3-2-2021

Raybon et al., Order on Pending Motions and Pre-Trial Scheduling order

Alice D. Bonner
Senior Judge, Fulton County Superior Court

IN THE SUPERIOR COURT OF FULTON COUNTY
BUSINESS CASE DIVISION
STATE OF GEORGIA

ROBERT S. RAYBON, GATEWOOD HOLDINGS, LLC, and AT LEGAL, LLC, Plaintiffs, v. CNH INDUSTRIAL AMERICA LLC, a foreign corporation doing business as Case IH, JAMES (JIM) WALKER, individually and in his capacity as Vice President of Case IH, and RICHARD H. CARVER, individually and as former Territory Sales Manager of Case IH, Defendants.	CIVIL ACTION FILE NO. 2017CV285048 Business Case Div. 1

ORDER ON PENDING MOTIONS
AND PRE-TRIAL SCHEDULING ORDER

The above styled action is before the Court on the following motions: (1) Plaintiffs AT Legal and Gatewood Holdings' Motion for Partial Summary Judgment Related to CNH's Breach of Contract in Connection with Three Specific Transactions; (2) Plaintiffs' Motion for Partial Summary Judgment as to Liability Pursuant to O.C.G.A. §13-8-15(c)(8) in Connection with Three Specific Transactions; (3) Defendants' Motion for Summary Judgment; (4) Plaintiffs' Motion to Exclude George Russell, Defendants' Proposed Industry Expert ("Plaintiffs' Motion to Exclude Testimony of George Russell"); (5) Defendants' Motion to Exclude Testimony of Robert J. Taylor IV; and (6) Plaintiffs' Motion to Compel Removal of Confidentiality Designation on Documents

Improperly Designated as Confidential ("Plaintiffs' Motion to Compel Removal of Confidentiality Designation"). Having considered the entire record, the Court finds as follows:

I. SUMMARY OF FACTS[1]

A. The Parties

Defendant CNH Industrial America ("CNH"), under the Case IH brand ("Case IH"), manufactures and sells agricultural equipment and provides parts and service support to farmers and commercial operators through a network of dealerships and dealers of CNH products throughout North America, including Georgia.[2] Defendant James Walker ("Walker") is a former Vice President for the Case IH brand of CNH equipment.[3] He served in that role at all times between August 2009 and July 2015. Defendant Richard H. Carver ("Carver") is a former Territory Sales Manager for Case IH, whose territory responsibility between November 2010 and mid-March 2015 included Georgia.[4]

Plaintiff Robert S. Raybon ("Raybon") is the former Chief Financial Officer ("CFO"), President, Chief Executive Officer ("CEO"), and Board member of Progressive Solutions Holdings, Inc., d/b/a AIMTrac ("AIMTrac"), which was formed on or about November 25, 2009.[5]

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[1] As discussed below, the expansive and often conflicting record in this case demonstrates a number of disputes of material fact that preclude summary judgment on Plaintiffs' claims. Although not comprehensive, the Court herein attempts to summarize and highlight the most salient factual allegations and disputes giving rise to the currently pending claims.

[2] Plaintiffs' Statement of Undisputed Material Facts ("Pls.' SUMF"), ¶ 2; Defendants' Response to Plaintiffs' Undisputed Material Facts ("Defs.'s Resp. to Pls.' SUMF"), ¶ 2. Although not a named party to this litigation, CNH Industrial Capital America, LLC ("Capital") is a direct subsidiary of CNH Industrial America, LLC. *See* CNH/Lawrence 30(b)(6) Dep., p. 23. Capital provides wholesale financing to CNH dealers and retail financing to end users, among other services. *Id.* at p. 36; *see, e.g.*, Kelley Dep. Ex. 4 (Capital Retail Financial Agreement), Ex. 5 (Capital Wholesale Financing and Security Agreement), & Ex. 6 (Capital Loan Agreement).

[3] Pls.' SUMF, ¶ 3; Defs.' Resp. to Pls.' SUMF, ¶ 3.

[4] Pls.' SUMF, ¶ 6; Defs.' Resp. to Pls.' SUMF, ¶ 6. On March 15, 2015, Carver was named AIMTrac's Vice President of Sales, and in the summer of 2015, he became a 6% owner of AIMTrac. *Id.*

[5] Pls.' SUMF, ¶¶ 4, 30, 35; Defs.' Resp. to Pls.' SUMF, ¶¶ 4, 30, 35. Raybon is the son-in-law of James C. Gatewood, discussed *infra*. Defendants' Theory of Recovery and Statement of Undisputed Material Facts ("Defs.' SUMF"), ¶ 13; Plaintiffs' Response to Defendants' Theory of Recovery and Statement of Undisputed Material Facts ("Pls.' Resp. to Defs.' SUMF"), ¶ 13.

AIMTrac was an authorized dealer of the Case IH brand of agriculture and farming equipment, selling new and used equipment to the consuming public.[6] AIMTrac also sold other lines of agricultural equipment in addition to equipment from the Case IH Brand.[7] Plaintiffs Gatewood Holdings, LLC ("Gatewood Holdings") and AT Legal, LLC ("AT Legal") are former shareholders of AIMTrac.[8]

Gatewood Holdings is managed by James C. Gatewood, who also served between 2010 and mid-July 2015 as counsel and corporate secretary of AIMTrac.[9] Gatewood Holdings initially owned 6,000 (out of 100,000) shares of AIMTrac common stock and, by April 2012, it owned 9,000 such shares.[10] It later acquired an additional 9,000 shares, resulting in an 18% ownership stake in AIMTrac by July 2015.[11] AT Legal is managed by Brian Kelley, who served as AIMTrac's President, CEO, and Chairman of its Board of Directors from the time of its inception until his resignation from those positions on December 3, 2012.[12] Kelley also manages Ag Technologies, LLC ("Ag Technologies").[13] Between 2010 and mid-July 2015, Ag Technologies owned 33,000 shares of AIMTrac stock, reflecting a 33% ownership interest in AIMTrac.[14] On December 1, 2016, Ag Technologies transferred and assigned its rights, title, and interest in this action to AT Legal, which is pursuing same through this litigation.[15]

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6 Pls.' SUMF, ¶¶ 4-5, 22, 131; Defs.' Resp. to Pls.' SUMF, ¶¶ 4-5, 22, 131.

7 Pls.' SUMF, ¶ 131; Defs.' Resp. to Pls.' SUMF, ¶ 131 (only "[d]isputed insofar as it reflects a legal conclusion").

8 Pls.' SUMF, ¶¶ 8, 14-16,19; Defs.' Resp. to Pls.' SUMF, ¶¶ 8, 14-16,19.

9 Pls.' SUMF, ¶ 12; Defs.' Resp. to Pls.' SUMF, ¶12.

10 Pls.' SUMF, ¶¶ 14, 29; Defs.' Resp. to Pls.' SUMF, ¶¶ 14, 29.

11 Pls.' SUMF, ¶¶ 15-16; Defs.' Resp. to Pls.' SUMF, ¶¶ 15-16. A portion of these shares were held by Crisp Investments, LLC ("Crisp Investments") as a nominee or agent or agent of Gatewood Holdings, and were transferred to Gatewood Holdings in July 2015. *Id.*

12 Pls.' SUMF, ¶¶ 9, 13; Defs.' Resp. to Pls.' SUMF, ¶¶ 9, 13.

13 Pls.' SUMF, ¶ 7; Defs.' Resp. to Pls.' SUMF, ¶ 7.

14 Pls.' SUMF, ¶ 8; Defs.' Resp. to Pls.' SUMF, ¶ 8.

15 Pls.' SUMF, ¶ 17; Defs.' Resp. to Pls.' SUMF, ¶ 17; Kelley 30(b)(6) Dep. Ex. 13 (Assignment of interest from Ag Technologies to AT Legal). Given this assignment and for ease of reference, Ag Technologies is referred to hereinafter as AT Legal unless otherwise specifically noted.

Between 2010 and mid-July 2015, the remaining shares in AIMTrac were held by non-parties Eugene Marshall, Randy Anderson, Scott Anderson, and William Greer ("Greer") (collectively, the "Minority Shareholders").[16]

B. The Sales Agreement

On or about March 25, 2011, CNH and AIMTrac entered into an Agricultural Equipment Sales and Service Agreement ("Sales Agreement") pursuant to which CNH appointed AIMTrac to serve as an "authorized Dealer for the marketing and servicing of [CNH's] Products" within a defined sales and service area specified in the Sales Agreement.[17] Relevant to this dispute, the Sales Agreement includes a provision governing "Dealer Succession" which provides in relevant part:

> [CNH] shall provide to [AIMTrac] the following succession options:
>
> (a) Change in Control or Ownership:
>
> Upon written request made by [AIMTrac] and [AIMTrac's] owner(s), [CNH] shall give ***good faith consideration*** to any succession plan for a change in the control or ownership of the dealership. If such consent is given, it shall be contingent upon the following at the time the change occurs:
>
> (i) The consent of all other owner(s) of the dealership.
>
> (ii) The vesting of the control or ownership with the person or persons designated,
>
> (iii) The approval by [CNH] of the dealership's sales performance, facilities and financial strength.
>
> (iv) The designation by [CNH] that [AIMTrac's] Sales and Service Area is a replacement market.
>
> (v) The execution of a new Sales and Service Agreement.

[16] Pls.' SUMF, ¶ 20; Defs.' Resp. to Pls.' SUMF, ¶ 20.

[17] Pls.' SUMF, ¶ 22; Defs.' Resp. to Pls.' SUMF, ¶ 22; Kelley Dep., Ex. 3 (Sales Agreement) at ¶ 1.

> If such consent is withheld by [CNH] and [AIMTrac], nonetheless, proceeds with the change, this Agreement shall terminate immediately.
>
> Change in control or ownership shall mean any event which may affect the operation of [AIMTrac's] business, including but not limited to…***any substantial change in the shareholders***, if [AIMTrac] is a corporation.[18]

(Emphasis added).

With respect to the use of CNH's name and marks, AIMTrac agreed to "[d]isplay [CNH] identification signs of the type and in a manner and in places approved by [CNH], including but not limited to signs on [AIMTrac's] facilities and services vehicles."[19] Further, the Sales Agreement includes a provision governing the use of "Trademarks and Trade Names" which states:

> [AIMTrac] agrees ***not to use the names*** "J. I. Case", "Case", "IH", "Case IH", "Case Corporation", "Case, LLC" or any other trademark or trade name of [CNH] or any of its affiliated companies in connection with [AIMTrac's] business ***except when selling items containing such marks or names and furnished to [AIMTrac] by [CNH], or as otherwise specifically approved in writing by [CNH]***.[20]

(Emphasis added).

