preliminary Injunction.

WALID DARWISH

Sworn and subscribed to before me
this 28 day of August, 2023.

Notary Public

GREGORY SCHER
Notary Public, State of New Jersey
My Commission Expires Oct 3, 2027

I, **MICHAEL S. HORN**, am an attorney at law authorized to practice in the State of New Jersey and New York. I do hereby affirm that the acknowledgment or proof upon the annexed document was taken in the manner prescribed by the laws of the State of New Jersey and conforms to the laws thereof and that this acknowledgment is notarized in conformance with the laws of the State of New York and New Jersey.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal, this 28th day of August 2023.

Michael S. Horn

CERTIFICATE OF CONFORMITY

I, Michael S. Horn, an attorney duly admitted to practice law before the courts of the State of New York, hereby certify that the attached document complies with the word count limit set forth in Uniform Rule 202.8-b as it contains 3,454 words, excluding the caption, table of contents, table of authorities and signature block. In preparing this certification, I have relied on the word count of the word-processing system used to prepare the attached document.

Dated: August 28, 2023
New York, New York

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Michael S. Horn, Esq.

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