C. Raybon's Employment

Kelley and AIMTrac recruited and ultimately hired Plaintiff Raybon to serve as AIMTrac's CFO pursuant to an employment agreement dated February 29, 2012.[21] The agreement included a three-year term of employment and benefits, including an option to purchase 4,000 shares of AIMTrac stock at a strike price of $50.00 per share.[22] However, on or about December 6, 2012, Raybon replaced Kelley as President and CEO of AIMTrac, and his employment agreement was

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18 Kelley Dep., Ex. 3 (Sales Agreement) at ¶ 12.
19 *Id.* at ¶ 6(b).
20 *Id.* at ¶ 18.
21 Pls.' SUMF, ¶ 30; Defs.' Resp. to Pls.' SUMF, ¶ 30.
22 Pls.' SUMF, ¶ 31; Defs.' Resp. to Pls.' SUMF, ¶ 31.

thereafter amended ("Amended Employment Agreement") to reflect the change in position.[23] Raybon's incentive stock option was replaced with an incentive payment plan which entitled Raybon to a certain percentage of AIMTrac's net proceeds or implied equity value based on the company's overall performance.[24] The incentive payment would become payable at such time when: (a) either the Board of Directors of AIMTrac or Plaintiff Raybon chose to terminate Raybon's employment; (b) shareholders of AIMTrac began receiving distributions; or (c) there was a "change in control event" where shareholders would receive proceeds from the transaction.[25]

Upon the occurrence of any of these events, the equity ownership portion of the incentive plan would be triggered and Plaintiff Raybon would be paid: (a) 10% of net proceeds from the sale of AIMTrac or implied equity value above $5,000,000 if such proceeds or equity value was determined to be less than $15,000,000; (b) 15% of net proceeds or implied equity value above $5,000,000 if such proceeds or equity value was determined to be greater than or equal to $15,000,000; or (c) 20% of net proceeds or implied equity value above $5,000,000 if such proceeds or equity value was determined to be greater than or equal to $20,000,000.[26] If no transaction triggered the equity ownership portion of the incentive plan, implied equity value would be based on the then-current book value of AIMTrac plus: (a) all shareholder distributions made between the effective date of Raybon's Amended Employment Agreement (*i.e.*, December 6, 2012) and the testing date; (b) with appropriate adjustment(s) for stock repurchases and/or sales, or similar events, made between the effective date and the testing date; and (c) three times the average of the

[23] Pls.' SUMF, ¶¶ 35-36; Defs.' Resp. to Pls.' SUMF, ¶¶ 35-36; Raybon Dep. Ex. 8 (Amended Employment Agreement).
[24] Pls.' SUMF, ¶ 38; Defs.' Resp. to Pls.' SUMF, ¶ 38; Raybon Dep. Ex. 8 (Amended Employment Agreement).
[25] Pls.' SUMF, ¶ 39; Defs.' Resp. to Pls.' SUMF, ¶ 39; Raybon Dep. Ex. 8 (Amended Employment Agreement).
[26] Pls.' SUMF, ¶ 41; Defs.' Resp. to Pls.' SUMF, ¶ 41; Raybon Dep. Ex. 8 (Amended Employment Agreement).

trailing three fiscal years pre-tax earnings, excluding any extraordinary adjustments made to alter taxable earnings.[27]

Ultimately disagreements arose between Raybon and Defendants. Plaintiffs claim Defendants were "threatened" by Raybon's business strategies and his "constant questioning of CNH and Capital's business ethics and overreaching attempts to control AIMTrac, its shareholder base, and its capital financing options, in addition to the fact that [Raybon] and other [AIMTrac employees] consistently advised CNH of issues with its cotton picker line of equipment."[28]

Additionally, as discussed *infra* in Part I.E, Raybon's incentive compensation plan became a point of dispute between the parties, with Defendants ultimately requiring that the plan be prematurely paid out and, thus, eliminated before Plaintiffs' stock transfer proposals would be considered. Indeed, Plaintiffs allege Defendants devised a plan to refuse their proposals and imposed the payout (among other terms, some of which was unique to Raybon) as a condition precedent to any changes of ownership with the "hop[e]" that Raybon would step down as CEO.[29] On or about August 1, 2014, AIMTrac executed a payout of the plan,[30] and Raybon eventually resigned as AIMTrac's President and CEO on February 24, 2015.[31]

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27 Pls.' SUMF, ¶ 42; Defs.' Resp. to Pls.' SUMF, ¶ 42; Raybon Dep. Ex. 8 (Amended Employment Agreement).

28 *Id.*, ¶¶ 63-64.

29 Pls.' SUMF, ¶¶ 70-73; Defs.' Resp. to Pls.' SUMF, ¶¶ 70-73; Wright Dep., Ex. 22 (June 23-26, 2014 email thread) ("…My notes state that we would help [AIMTrac] look for a CEO and that we think Robbie is a good CFO. I agree. What if he does not step down or how do we show our support to the board for a CEO search so that they do not go overboard again trying to retain Robbie as CEO/CFO? We cannot force him to step down. We are hoping he will do that as a result of our decision to decline his proposal. . . ."); *see also* Kelley Dep., Ex. 59, p. 9 (Transcript of June 1, 2015 telephone call from Jim Walker and Melinda Griffin to Brian Kelley) ("And come to find out that building up the balance sheet, building up the value, well, it was really positive for one individual in the whole organization, and we - - and the - - certainly the - - the sales in the business. So we said, look, we appreciate that and we - - we don't take kindly to it. *We're going to buy Robbie out. We want him out of the business.*") (emphasis added).

30 Pls.' SUMF, ¶ 87; Defs.' Resp. to Pls.' SUMF, ¶ 87; Raybon Dep. Ex. 54 (Raybon August 1, 2014 email).

31 Pls.' SUMF, ¶ 92; Defs.' Resp. to Pls.' SUMF, ¶ 92; Raybon Dep. Ex. 26 (Raybon February 24, 2015 resignation letter). Plaintiffs allege the "[e]arly elimination of the incentive compensation plan that had been agreed upon between Plaintiff Raybon and AIMTrac, combined with the repeated rejection of proposals by Raybon and AIMTrac for him to be issued stock options in the company, effectively resulted in the premature termination of Plaintiff Raybon's employment contract and Raybon's constructive discharge by CNH." Third Am. Verified Compl., ¶ 174. *See* Raybon Aff., ¶¶ 2-15.

D. Performance Under the Sales Agreement

During its first several years of operation, AIMTrac's sales grew steadily. In its first fiscal year, it generated net sales of approximately $21,000,000 and had total stockholder equity or book value of approximately $4,500,000.[32] By the end of AIMTrac's second fiscal year (September 30, 2011), AIMTrac had net sales of over $65,000,000.[33] During its 2012 fiscal year (September 30, 2012), AIMTrac's net sales were over $83,000,000 and its gross profits were over $8,900,000.[34] By the end of its 2013 fiscal year (September 10, 2013), AIMTrac's annual sales revenue exceeded $99,000,000 and its post-audited financial statements indicated the company's book value exceeded $6,600,000.[35]

Nevertheless, Defendants counter that AIMTrac's financial status reflected substantial support from Defendant CNH, including $66,750,000 in financial assistance from 2012 to 2015.[36] Defendants assert that, even with this considerable support, AIMTrac failed to mature into a self-sustaining dealership.[37] They point to AIMTrac's failure to reach "absorption" (enough profits

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[32] Pls.' SUMF, ¶ 27; Defs.' Resp. to Pls.' SUMF, ¶ 27.

[33] Pls.' SUMF, ¶ 28; Defs.' Resp. to Pls.' SUMF, ¶ 28.

[34] Pls.' SUMF, ¶ 34; Defs.' Resp. to Pls.' SUMF, ¶ 34.

[35] Pls.' SUMF, ¶ 45; Defs.' Resp. to Pls.' SUMF, ¶ 45. On July 23, 2013, private equity firm Everwatch Capital ("Everwatch") submitted a non-binding letter of intent, proposing to invest $8,000,000 for 60% ownership in AIMTrac, reflecting an overall valuation of approximately $13,300,000. Pls.' SUMF, ¶¶ 89-90; Defs.' Resp. to Pls.' SUMF, ¶¶ 89-90; Everwatch 30(b)(6)/Webb Depo, Ex. 3 (July 23, 2013 letter of interest). On August 7, 2014, NGP Agribusiness Follow-On Fund, L.P. ("NGP") submitted a "Non-Binding Indication of Interest" under which it indicated its interest to purchase all of AIMTrac's assets and liabilities for $9,500,000, presuming a book value of $10,455,024 not including goodwill. Pls.' SUMF, ¶ 91; Defs.' Resp. to Pls.' SUMF, ¶ 91; Greer Dep. Ex. 30 (NGP Indication of Interest). The parties ultimately did not proceed with either transaction. *See infra* note 78.

[36] Defs.' Resp. to Pls.' SUMF, ¶¶ 27, 28, 34, 45; Defs.' SUMF, ¶ 21; Pls.' Resp. to Defs.' SUMF, ¶ 21. *See* Winter Aff. ¶¶ 5-8; *see also* Raybon Dep. Ex. 56 (Raybon email dated September 10, 2014) ("I understand Case/CNH Capital's position and I think it's prudent to figure out how we can help as we are still highly dependent on them for survival…"); Walker Aff. (June 5, 2019), ¶¶ 14-16 (describing the financial support CNH provided AIMTrac); Griffin Aff. (June 4, 2019) ("Mr. Walker had been fully supportive of AIMTrac since it was founded in 2010, including by approving tens of millions of dollars of financial support to AIMTrac. In fact, during 2014 alone, CNH had provided AIMTrac in excess of $28 million in support using promotional programs, incentive payments, and discounts, such as the Georgia Keys program. Even with this financial backing from Case IH, AIMTrac earned less than $4.6 million in gross profit that year.").

[37] Defendants' Consolidated Opposition to Plaintiffs' Motions for Partial Summary Judgment ("Defs.' Con. Opp. To Pls.' MPSJ"), p. 7.

from sales of parts and service to cover the costs of operating the dealership) and its reliance on one-year lease transactions.[38] According to Defendants, AIMTrac's failure to assure that older Case IH equipment remained in the field, in turn, meant that AIMTrac did not develop the necessary scale of its parts and service business which allegedly has higher margins and provides a more consistent stream of revenue and profit.[39] Defendants blame AIMTrac's shortage of capital and limited cash flow as some of the reasons it failed an audit by Capital and was placed in "special assets status," a category used for dealerships presenting financial risk to Capital.[40] This became of particular concern entering 2015, when commodity prices fell, farmers' profits shrank, and the agricultural industry entered a down period.[41]

E. Proposed Stock Transactions

Around the fall of 2013, following his resignation as President and CEO, Kelley identified a separate investment opportunity for which he needed immediate cash. In addition, since Kelley was no longer actively involved in AIMTrac's day-to-day affairs, the remaining AIMTrac shareholders "desired to re-purchase the 33,000 shares held by AT Legal in order to re-align the shareholder base with those who were actively managing and investing in AIMTrac's long-term future."[42] Thus, beginning in late 2013, AIMTrac submitted various proposals to CNH seeking approval for stock transactions that would realign AIMTrac's ownership through the purchase of

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38 Walker Aff. (June 5, 2019), ¶¶ 17-19.

39 Walker Aff. (June 5, 2019), ¶¶ 20-24.

40 Waterworth Dep. p. 141. *See* Defs.' SUMF, ¶¶ 25-28; *compare* Pls.' Resp. to Defs.' SUMF, ¶¶ 25-28.

41 Kelley Dep. Ex. 52 (January 2, 2015 email from Raybon) (describing, *inter alia*, certain economic "challenges" and predicting farmers would temper their purchases and that AIMTrac would "be down 30% to 40% [in 2015]"); Weber Dep., pp. 110-11.

42 Pls.' SUMF, ¶ 44; Defs.' Resp. to Pls.' SUMF, ¶ 44.

stock held by AT Legal through a combination of, *e.g.*, CNH financing,[43] seller financing, and/or a payout of Raybon's incentive payment plan, among other terms.[44]

The parties, however, were unable to reach complete agreement on any proposal and strongly dispute, *inter alia*: whether "good faith consideration" was given to AIMTrac's proposals as required under the Sales Agreement; the parties' respective responses and conditions placed on further consideration/approval of AIMTrac's proposals; CNH's insistence that before considering any ownership changes AIMTrac had to pay out and thus eliminate Raybon's incentive compensation plan; and whether the proposed transactions constituted a "substantial change in the shareholders" of AIMTrac, among other areas of factual dispute.[45] In particular, Plaintiffs allege Defendants violated Georgia law by requiring—in practice and/or by contract—that any and all ownership changes be approved by CNH's Dealer Review Board ("DRB") and Capital.[46] Further, Plaintiffs assert Defendants breached the Sales Agreement by failing to give "good faith consideration" to three separate proposed transactions involving AIMTrac's ownership made in May 2014, July 2014, and May 2015 (collectively the "Three Proposed Transactions"), as summarized below.

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[43] *See infra* note 78.

[44] *See, e.g.*, Pls.' SUMF, ¶¶ 46 (December 2013 proposal), 47 (January 2014 proposal), 49-50 (February 2014 proposal), 54 (March 2014 proposal), 58-60 (May 2014 proposal), 79-80 (July 2014 proposal), 100-110 (May 2015 proposal); Pls.' Resp. to Defs.' SUMF, ¶¶ 26-52. *Compare* Defs.' Resp. to Pls.' SUMF, ¶¶ 46 (December 2013 proposal), 47 (January 2014 proposal), 49-50 (February 2014 proposal), 54 (March 2014 proposal), 58-60 (May 2014 proposal), 79-80 (July 2014 proposal), 100-110 (May 2015 proposal); Defs.' SUMF, ¶¶ 26-52.

[45] *See, e.g.*, Pls.' SUMF, ¶¶ 48, 51-53, 55-57, 62-78, 82-86, 102-106, 110-111, 116-117; *compare* Defs.' Resp. to Pls.' SUMF, ¶¶ 48, 51-53, 55-57, 62-78, 82-86, 102-106, 110-111, 116-117.

[46] Pls.' SUMF, ¶¶ 24, 26; *compare* Defs.' Resp. to Pls.' SUMF, ¶¶ 24, 26. The Retail Financing Agreement and Wholesale Financing Agreement and Security Agreement AIMTrac executed with Capital deemed an unapproved "change of control" of AIMTrac to be an event of default. Kelley Dep. Ex. 4 (Capital Retail Financial Agreement) at ¶ 13(b)(viii), Ex. 5 (Capital Wholesale Financing and Security Agreement) at ¶ 11(a)(xii). The Loan Agreement AIMTrac signed with Capital prohibited any transaction "not in the ordinary course of business," and prohibited any cash "distribution to shareholders, member or other equity holders" without the prior written consent of Capital. Kelley Dep. Ex. 6 (Capital Loan Agreement) at ¶6.1B(1)(c)(v), 6.1B(4).

1. May 2014 Proposal

As described by Plaintiffs, on May 16, 2014, AIMTrac's Board of Directors[47] unanimously approved the following transaction: Raybon would be issued an option to buy 17,000 shares of AIMTrac stock; Raybon would not be required to provide a personal guaranty; AIMTrac would prematurely pay him approximately $1,000,000 pursuant to his incentive compensation package, leaving cash available for Raybon to execute the stock option; and AIMTrac and Kelley, individually, would collectively purchase the 33,000 shares of stock held by AT Legal for $1,800,000 ("May 2014 Proposal").[48] That same day the proposed transaction was submitted to CNH in writing for approval.[49]

CNH ultimately did not approve the proposal as submitted, preferring instead for AIMTrac to "take a step by step approach in regards to the proposed ownership change."[50] Among other issues raised, CNH wanted AIMTrac "to come to a resolution of [Raybon's] employment agreement prior to the consideration of any proposed ownership changes involving [AT Legal] and [Kelley]" and indicated that "[o]nce the 'contingent liability' of [Raybon's] employment agreement has been eliminated [CNH] will be able to more clearly review a potential change in ownership."[51]

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47 At the time of the May 2014 Proposal, the AIMTrac Board included: William Greer, Eugene Marshall, Randy Anderson, Scott Anderson, Robert Raybon, Jim Gatewood, Brian Kelley, and Bob Sternenberg. Pl's SUMF, ¶ 61; Defs.' Resp. to Pls.' SUMF, ¶ 61.

48 Pls.' SUMF, ¶¶ 58-61; Defs.' Resp. to Pls.' SUMF, ¶¶ 58-61.

49 Spillars Dep. Ex. 22 (May 2, 2014 AIMTrac proposal).

50 Pls.' SUMF, ¶¶ 62-73; *compare* Defs.' Resp. to Pls.' SUMF, ¶¶ 62-73. *See* Spillars Dep. Ex. 36.

51 Spillars Dep. Ex. 36 (Spillars' June 30, 2014 response letter).

2. July 2014 Proposal

After previous proposals were rejected (whether in whole or in part) by CNH, on July 8, 2014, AIMTrac's Board of Directors[52] unanimously approved the following transaction: the requirement for termination and/or resignation to trigger the payment of Raybon's incentive plan as set forth in his Amended Employment Agreement would be waived; AIMTrac would pay Raybon the incentive compensation as calculated at that time, which was $1,010,000, with 50% payable immediately and 50% payable prior to the closing of a private equity/financial transaction or on February 28, 2015; AIMTrac would issue an option to Raybon to purchase 15,000 shares of AIMTrac stock in the event of a consummated deal with a financial partner, such that the proceeds would be reinvested into AIMTrac; AIMTrac would repurchase 25,750 shares from AT Legal for $1,450,000; Kelley would be allowed to individually purchase the remaining AIMTrac shares held by AT Legal for $400,000; and Kelley would be removed from all Capital personal guarantees ("July 2014 Proposal").[53] On July 9, 2014, the foregoing proposal was submitted in writing to CNH.[54]

However, CNH did not approve the proposal, again requiring that Raybon's compensation package be removed and a commitment that no similar agreements were in place, among other issues raised.[55] In a subsequent email, Walker demanded that Raybon's incentive compensation package be paid out "immediately and before any discussions…on equity investors" and indicated that CNH would not accept any fourth quarter lease orders until the incentive package was paid out.[56]

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[52] At the time of the July 2014 Proposal, AIMTrac's Board was still comprised of the same eight members: William Greer, Eugene Marshall, Randy Anderson, Scott Anderson, Robert Raybon, Jim Gatewood, Brian Kelley, and Bob Sternenberg. Pls.' SUMF, ¶ 81; Defs.' Resp. to Pls.' SUMF, ¶ 81.

[53] Pls.' SUMF, ¶¶ 79-80; Defs.' Resp. to Pls.' SUMF, ¶¶ 79-80.

[54] Spillars Dep. Ex. 37 (July 9, 2014 AIMTrac proposal).

[55] Wright Dep. Ex. 26 (Walker July 24, 2014 response letter).

[56] Walker Dep. Ex. 23 (Walker July 31, 2014 email).

3. May 2015 Proposal

On or about August 1, 2014, AIMTrac's Board of Directors executed a cash payout of Raybon's incentive compensation package.[57] On February 24, 2015, Raybon resigned as President and CEO of AIMTrac.[58] Following Raybon's resignation, Bill Greer became the President and CEO of AIMTrac as well as the Chairman of its Board of Directors, and Carver was hired as its Vice President of Sales.[59]

Notwithstanding Raybon's resignation, Gatewood Holdings and AT Legal requested Raybon's assistance in pursuing the sale of their respective interests in AIMTrac.[60] Ultimately, by May 6, 2015, AIMTrac's shareholders reached an agreement for the purchase and sale of the 51,000 shares held by AT Legal, Crisp Investments,[61] and Gatewood Holdings.[62] Specifically, the Minority Shareholders would purchase AT Legal's 33,000 shares for $2,555,882 and Gatewood Holdings' 18,000 shares for $1,394,118,[63] for a total purchase price of $3,950,000, subject to the transaction closing by June 19, 2015 ("May 2015 Proposal").[64, 65]

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57 Pls.' SUMF, ¶ 87; Defs.' Resp. to Pls.' SUMF, ¶ 87; Raybon Dep. Ex. 54 (Raybon August 1, 2014 email).

58 Pls.' SUMF, ¶ 92; Defs.' Resp. to Pls.' SUMF, ¶ 92; Raybon Dep. Ex. 26 (Raybon February 24, 2015 resignation letter). Plaintiffs allege the "[e]arly elimination of the incentive compensation plan that had been agreed upon between Plaintiff Raybon and AIMTrac, combined with the repeated rejection of proposals by Raybon and AIMTrac for him to be issued stock options in the company, effectively resulted in the premature termination of Plaintiff Raybon's employment contract and Raybon's constructive discharge by CNH." Third Am. Verified Compl., ¶ 174.

59 Pls.' SUMF, ¶ 93; Defs.' Resp. to Pls.' SUMF, ¶ 93. *See supra* note 4.

60 Pls.' SUMF, ¶ 95; Defs.' Resp. to Pls.' SUMF, ¶ 95.

61 *See supra* note 11.

62 Pls.' SUMF, ¶ 100; Defs.' Resp. to Pls.' SUMF, ¶ 100.

63 This proposal was contingent on Crisp Investment transferring its shares to Gatewood Holdings. *See supra* note 11.

64 Pls.' SUMF, ¶¶ 104, 107-109; Defs.' Resp. to Pls.' SUMF, ¶¶ 104, 107-109; Greer Dep. Ex. 35 (Greer May 11, 2015 email with Raybon May 11, 2015 letter attached). The price would increase by $50,000 for every two-week period of delay beyond June 19, 2015, with total maximum proceeds not to exceed $4,100,000. *Id.*

65 At the time the May 2015 Proposal was submitted for approval, the AIMTrac Board consisted of eight members: William Greer, Eugene Marshall, Randy Anderson, Scott Anderson, Jim Gatewood, Brian Kelley, Richard Carver, and Bob Sternenberg. However, on May 11, 2015 hours after Raybon formally submitted the May 2015 Proposal to CNH, Raybon, Kelley, and Gatewood exchanged emails referencing their desire to "push for the changing of the board structure." Gatewood Dep. Ex. 14. Subsequently, on May 22, 2015, the board was reduced from eight members to five members: William Greer, Randy Anderson, Jim Gatewood, Brian Kelley, Bob Sternenberg. Pls.' SUMF, ¶¶ 113-114; Defs.' Resp. to Pls.' SUMF, ¶¶ 113-114.

However, CNH instructed that AIMTrac should obtain an "independent" third-party valuation before it would consider the proposal.[66] CNH recommend Dr. James Weber, among others, and he was selected to provide the valuation.[67] During the time that Dr. Weber was evaluating AIMTrac and preparing his valuation analysis, he communicated several times with representatives from both AIMTrac and CNH/Capital. Plaintiffs outline a timeline of communications from May 25, 2015 and June 2, 2015 and allege that, through those communications, Defendants "conspire[ed] with Dr. Weber to fraudulently undervalue the shares of AIMTrac and direct[ed] employees of [CNH and Capital] to communicate with and attempt to influence Dr. Weber during his valuation process."[68]

On June 6, 2015, Dr. Weber provided two separate valuations of AIMTrac using what he described as "two generally accepted valuation methods, i.e. capitalization of earnings and actual book value."[69] The first method, capitalization of earnings, derived a valuation of AIMTrac as of September 30, 2014 of $8,389,687, while the book value method derived a valuation of $7,738,404 as of the same date.[70] However, in a letter to Greer regarding the valuation, Dr. Weber also stated: "Although I was retained to provide you with a valuation, I will take this opportunity to proffer some consulting advice. I would not pay a penny more than [$5,000,000] for the entire business . . . Purchase 51% of the business for [$2,500,000], and not a penny more."[71] CNH accepted and

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66 Pls.' SUMF, ¶¶ 102-103; Defs.' Resp. to Pls.' SUMF, ¶¶ 102-103.

67 Pls.' SUMF, ¶¶ 104, 118; Defs.' Resp. to Pls.' SUMF, ¶¶ 104, 118; Weber Dep., Ex. 5 (Greer May 13, 2015 email to Dr. Weber).

68 Third Am. Verified Compl., ¶¶ 86-88, 224, 231-243. *See* Pls.' Resp. to Defs.' Mot. for Summ. J., pp. 14-17. *See, e.g.,* Weber Dep., Ex. 9 (May 28, 2015 email from Dr. Weber to Bill Greer) ("Had a very interesting conversation with Adam Wright this evening. Based on our talk, I will need to stay with my original valuation of approximately $6.3M. Anything higher than that will severely damage what little credibility I have with CIH. I'm confident that Wright/Walker and CNH Capital are looking at the same numbers I'm looking at and an inflated number is not going to pass the 'smell test.'").

69 Pls.' SUMF, ¶ 118; Defs.' Resp. to Pls.' SUMF, ¶ 118; Weber Dep., Ex. 11 (June 6, 2015 letter from Dr. Weber to Greer with Dr. Weber valuation and opinion regarding AIMTrac).

70 Pls.' SUMF, ¶ 118; Defs.' Resp. to Pls.' SUMF, ¶ 118.

71 Pls.' SUMF, ¶ 119; Defs.' Resp. to Pls.' SUMF, ¶ 119; Weber Dep., pp. 106-107, 191-192, Exs. 11, 12.

"adopted" this lower number and indicated it would only approve a $2,550,000 transaction for the combined 51,000 shares of AIMTrac stock held by AT Legal, Crisp Investments, and Gatewood Holdings, rather than the May 2015 proposal of $3,950,000.[72] Plaintiff contend that, as a result of Defendants' actions, including conspiring with Dr. Weber to undervalue AIMTrac, "Gatewood Holdings was forced to sell its shares for $900,000 rather than $1,394,118, and AT Legal's shares were sold for $1,650,000 rather than $2,555,882.[73]

F. Other Disputes

Relevant to and in the context of the parties' disputes regarding the Plaintiffs' proposed stock transfers, a number of other problems and disagreements arose concerning the incentive programs offered to AIMTrac and allegedly defective equipment CNH sold to and through AIMTrac, among other disputes.

1. Georgia Keys Program

Early in the parties' business relationship, CNH invited AIMTrac to participate in the Georgia Keys Program, an "unpublished" dealer incentive program that allowed AIMTrac to offer incentivized discounts on CNH equipment that it sold.[74] The program was allegedly promulgated for AIMTrac on behalf of Case IH by Defender Carver between November 2010 and February 2015.[75] As described by Plaintiffs, "[t]he program's zero interest loan program coupled with

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[72] Pls.' SUMF, ¶¶ 120-128; Defs.' Resp. to Pls.' SUMF, ¶¶ 120-128.

[73] Memorandum of Law in Support of AT Legal's and Gatewood Holdings' Motion for Partial Summary Judgment Related to CNH's Breach of Contract in Connection with Three Specific Transaction ("Pls' MPSJ on Breach of Contract Claim"), p. 17 n. 16; Memorandum of Law in Support of Plaintiffs' Motion for Partial Summary Judgment as to Liability Pursuant to O.C.G.A. §13-8-15(c)(8) in Connection with Three Specific Transactions ("Pls' MPSJ Regarding O.C.G.A. §13-8-15(c)(8)"), p. 19 n. 19.

[74] Third Am. Verified Compl., ¶ 55, Ex. D (Georgia Keys Program).

[75] *Id.*, ¶¶ 56, 61. The description of the Georgia Keys Program attached to Plaintiffs' Third Amended Verified Complaint indicates that the program would run from January 1, 2010 to December 21, 2014. *Id.*, Ex. D (Georgia Keys Program).

enhanced discounts permitted AIMTrac to accept trade-ins of other manufacturers products at higher values than other dealerships."[76]

However, Plaintiffs contend they later learned the Georgia Keys Program was exclusive to AIMTrac and was not offered to other dealers within CNH's network of dealerships, in violation of Georgia law.[77] Due to their potential exposure to liability for same, Defendants allegedly sought to keep the program secret and thus: rebuffed Plaintiffs' efforts to bring in outside investors[78]; orchestrated a stock sale to the Minority Shareholders; and leveraged the Georgia Keys Program (including decisions on whether to renew the program in 2014) to force the elimination of Raybon's incentive compensation plan and, ultimately, to cause his constructive discharge.[79]

2. One-year, Non-Recourse Leases

Disputes also arose regarding AIMTrac's increase in sales orders made pursuant to one-year lease agreements with customers between 2013 and 2014. As described by Plaintiffs, during this period, "sold retail ("SR") lease orders of equipment manufactured by CNH were financed by non-recourse leases, whereby at the end of a lease term when the leased equipment was returned, the residual value of the leased equipment was borne by Capital, rather than AIMTrac."[80] AIMTrac

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76 Third Am. Verified Compl., ¶ 55. *See* Defs.' SUMF, ¶ 21; Pls.' Resp. to Defs.' SUMF, ¶ 21.

77 Third Am. Verified Compl., ¶¶ 57-60.

78 For example, following receipt of Everwatch's July 23, 2013letter of intent, Walker allegedly offered AIMTrac a financing alternative through Capital ("Proposed Financing Agreement") consisting of "[$5,000,000 - $6,000,000] in subordinated debt, sub 10% cash interest, with an 8-year bullet" in exchange for 60% ownership of AIMTrac. Third Am. Verified Compl., ¶¶ 101-102. The funds would be used to fund AIMTrac's "working capital growth and continued market share and geographic expansion." *Id.*, ¶102. Plaintiffs allege that, in reliance on the Proposed Financing Agreement, AIMTrac ceased discussions with Everwatch; however, when AIMTrac proposed to use those proceeds to repurchase AT Legal's stock in 2013, CNH and Capital rejected the proposal and ultimately "reneged on [the] original offering and added additional terms just prior to the closing," including requiring that AIMTrac pledge all outstanding stock in order to close the Proposed Financing Agreement. *Id.*, ¶¶ 103-115. With respect to NGP's 2014 indication of interest, although NGP and Raybon requested a meeting with CNH's upper management to discuss the proposed transaction, CNH allegedly "never entertained the meeting." *Id.*, ¶ 203; Raybon Dep., pp. 280-282. *See supra* note 35.

79 Third Am. Verified Compl., ¶¶ 57, 62, 66, 124, 155, 324, 475, 513.

80 Third Am. Verified Compl., ¶¶ 64, 187. Defendants describe the one-year, non-recourse leases as follows: "To facilitate a lease transaction, AIMTrac would identify a potential lessee of the tractor, and then order the tractor at wholesale from Case IH. Capital would then execute lease documentation with the customer. In turn, AIMTrac would resell the tractor to Capital, thus making a profit on the sale. Capital would collect rental payments for its own

facilitated a number of such one-year leases. However, Plaintiffs allege that Defendants were ultimately threatened by AIMTrac's increase in sales under such lease agreement because, between 2013 and 2014, Capital "routinely overestimated the residential value of the lease orders that AIMTrac was making, thus exposing Capital to monetary losses caused by its failure to properly estimate the value of residuals."[81]

Plaintiffs claim that Defendants ultimately leveraged CNH's control over AIMTrac, including with respect to the proposed stock transfers, to force AIMTrac to accept a "revised marketing agreement" relating to lease transactions ("Remarketing Agreement").[82] Under the Remarketing Agreement, AIMTrac allegedly was required to accept approximately $20,000,000 of lease return liability from 80 previously non-recourse-leased tractors.[83] Plaintiffs assert CNH forced AIMTrac to accept this recourse liability prior to fulfilling orders and/or allowing orders to proceed.[84]

Defendants, however, contend that, in the fall of 2014, Capital was faced with 2013 leases that were expiring and leased tractors that were returning just as the agricultural equipment market was "softening."[85] Thus, Capital made changes to its *nationwide* leasing program, *prospectively* eliminating one-year leases and requiring all participant dealers to share liability for remarketing tractors when new leases expired.[86]

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account and, at the end of the lease, would take the used tractor back for remarketing. Capital, not AIMTrac, retained all risk that the used tractor returned after the lease expired might not sell or might sell at a loss." Defs.' Mot. for Summ. J. Br., pp. 5-6.

81 Third Am. Verified Compl., ¶ 64.

82 *Id*., ¶ 188.

83 *Id*., ¶¶ 186-188.

84 *Id*., ¶¶ 188-189. *See* Raybon Aff. ¶¶ 12-13; Greer Dep., pp. 111-117; Wright Dep., pp. 176-177, Ex. 24 (November 21, 2014 email from Eric Weaver with the "Q4'14 Magnum Lease Remarketing Agreement attached) ("The agreement with Aimtrac is signed on the 80 machines. Please allow the new contracts to go through.").

85 Defs.' SUMF, ¶ 54; *compare* Pls.'s Resp. to Defs.' SUMF, ¶ 54.

86 Defs.' SUMF, ¶ 55; *compare* Pls.'s Resp. to Defs.' SUMF, ¶ 55.

3. Allegedly Defective Equipment

Plaintiffs also allege CNH used AIMTrac to flood the market with defective Case IH equipment, namely a combined cotton picker and baler known as the Module Express.[87] CNH and Case IH representatives allegedly encouraged AIMTrac to sell the Module Express despite the fact that, throughout its production, the product had design defects (including problems with the power, hydraulic, module packing, and software systems) and had suffered from manufacturing process failures at the plant where the product is made and assembled.[88] Plaintiffs claim that as early as 2010 AIMTrac informed Defendants of issues regarding the quality of CNH's cotton pickers, and "customer complaints and design- and manufacturing-related defects continued to impact AIMTrac's customer base and goodwill in 2013 and beyond."[89] CNH's Case-IH branded defective equipment lines allegedly "cost AIMTrac and its customers millions of dollars," harmed AIMTrac's goodwill as well as the reputation and goodwill of Raybon, and ultimately adversely impacted the value of the stock held by Gatewood Holdings, Crisp Investments, and AT Legal and the value of Raybon's stock option and incentive compensation plan.[90]

G. Pending Claims

As summarized above and further pled in their Third Amended Verified Complaint, Plaintiffs accuse Defendants of engaging in a series of "calculated schemes" against them in order to, *inter alia*: force the premature payout of Raybon's incentive compensation plan and ultimately force Raybon out of AIMTrac, resulting in his constructive discharge; force Gatewood Holdings and AT Legal to sell their shares at a manipulated sales price to AIMTrac's Minority Shareholders

87 Third Am. Verified Compl., ¶¶ 69-70.
88 *Id.*
89 *Id.*, ¶¶ 73-76.
90 *Id.*, ¶ 81.

who allegedly were less sophisticated and who Defendants could more easily manipulate; and continue to exercise unlawful dominion and control over AIMTrac and its operations.

Plaintiffs assert the following causes of action in this litigation: (1) violations of the Regulation of Agricultural Equipment Manufacturers, Distributors, and Dealers Act, O.C.G.A. §§ 13-8-11 to 13-8-25 ("Agricultural Equipment Act" or "Act") (asserted by all Plaintiffs against each Defendant); (2) breach of contract (asserted by Plaintiffs Gatewood Holdings and AT Legal against Defendant CNH); (3) breach of the covenant of good faith and fair dealing (asserted by Plaintiffs Gatewood Holdings and AT Legal against Defendant CNH); (4) violations of the Georgia Racketeer Influenced and Corrupt Organizations ("RICO") Act, O.C.G.A. § 16-14-4 *et seq.* (asserted by all Plaintiffs against each Defendant); (5) conspiracy to violate the Georgia RICO Act (asserted by all Plaintiffs against each Defendant); (6) entitlement to punitive damages (asserted by all Plaintiffs against each Defendant); (7) attorneys' fees and expenses (asserted by all Plaintiffs against each Defendant); and (8) pre and post judgment interest.

II. CROSS MOTIONS FOR SUMMARY JUDGMENT

A. Standard on Summary Judgment

Summary judgment should be granted when the movant shows that "there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." O.C.G.A. § 9-11-56(c). If the moving party meets its initial burden of proof, the nonmoving party cannot rest on mere allegations or denials in its pleadings,[91] but his response, by affidavits or as otherwise provided in this Code section, must set forth specific facts showing that there is a genuine issue for trial. O.C.G.A. § 9-11-56(e).

[91] Nevertheless, "[v]erified pleadings have been held to be equivalent to a supporting or opposing affidavit for purposes of raising an issue of fact on summary judgment." *Weekes v. Nationwide Gen. Ins. Co.*, 232 Ga. App. 144, 148, 500 S.E.2d 620, 624 (1998) (citing *Harrison v. Harrison*, 159 Ga. App. 578, 284 S.E.2d 83 (1981)).

A genuine issue of material fact exists where the facts in the record create a conflict in the evidence as to a material issue that could affect the outcome of the case under the governing law. *See Shell v. Tidewater Fin. Co.*, 318 Ga. App. 69, 69, 733 S.E.2d 375 (2012); *Johnson v. Unified Residential Dev. Co., Inc.*, 285 Ga. App. 852, 857, 648 S.E.2d 163, 168 (2002). When ruling on a motion for summary judgment, the nonmovant should be given the benefit of all reasonable doubt, and the court should construe the evidence and all inferences and conclusions therefrom most favorably toward the party opposing the motion. *ARP v. United Cmty. Bank*, 272 Ga. App. 331, 331, 612 S.E.2d 534, 536 (2016); *Smith v. Tenet Health Sys. Spalding, Inc.*, 327 Ga. App. 878, 879, 761 S.E.2d 409, 411 (2014). *See Word v. Henderson*, 220 Ga. 846, 848, 142 S.E.2d 244, 246 (1965) ("Where the evidence on motion for summary judgment is ambiguous or doubtful, the party opposing the motion must be given the benefit of all reasonable doubts and of all favorable inferences and such evidence construed most favorably to the opposing party opposing the motion." (citation omitted)).[92]

[92] The Court further notes that, here, both sides have submitted affidavits that could be construed as conflicting with deposition testimony. "The rule in Georgia is that the testimony of a party who offers himself as a witness in his own behalf at trial is to be construed most strongly against him when it is self-contradictory, vague or equivocal." *Prophecy Corp. v. Charles Rossignol, Inc.*, 256 Ga. 27, 28, 343 S.E.2d 680, 681 (1986) (citation and punctuation omitted). "For purposes of the *Prophecy* rule, testimony is contradictory if one part of the testimony asserts or expresses the opposite of another part of the testimony. However, contradictory testimony is not to be construed against a party if she offers a reasonable explanation for the contradiction." *State Farm Mut. Auto. Ins. Co. v. Fabrizio*, 344 Ga. App. 264, 266, 809 S.E.2d 496, 497 (2018) (citation and punctuation omitted). However, this "is a rule for construing testimony separate from those rules allocating burdens of proof at trial and on motion for summary judgment. That the rule of summary judgment places on the movant the burden of demonstrating that there are no genuine issues of fact and that [she] is entitled to judgment as a matter of law while providing that the party opposing the motion is entitled to all favorable inferences from the evidence does not suspend the application of this rule for construing testimony to summary judgment proceedings." *Id.* at 266-267 (citation omitted). Moreover, "*Prophecy* and its progeny are applicable only to the testimony of a party to the litigation." *Travick v. Lee*, 278 Ga. App. 823, 826, 630 S.E.2d 99, 102 (2006) (citing *Thompson v. Ezor*, 272 Ga. 849, 852–853(2), 536 S.E.2d 749 (2000)).

B. Plaintiffs' Motion for Partial Summary Judgment Related to CNH's Breach of Contract in Connection with Three Specific Transactions

Plaintiffs AT Legal and Gatewood Holdings have asserted claims against CNH for breach of contract and breach of the implied duty of good faith and fair dealing, alleging CNH violated §12 of the Sales Agreement by failing to give "good faith consideration" to AIMTrac's proposals to change its ownership pursuant to a stock sale, stock option, or stock transfer.[93] In this motion, AT Legal and Gatewood Holdings move for summary judgment on these claims with respect to the Three Proposed Transactions (the May 2014 Proposal, June 2014 Proposal, and May 2015 Proposal), [94] asserting CNH failed to give any consideration to these proposals, much less good faith consideration as required under the Sales Agreement.

"The elements for a breach of contract claim in Georgia are the (1) breach and the (2) resultant damages (3) to the party who has the right to complain about the contract being broken." *SAWS at Seven Hills, LLC v. Forestar Realty, Inc.*, 342 Ga. App. 780, 784, 805 S.E.2d 270, 274 (2017) (*quoting Dewrell Sacks, LLP v. Chicago Title Ins. Co.*, 324 Ga. App. 219, 223 (2) (a), 749 S.E.2d 802 (2013)). Further, "[e]very contract implies a covenant of good faith and fair dealing in the contract's performance and enforcement." *Onbrand Media v. Codex Consulting, Inc.*, 301 Ga. App. 141, 147, 687 S.E.2d 168, 174 (2009) (*quoting Myung Sung Presbyterian Church v. North American Assn. etc.*, 291 Ga. App. 808, 810(2), 662 S.E.2d 745 (2008)). Importantly, "[t]he implied covenant modifies and becomes a part of the provisions of the contract, but the covenant cannot be breached apart from the contract provisions it modifies and therefore cannot provide an independent basis for liability." *Id.*

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93 *See* Third Am. Verified Compl., ¶¶ 438-485.

94 The Court previously ruled that Defendants Gatewood Holdings and AT Legal are third party beneficiaries of §12 of the Sales Agreement. *See* Order on Defendants' Motion to Dismiss, pp. 21-22.

Here, Plaintiff argue CNH breached the Sales Agreement and violated their duty of good faith and fair dealing by failing to give any consideration to the Three Proposed Transactions.[95] Plaintiffs point to record evidence that CNH required that all proposed ownership changes of AIMTrac—even those that did not impact AIMTrac's business operations—be submitted to the Case IH Dealer Review Board ("DRB"), which had the power to approve or reject such proposals, as well as to Capital.[96] For example, Melinda Griffin, Case IH North America's Director of Network Development and a member of the DRB between January 2014 and July 2015, testified:

> Q: All right. And then the dealer review board…let me just make sure we're on the same page. This is a board that has the primary function, am I correct, of reviewing and approving or rejecting ownership changes?
>
> A: Yes.
>
> Q: Okay.
>
> A: That's one of the things that we review.
>
> Q: All right. And what else do you review?
>
> A: Mergers and acquisitions. We review if a dealer wants to add a location or move a location, close a location. They want to add a product line, we review that as well…Succession plans.
>
> Q: And every single one of those business decisions has to be submitted for review and approval by the dealer review board.
>
> A: Yes. . . .
>
> Q: Say there's a proposed ownership change of 25 percent of a dealer's stock. They're supposed to submit that for review and approval to the dealer review board; right?
>
> A: Yes. . . .
>
> Q: And if they either don't submit it for approval or they do, and they go against whatever the recommendation or the final decision is from the

95 Pls' MPSJ on Breach of Contract Claim, pp. 2, 25.
96 Pls' MPSJ on Breach of Contract Claim, pp. 5-6, 23.

> review board, isn't that grounds for terminating the relationship between Case IH and the brand - - I mean and the dealer?
>
> A: We may decide to do that. . . .
>
> Q: Okay. All right. But would you agree, Ms. Griffin, that this paragraph twelve [of the Sales Agreement] served to prevent or attempt to prevent AIMTrac and its owners from selling or transferring their interest in a company without the approval of the Case IH dealer review board.
>
> A: Yes.

Griffin Dep., pp. 14, 48-50. *See also* Waterworth Dep., pp. 52-53 ("Q: Okay. And what is [DRB]? A: My knowledge is anytime there's any change or discussion over a dealer, the owner, whether it be a minority or majority shareholder difference or anytime they have a change in products that they carry, it goes first to this Case IH Dealer Review Board. Q: Is it your understanding that all ownership changes, even if it doesn't involve a majority control change, have to go before the [DRB]? A: Yes."); Wright Dep., pp. 31-32 ("Q: All right. And just for the record, what - - what is [the DRB], and what does it do to the best of your knowledge? A: It reviews major changes within our dealer network organizations by various people and makes sure it's in the best interest of - - of Case IH from a variety of perspectives. Q: All right. And we've heard that the [DRB], one of its - - one of its major functions is to look at any proposed changes in the shareholder base of a - - of a dealership such as AIMTrac; is that right? A: Yes."); Spillars Dep., pp. 33, 43-44 ("Q: Okay. And what is [the DRB]? If you can just explain it in your own words. A: It's a review, it's a committee, if you will, that makes a determination on whether dealer changes, be it ownership, location, number of stores, is acceptable to Case IH. . . . Q: . . . Are we on the same page that you were trained that any change, regardless of how substantial, in the ownership or the stock of a corporation had to be submitted for review and approval to CNH [C]apital and Case IH? A: Yes.").

Plaintiffs also reference record evidence that it was the practice of the DRB to review a PowerPoint presentation reflecting any proposed ownership transactions submitted in writing by a dealer. *See, e.g.,* Griffin Dep., p. 260 ("Q: Okay. And I'm correct, aren't I, that the - - that the $3.95 million agreement, that that proposal, it was - - that number was never actually reviewed and voted upon ever by the [DRB]? A: I don't believe so. I believe - - yeah, I don't believe so. Q: And if it had been, you would expect there to be a Power Point discussing the 3.95 million [dollar deal] - - A: Yes."); Wright Dep., p. 74 ("Q: . . . Am I correct that whenever there was a [DRB] meeting, whether it was an in-person or a call-in meeting, that the standard practice was there would be an accompanying PowerPoint presentation that would help guide the meeting? A: Yes."); Spillars Dep., pp. 35-36 ("Q. Okay. And so for any and all ownership changes or stock sales or anything like that that were actually considered by the [DRB], would you expect there to be an accompanying Power Point presentation? A. If it was presented to the [DRB], there was a presentation made, correct. Q. So if there was no presentation on a particular matter, it would be fair to assume that it wasn't considered by the [DRB]? . . . A. Yes. I would say that's generally correct.").

With respect to the May 2014 Proposal, Plaintiffs assert there is no record evidence that the DRB considered or voted on the proposal following a DBR-prepared PowerPoint presentation, and further assert CNH refused to consider any proposed ownership changes until Raybon's incentive compensation package was resolved.[97] Similarly, regarding the July 2014 Proposal, Plaintiffs allege there is no evidence that the DBR considered the proposal or prepared a PowerPoint presentation related to the same.[98] They also point to correspondence from Walker in

[97] Pls' MPSJ on Breach of Contract Claim, pp. 10, 25-26. *See* Pls' SUMF, ¶¶ 63-64; Spillars Dep. Ex. 36 (Spillars' June 30, 2014 response letter); Wright Dep., p. 165.

[98] Pls' SUMF, ¶¶ 82-84.

response to the proposal emphasizing CNH's "expectation" that Raybon would first "immediately execute and remove [his] severance compensation package and commit that no other agreements of th[at] type are in place."[99]

Finally, with respect to the May 2015 Proposal, Plaintiffs note that immediately upon learning of the proposal, which had been approved by the AIMTrac Board, Adam Wright (CNH's Regional Sales Director for the Southern Region) directed Greer (then the President and CEO of AIMTrac and Chairman of its Board) not to sign any documents memorializing the proposed transaction.[100] *See* Wright Dep., pp. 216-218; *id.*, Ex. 39 (Wright May 11, 2015 email) ("Like we said on Wednesday, do not sign anything."). Further, Greer was instructed that the Minority Shareholders had to obtain an independent third-party valuation before CNH and Capital would consider the proposal. *Id.*, pp. 213, 219-221; Griffin Dep., pp. 213, 221-226; *id.*, Ex. 34 ("Adam, Mike, and I met last week and we are in agreement that the other owners of AIMTRAC need to have the business valued by an independent party before agreeing to a price. We believe the current price they have negotiated is at least $2M over the current value because it is based on past revenue stream instead of projected venues. We had a call with Bill Greer last week and told him we want to review the independent valuation as part of the application process before any approval is given."). Moreover, Plaintiffs complain that, even though independent valuations were conducted that supported the May 2015 Proposal, there is no record evidence that the DRB ever considered or voted on the $3,950,000 proposal.[101]

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[99] Pls' MPSJ on Breach of Contract Claim, pp. 11-10, 25-26. *See* Pls' SUMF, ¶ 84; Wright Dep. Ex. 26 (Walker July 24, 2014 response letter).

[100] Pls' MPSJ on Breach of Contract Claim, pp. 13-15, 26-31.

[101] Pls' MPSJ on Breach of Contract Claim, pp. 15-17, 27-30. *See* Wright Dep., p. 276; Griffin Dep., p. 260; Waterworth Dep., pp. 55-56; Lawrence/CNH Dep., pp. 199-200.

Essentially Plaintiffs argue that Defendants' failure to prepare a PowerPoint presentation and to present their proposals to the DRB for a vote as well as the instruction that Raybon's compensation package should be eliminated before consideration would be given to such proposals establish as a matter of law that CNH failed to give "good faith consideration" to their proposals, constituting a breach of the Sales Agreement. Further, because Dr. Weber's valuation using a capitalization of earnings method ($8,389,687) and his valuation using an actual book value ($7,738,404) both supported the May 2105 Proposal (a $3,950,000 transaction for 51% of AIMTrac),[102] AT Legal and Gatewood Holdings urge CNH's failure to consider the $3,950,000 proposal was not in "good faith" as a matter of law. However, having considered the entire record and construing the evidence and all inferences and conclusions therefrom most favorably toward CNH as the non-moving party (*see ARP v. United Cmty. Bank*, 272 Ga. App. at 331; *Smith*, 327 Ga. App. 879), the Court finds questions of material fact regarding the consideration given to Plaintiffs' proposals preclude entry of judgment as a matter of law on AT Legal and Gatewood Holdings' breach of contract claims.

First, a jury question remains as to the role the DRB played when considering proposals such as those at issue here. The Sales Agreement on its face does not require a Power Point presentation or a formal vote by the DRB. Although Plaintiffs contend all proposed ownership changes had to be approved by the DRB, this allegation is disputed in the record. Defendants contend that "under company practice, *review and approval* by the DRB was required before any covered share transaction could be *consummated*, but CNH's practice was to convene the DRB only after preliminary review of a proposal determined that the proposal had sufficient merit to warrant formal presentation to the full DRB.[103] Regarding the DRB, Melinda Griffin testified:

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102 *See supra* Part I.E.3.

103 Defs.' Con. Opp. To Pls.' MPSJ, p. 2.

> Although the [Sales Agreement] requires CNH to give good faith consideration to dealership proposal, it does not require that each proposal be brought before the DRB for consideration. In fact, the [Sales Agreement] does not contain any provisions regarding the DRB…When a dealership submits a written proposal to Case IH, it begins a dialogue among Case IH, Capital, and the dealership concerning the details of the proposal, the effect the plan will have on the dealership's operations and financial stability, and the resources that might be necessary from Case IH or Capital to facilitate the requested activity….After the proposal has been vetted by Case IH, and there is agreement among Case IH, Capital, and, most always, the dealership, the DRB will vote on the proposal.

Griffin Aff. (June 4, 2019), ¶¶ 8-9, 11. Similarly, James Walker (former Vice President of Case IH North America), testified that not all proposals were subject to a vote by the DRB:

> CNH assembled a Dealer Review Board ("DRB") to formally approve dealership proposals. The DRB comprises several personnel from Case IH and Capital who meet periodically to approve activities by Case IH's network of dealers. These include among other activities, changes of ownership, new dealership applications, and facility changes or relocations. Although I was not a member of the DRB, I was aware or its process and activities, and several individuals on the DRB, including Melinda Griffin, reported directly to me and informed me about the DRB's activities…Although no change of control could be approved without DRB review, that does not mean that every proposal from a dealership required a vote by the DRB. In many circumstances, it was clear from the face of the proposal that the proposal was not sufficient for approval, CNH would discuss the proposal with the dealership, propose alternatives, seek additional information, or request an independent appraisal. During these discussions, dealerships often provided clarifications, amended the proposals, or withdrew the proposals altogether. Therefore, CNH often gave "good faith consideration" to the proposal as required by Section 12(a) of the [Sales Agreement] without convening a formal DRB review.

Walker Aff. (June 5, 2019), ¶¶ 12-13.

Moreover, Plaintiffs' motion ignores record evidence that CNH internally discussed and considered Plaintiffs' various proposals. With respect to the May 2014 Proposal, there is evidence that CNH officers (some of which were members of the DRB) exchanged emails in May 2014 discussing the pros and cons of the proposal (with some expressing concerns the transaction would, *e.g.,* increase AIMTrac's debt, decrease its available cash, and did not address concerns regarding

management), and several met in person with Raybon and Greer on June 18, 2014 to discuss the proposal and the valuation upon which it was based before formally responding on June 30, 2014.[104] Following the July 2014 proposal, CNH officers again internally discussed the proposal, including the financial strain it would pose and the need to verify the financial data used to calculate Raybon's payout, before responding.[105]

Likewise, with respect to the May 2015 Proposal, there is evidence that CNH officers discussed the proposal internally. In internal emails they expressed concerns: that the purchase price "still seem[ed] too high based on [their] "back of the napkin" assessment and thus they "recommended" that AIMTrac get an independent appraisal of the business; whether Capital would support the proposal; that AIMTrac would have to borrow money to fund the acquisition of Gatewood and Kelley's shares "put[ting] further pressure on cash flow"; and that no new equity would be coming into AIMTrac's "already levered business in a declining market environment."[106] As discussed in Part I.E.3 above, AIMTrac selected Dr. Weber to conduct an independent valuation and, based on Dr. Weber's opinion that he would not pay more than $5,000,000 for the entire dealership, CNH ultimately approved a $2,550,000 transaction to purchase the 51% ownership interest held by Gatewood Holdings and AT Legal.[107]

Thus, at least some consideration was given to Plaintiffs' Three Proposed Transactions. Given the foregoing and in light of the conflicting record evidence and factual disputes regarding the parties' ongoing discussions, responses, and conditions placed when reviewing and considering

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104 *See, e.g.*, Griffin Dep., Ex. 15 (May 28-29 email thread); Spillars Dep., Ex. 30 (May 29, 2014 email), Ex. 32 (VanVlaenderen's June 12, 2014 email and response letter), Ex. 34 (June 18-19 email thread), Ex. 36 (Spillars' June 30, 2014 response letter); Walker Aff. (June 5, 2019), ¶35.

105 *See, e.g.*, Griffin Dep., Ex. 23 (July 14, 2014 email thread); Wright Dep. Ex. 26 (Walker July 24, 2014 response letter); Walker Dep. Ex. 23 (Walker July 31, 2014 email); Walker Aff. (June 5, 2019), ¶37.

106 Waterworth Dep. Ex. 7 (VanVlaenderen May 21, 2015 email); Wright Dep. Ex. 40 (May 11-12, 2015 email thread); Griffin Dep., p. 62-63.

107 *See supra* Part I.E.3.

the proposals,[108] the issue whether CNH gave "good faith consideration" to the proposals as required under the Sales Agreement presents a jury question that cannot be decided by the Court as a matter of law. *See Doctors Hosp. of Augusta, LLC v. Alicea*, 332 Ga. App. 529, 541, 774 S.E.2d 114, 123–24 (2015), *aff'd* 299 Ga. 315, 788 S.E.2d 392 (2016) ("Ordinarily, good faith is a question for the jury based on a consideration of the facts and circumstances of the case." (citation omitted)); *Ginn v. Citizens & S. Nat. Bank*, 145 Ga. App. 175, 177, 243 S.E.2d 528, 530 (1978) ("Good faith . . . is always a question for the jury. Even though the party may swear he acted in good faith, the jury may decide he acted in bad faith from consideration of facts and circumstances in the case." (*quoting Hodges v. Youmans*, 129 Ga. App. 481, 200 S.E.2d 157 (1973))). *See, e.g.*, *City of Atlanta v. Hogan Constr. Grp., LLC*, 341 Ga. App. 620, 624, 801 S.E.2d 606, 610 (2017); *Capital Health Mgmt. Grp., Inc. v. Hartley*, 301 Ga. App. 812, 820, 689 S.E.2d 107, 113 (2009). *See also Shelnutt v. Mayor and Aldermen of the City of Savannah*, 333 Ga. App. 446, 453, 776 S.E.2d 650, 657 (2015) ("[I]n Georgia, [a] decision that is made for arbitrary or capricious reasons, is based on an improper pecuniary motive, or is predicated on dishonesty or illegality is not made in good faith." (*quoting Rigby v. Boatright*, 330 Ga. App. 181, 185, 767 S.E.2d 783, 787 (2014))). Thus, Plaintiffs AT Legal and Gatewood Holdings' Motion for Partial Summary Judgment Related to CNH's Breach of Contract in Connection with Three Specific Transactions is hereby DENIED.

C. Plaintiffs' Motion for Partial Summary Judgment as to Liability Pursuant to O.C.G.A. §13-8-15(c)(8)

Plaintiffs Raybon, AT Legal, and Gatewood Holdings also assert they are entitled to judgment as a matter of law with respect to their claim that Defendant CNH and its employees, including Defendants Carver and Walker, violated O.C.G.A. §§ 13-8-14 and 13-8-15(c)(8) of the

[108] *See supra* Part I.E.

Agricultural Equipment Act[109] through their actions to either prevent or attempt to prevent the Three Proposed Transactions.

A plaintiff seeking to recover damages under the Agricultural Equipment Act must establish that: (i) the defendant is subject to the Act; (ii) the defendant violated a provision of the Act; (iii) the plaintiff's "business or property" was injured, and (iv) that such injury was "by reason of" the violation. *See* O.C.G.A. §§ 13-8-12, 13-8-15, 13-8-18, 13-8-20. In construing the provisions of the Agricultural Equipment Act, the Court applies the rules of statutory construction:

> The cardinal rule of statutory construction requires th[e] Court to "look diligently for the intention of the General Assembly…" (O.C.G.A. § 1–3–1), and "the 'golden rule' of statutory construction…requires us to follow the literal language of the statute 'unless it produces contradiction, absurdity, or such an inconvenience as to insure that the legislature meant something else.'" (Citation and punctuation omitted.) *Telecom*USA v. Collins,* 260 Ga. 362, 363, 393 S.E.2d 235 (1990). Absent clear evidence that a contrary meaning was intended by the legislature, we assign words in a statute their ordinary, logical, and common meanings. *Glanton v. State,* 283 Ga. App. 232, 233, 641 S.E.2d 234 (2007). Where the language of a statute is capable of more than one meaning, we construe the statute so as to carry out the legislative intent. *Aldrich v. City of Lumber City,* 273 Ga. 461, 464, 542 S.E.2d 102 (2001).

Judicial Council of Georgia v. Brown & Gallo, LLC, 288 Ga. 294, 296–97, 702 S.E.2d 894, 897 (2010). *See U.S. Bank Nat. Ass'n v. Gordon*, 289 Ga. 12, 14–15, 709 S.E.2d 258, 261 (2011) ("Particular words of statutes are not interpreted in isolation; instead, courts must construe a statute to give sensible and intelligent effect to all of its provisions, . . . and must consider the statute in relation to other statutes of which it is part.") (citations and punctuation omitted)); *see also Willis v. City of Atlanta*, 285 Ga. 775, 776, 684 S.E.2d 271 (2009) ("[S]tatutes 'in pari materia,' i.e., statutes relating to the same subject matter, must be construed together." (citation omitted)).

[109] The legislative history of the Agricultural Equipment Act is summarized in the Court's Order on Defendants' Motion to Dismiss, entered on April 12, 2018. *Id.* at pp. 6-9.

Relevant here, O.C.G.A. §13-8-14 of the Agricultural Equipment Act states: "Unfair methods of competition and unfair or deceptive acts or practices as defined in Code Section 13-8-15 are declared to be unlawful." O.C.G.A. §13-8-15(c)(8), in turn, provides:

> It shall be deemed a ***violation of Code Section 13-8-14 for a manufacturer***, a distributor, a wholesaler, a distributor branch or division, a factory branch or division, or a wholesale branch or division, or officer, agent, or other representative thereof: . . . (8) ***To prevent or attempt to prevent, by contract or otherwise, any dealer or any officer, partner, or stockholder of any dealer from selling or transferring any part of the interest of any of them to any other person*** or persons or party or parties; ***provided, however, that no dealer, officer, partner, or stockholder shall have the right to sell, transfer, or assign the franchise or power of management or control thereunder without the consent of the manufacturer***, distributor, or wholesaler, except that such consent shall not be unreasonably withheld…

(Emphasis added).

Given the distinction made in the foregoing statute between dealers and franchises, the Court must first consider whether the franchise exception in the final clause of O.C.G.A. §13-8-15(c)(8) applies. Plaintiffs urge the exception does not apply as AIMTrac did not operate as a "franchise" of the Case IH brand and "did not conduct business under the "Case IH" trade name.[110] Defendants, however, assert the parties' business relationship constitutes a franchise as specifically defined under the Agricultural Equipment Act such that it falls within the franchise exception.

The Act defines "franchise" as

> an oral or written agreement for a definite or indefinite period of time in which a manufacturer, distributor, or wholesaler grants to a dealer permission to ***use a trade name, service mark, or related characteristic, and in which there is a community of interest in the marketing of equipment or services related thereto*** at wholesale or retail, whether by leasing, sale, or otherwise.

O.C.G.A. §13-8-12(9) (emphasis added). *See also* O.C.G.A. §13-8-12(10) (defining "franchisee" to mean "a *dealer* to whom a franchise is offered or granted") (emphasis added); O.C.G.A. §13-8-

[110] Pls' MPSJ Regarding O.C.G.A. §13-8-15(c)(8), pp. 2, 24.

12(11) (defining "franchisor" to mean "a manufacturer, distributor, or wholesaler who grants a franchise to a *dealer*") (emphasis added).[111]

Here, the Court cannot ignore that several provisions in the Sales Agreement expressly reference AIMTrac's use of Case IH's tradenames and marks:

> 6. [CNH] and [AIMTrac] agree that it is essential that [AIMTrac] use its best efforts to effectively sell and service the Products. In order to carry out these responsibilities, [AIMTrac] agrees at a minimum to: (a) Promote and sell Products sufficient to achieve sales objectives and share of market satisfactory to [CNH] within [AIMTrac]'s Sales and Service Area; (b) ***Display [CNH] identification signs of the type and in a manner and in places approved by [CNH], including but not limited to signs on [AIMTrac]'s facilities and service vehicles***. . . .
>
> 14. Upon termination of this Agreement: . . . (e) [AIMTrac] shall cease to operate as or represent that [AIMTrac] is an authorized Dealer and shall remove and discontinue use of any ***identification and any promotions or advertising that associates [AIMTrac] with [CNH]. (f) [CNH] shall remove all signs and advertising displays bearing the name "J. I. Case", "Case", "IH, "Case IH", "Case Corporation", "Case, LLC" or any other trade names or trademarks of [CNH] or any of its affiliated companies*** from [AIMTrac]'s business establishment and vehicles and thereafter shall not use such names or trademarks in connection with any business conduct by [AIMTrac]. (g) [AIMTrac] agrees to deliver to [CNH] all sales records, mailing lists, service history records, microfiche, catalogs, registrations and any other material of any kind relating to the promotion, marketing, sale, operation or servicing of Products covered by this Agreement. . . .[112]
>
> 15. Upon the termination of this Agreement . . . [CNH] shall repurchase from [AIMTrac] all of the following items purchased from [CNH], on the terms specified, and [AIMTrac] shall return such items to [CNH] on such terms: . . . (c) ***Any business signs, which were sold to [AIMTrac] by [CNH] bearing trade names or registered trademarks of [CNH].*** Such signs shall be repurchased by [CNH] for the amount paid by [AIMTrac], less an annual depreciation of 20%. . . .

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111 *Compare* O.C.G.A. §13-8-12(1) (defining "dealer" to mean "any person who sells, maintains, solicits, or advertises the sale of new and used equipment to the consuming public," with certain exceptions); O.C.G.A. §13-8-12(2) (defining "dealership" to mean "the business of selling or attempting to effect the sale by a dealer of new equipment or the right conferred by written or oral agreement with the manufacturer, distributor, or wholesaler for a definite or indefinite period of time to sell or attempt to effect the sale of new equipment").

112 As noted by Defendants, there would be no need to revoke permission to use signage, promotions, and advertising containing the Case IH name and trademark if CNH had not granted AIMTrac such permission in the first place. Defs.' Opp. To Pls.' MPSJ, p. 22.

> 18. Dealer agrees not to use the ***names "J. I. Case", "Case", "IH", "Case IH", "Case Corporation", "Case, LLC" or any other trademark or trade of [CNH] or any of its affiliated companies in connection with [AIMTrac]'s business except when selling items containing such marks or names*** and furnished to [AIMTrac] by [CNH], or as otherwise specifically approved in writing by [CNH].

(Emphasis added).

Further, Defendant Carver[113] testified that he "worked directly with AIMTrac personnel to assist with the promotion and sale of Case IH-brand machines and products," and thus is familiar with the Sales Agreement as well as the Case IH marketing programs available to AIMTrac and AIMTrac's use of the Case IH trademarks and tradename since 2010.[114] He avers that, in order to grow market share in the South Georgia region, AIMTrac "prominently displayed Case IH signage and equipment" at its stores, service equipment and vehicles.[115] AIMTrac personnel traveled to trade shows to promote Case IH-brand equipment wearing Case IH embroidered clothing and distributing Case IH marketing and promotional materials.[116] Carver further avers that "CNH strongly encouraged AIMTrac to use the Case IH logo, trademarks, and tradename."[117]

Thus, there is at least some record evidence that CNH gave AIMTrac certain permission, whether orally and/or under the Sales Agreement, to "use its trade name, service mark, or related characteristic" when selling CNH products. AIMTrac has also acknowledged that the parties shared "a community of interest in the marketing of equipment or services" of CNH's products.[118]

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113 Carver was CNH's Territory Sales Manager from November 2010 until March 2015 and served as AIMTrac's Vice President from March 2015 to January 2019. Carver Aff. ¶¶ 3-4. *See supra* note 4.

114 Carver Aff. ¶ 5; *see* Defs.' Con. Opp. To Pls.' MPSJ, p. 4.

115 *See* Carver Aff. ¶ 6, Ex. A (photo of AIMTrac's former Tifton branch store with signage showing the Case IH name and mark on the building); *id.* Ex. B (photo of AIMTrac's former Smithville branch store displaying the Case IH name and mark on the building and on signage on the premises); *id.* Ex. C (photo of AIMTrac service vehicle with the Case IH name on the vehicle).

116 Carver Aff. ¶¶ 8-10, Ex. E (photos of Carver and Greer wearing shirts with the Case IH logo and distributing Case IH branded materials at the 2012 Georgia Peanut Growers Conference); *id.* Ex. D (copy of an article with a link to an interview of Greer at the 2012 Georgia Peanut Growers Conference during which Greer stated, *inter alia*, that he was there to "advertise [AIMTrac] as well as Case IH" and to "promote the Case IH brand").

117 Carver Aff. ¶ 11.

118 Pls' MPSJ Regarding O.C.G.A. §13-8-15(c)(8), p. 2.

Given this and construing the evidence in the light most favorable to Defendants as the non-movants, a reasonable jury could find that AIMTrac was a "franchise" of CNH, as specifically defined under the Agricultural Equipment Act.[119]

Plaintiffs also argue that, even if AIMTrac was a franchise, Defendants' rejection of the May 2014 and July 2014 Proposals constitute violations of O.C.G.A. § 13-8-15(c)(8), because they prevented Plaintiffs from transferring their interests when neither transaction would have had the effect of "sell[ing], transfer[ring], or assign[ing]" AIMTrac, the Sales Agreement, or the "power of management or control" thereunder.[120] However, any of the Three Proposed Transactions would have "transfer[red] control" from Gatewood Holdings and AT Legal (which together held a controlling 51% of AIMTrac's stock).[121]

Even if the May 2014 and July 2014 Proposals were construed as involving a sale, transfer, or assignment of a franchise or "power of management or control thereunder," Plaintiffs assert CNH is still liable because it "unreasonably withheld" its consent by refusing to even consider the proposals unless and until Raybon's incentive compensation package was paid out. However,

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119 Plaintiffs also contend the franchise exception is inapplicable because it only applies to a "s[ale], transfer, or assign[ment] of [a] franchise or power of management or control thereunder" by a "deal<u>er</u>", "offic<u>er</u>", or "stockhold<u>er</u>." O.C.G.A. §13-8-15(c)(8) (emphasis added). Since neither Raybon, Gatewood Holdings, Crisp Investments, nor AT Legal "was a stand-alone offic<u>er</u> or stockhold<u>er</u> of the alleged 'franchise' with a majority ownership or control," Plaintiffs reason the franchise exception cannot apply. Pls' MPSJ Regarding O.C.G.A. §13-8-15(c)(8), p. 27 (emphasis in original). However, this ignores that, under Georgia law, "[t]he singular or plural number each includes the other, unless the other is expressly excluded." O.C.G.A. § 1-3-1(d)(6). Therefore, the terms dealer, officer, partner, and stockholder as used in O.C.G.A. §13-8-15(c)(8) are not limited to individual actors but rather may encompass actions taken by groups of dealers, officers, partners, and stockholders.

120 Pls' MPSJ Regarding O.C.G.A. §13-8-15(c)(8), pp. 28-30.

121 Defs.' Con. Opp. To Pls.' MPSJ, pp. 24 n. 7, 26. Indeed, Gatewood Holdings and AT Legal leveraged this control when they restructured the AIMTrac Board of Directors shortly after AIMTrac submitted the May 2015 Proposal to CNH. *See* Gatewood Dep., p. 81 ("Q. And, Mr. Gatewood, . . . why did you and Mr. Kelley undertake a process to restructure the AIMTrac board? A. We had already had considerable indication that Case was going to be a problem with this, and we didn't know . . . what was going to happen, but we'd . . . already known at this point that we couldn't go to any outside investors, that they were pretty much blocking us from other dealers. And so we knew there were problems and we knew . . . who they wanted us to do it with and who they insisted we do it with, which is this group. And so we wanted control of the board. We controlled the stock base; but we didn't control the board, you know, in terms of - - and so we wanted to [sic] board to reflect the stock ownership. Q. What was . . . the benefit to AIMTrac of you restructuring the board? A. That the majority owners control the board.")

given the heavily disputed evidence summarized herein—including with respect to AIMTrac's financial performance and capitalization, and CNH's concerns regarding the impact the incentive payment could have on AIMTrac's financial stability—whether CNH "unreasonably withheld" its consent presents a jury question. For the same reasons, whether CNH's requirement that AIMTrac obtain an independent valuation and its subsequent rejection of the May 2015 Proposal based on the "opinion" of Dr. Webber were reasonable under these circumstances is for a jury to decide.[122]

Plaintiffs also argue that Defendants' policy and practice (whether under the Sales Agreement or otherwise) to require that *all* proposed ownership transactions be submitted for review and approval to the DRB and Capital—even those that did not affect the operations of AIMTrac's business, did not result in a substantial change in its shareholders, and did not involve the sale or assignment of the Sales Agreement or the power of management or control over AIMTrac—ultimately prevented Plaintiffs from transferring their respective interests in AIMTrac and constitute *per se* violations of O.C.G.A. §13-8-15(c)(8).[123] However, Plaintiffs' argument is predicated on the allegation that CNH required that *all* proposed ownership transactions and all proposed stock transfers to be submitted to CNH for approval, an allegation which is disputed.

Having considered the entire record, Plaintiffs' Motion for Partial Summary Judgment Regarding O.C.G.A. §13-8-15(c)(8) is hereby DENIED.

D. Defendants' Motion for Summary Judgment

Defendants have moved for summary judgment with respect to all of Plaintiffs' pending claims, asserting, *inter alia*, that the "undisputed evidence rebuts the factual predicates for every claim asserted by [Plaintiffs]."[124] The Court addresses each argument, in turn, below.

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122 Pls' MPSJ Regarding O.C.G.A. §13-8-15(c)(8), pp. 30-32.
123 Pls' MPSJ Regarding O.C.G.A. §13-8-15(c)(8), pp. 23-24.
124 Defs. Mot. for Summ. J. Br., p. 2.

1. Claims Related to the Allegation Defendants Forced Raybon to Accept a Premature Buyout of his Compensation Package

Defendants contend Raybon's claims brought under the Agricultural Equipment Act and Georgia's RICO statute hinge on the predicate allegation that Defendants "forced the premature and reduced payout of compensation contractually owed to Plaintiff Raybon which resulted in his constructive discharge from the dealership he had helped to grow."[125] However, Defendants assert there is "no evidence that [they] concocted the idea to pay out the incentive package, or dictated the amount to be paid"; rather, Raybon introduced the idea and first sought a payout of the incentive compensation plan beginning in February 2014, and Raybon allegedly was paid the value he sought.[126] Defendants reason that the failure of this allegation undermines Raybon's claims that Defendants acted arbitrarily under the Agricultural Equipment Act[127] or committed a racketeering offense[128] in violation of RICO.[129]

Defendants' argument ignores that the payout of Raybon's incentive compensation plan was first suggested within the context of certain stock transfer proposals that included, among other terms, stock options for Raybon.[130] Further, there is evidence that Defendants ultimately required that Raybon's incentive compensation plan be paid out *before* Plaintiffs' ownership proposals would even be considered. For example, in Spillar's June 30, 2014 letter responding to the May 2014 Proposal, Spillars wrote:

> [T]he Company would like [AIMTrac] to come to a resolution of Robbie Raybon's employment agreement prior to the consideration of any proposed ownership changes involving Ag Tech and Brian Kelley. Once the

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125 Defs. Motion for Summ. J. Br., p. 16 (quoting Third Am. Verified Compl., Introduction).

126 *Id. See* Defs.' SUMF, ¶ 51.

127 *See* O.C.G.A. § 13-8-15(a) ("It shall be deemed a violation of Code Section 13-8-14 for any manufacturer, factory branch, factory representative, distributor, or wholesaler, distributor branch, distributor representative, or dealer to engage in any action which is arbitrary, in bad faith, or unconscionable and which causes damage in terms of law or equity to any of the parties or to the public.").

128 *See* O.C.G.A. § 16-14-4 (setting forth prohibited acts under the Georgia RICO Act).

129 Defs. Motion for Summ. J. Br., p. 16.

130 *See supra* Part I.E; *see also* Raybon Aff. ¶¶ 2-13.

> "contingent liability" of Mr. Raybon's employment agreement has been eliminated the Company will be able to more clearly review a potential change in ownership. [AIMTrac] would also need to represent that no other compensation "packages" or agreements exist and that [AIMTrac] will not enter into such "packages" or agreements in the future without prior notification to Company.[131]

Similarly, in response to the July 2014 Proposal, Walker wrote:

> Our expectations regarding the steps that [AIMTrac] needs to take have not changed. We would like [AIMTrac] to: 1. Immediately execute and remove your severance compensation package and commit that no other agreements of this type are in place. We would expect to be notified in advance should [AIMTrac] consider offering such a package to any employee in the future.[132]

Furthermore, Walker reiterated CNH's position in an email sent on July 31, 2014, just one day before AIMTrac's Board of Directors executed a cash payout of Raybon's incentive compensation plan[133]:

> To be clear, and in order of priorities [sic] I stipulated in my July 24, 2014 letter to you, we expect the Board of [AIMTrac] to execute and payout your severance compensation package immediately and before any discussions are held on Equity [sic] investors. In addition, we are not accepting any Q4 Lease [sic] orders until the incentive is paid out. Please let me know when this happens. It is important that we complete one task at a time in an orderly fashion.[134]

Indeed, Plaintiffs' theory of the case is in part that, by requiring that the incentive compensation plan be paid out and making equipment orders contingent on the payout, Defendants forced AIMTrac and Raybon's hand prematurely, and a jury could so find from the foregoing evidence. Thus, Defendants' Motion for Summary Judgment on these grounds is DENIED.

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131 Spillars Dep. Ex. 36 (Spillars' June 30, 2014 response letter).
132 Wright Dep. Ex. 26 (Walker July 24, 2014 response letter).
133 Pls.' SUMF, ¶ 87; Defs.' Resp. to Pls.' SUMF, ¶ 87; Raybon Dep. Ex. 54 (Raybon August 1, 2014 email).
134 Walker Dep. Ex. 23 (Walker July 31, 2014 email).

2. Claims Related to the Allegation Defendants Forced Gatewood Holdings and AT Legal's Share Sale to Minority Shareholders

Similarly, Defendants note the "central allegation" of Gatewood Holdings and AT Legal's claims is that Plaintiffs were "forced" to sell their shares to the Minority Shareholders.[135] Defendants, however, contend there is no evidence of this; rather, Plaintiffs searched for but found no other buyers and ultimately persuaded the other shareholders to authorize AIMTrac to buy back their shares for $3,950,000 (the May 2015 Proposal).[136] Defendants further assert they reviewed the proposal in good faith and determined that it unfairly valued the shares and would drain too much capital from AIMTrac so they approved a sale for a lesser amount of $2,550,000—a transaction that Gatewood Holdings and AT Legal chose to (but were not required to) consummate.[137] As such, Defendants argue Plaintiffs' claims under the Georgia RICO Act and the Agricultural Equipment Act premised upon the theory that Gatewood Holdings and AT Legal were forced to sell their shares to the Minority Shareholders fails.

However, the Court cannot consider these select events in isolation, and cannot ignore the history of stock transaction proposals that culminated in the eventual sale of Gatewood Holdings and AT Legal's shares in 2015. Indeed, as summarized above, there is record evidence of the considerable control Defendants purported to exert over the operations of AIMTrac and its stock transactions. The Court cannot say as a matter of law that Gatewood Holdings and AT Legal's theories of recovery predicated on the alleged "forced" sale of their stock lack at least some evidentiary support which ultimately will have to be weighed and considered by the trier of fact. Defendants' Motion for Summary Judgment on these grounds is DENIED.

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135 *Id.*, pp. 16-17. *See, e.g.,* Third Am. Verified Compl., ¶ 212 ("CNH would only consider an inside sale of the majority shares of Plaintiffs Gatewood Holdings and AT Legal to the minority shareholders of AIMTrac.").

136 Defs. Motion for Summ. J. Br., p. 17.

137 Defs. Motion for Summ. J. Br., pp. 17-18.

3. Plaintiffs' Claims under Georgia RICO

As discussed in more detail below, Plaintiffs allege Defendants participated in an unlawful enterprise and "by means of extortion, mail fraud, wire fraud, and other unlawful acts, manipulated share transactions, removed Plaintiff Raybon from AIMTrac through means of extortion and constructive discharge, fraudulently undervalued the shares of AIMTrac owed by Plaintiffs Gatewood Holdings and AT Legal, and directed an inside sale of the majority interest of AIMTrac,"[138] all in violation of the Georgia RICO Act.

To assert a civil claim based upon a violation of the Georgia RICO Act, a plaintiff "must show that the defendants violated or conspired to violate the RICO statute; that as a result of this conduct the plaintiff has suffered injury; and that the defendant's violation of or conspiracy to violate the RICO statute was the proximate cause of the injury." *Wylie v. Denton*, 323 Ga. App. 161, 165, 746 S.E.2d 689, 693 (2013) (citing *Cox v. Mayan Lagoon Estates*, 319 Ga. App. 101, 109(2)(b), 734 S.E.2d 883 (2012)). *See also* O.C.G.A. §16-14-2(b) ("It is the intent of the General Assembly . . . that th[e] [Georgia RICO Act] apply to an interrelated pattern of criminal activity motivated by or the effect of which is pecuniary gain or economic or physical threat or injury. This chapter shall be liberally construed to effectuate the remedial purposes embodied in its operative provisions.").

O.C.G.A. §16-4-4 sets forth "prohibited activities" under the RICO Act and provides:

> (a) It shall be unlawful for any person, through a pattern of racketeering activity or proceeds derived therefrom, to acquire or maintain, directly or indirectly, any interest in or control of any enterprise, real property, or personal property of any nature, including money.
>
> (b) It shall be unlawful for any person employed by or associated with any enterprise to conduct or participate in, directly or indirectly, such enterprise through a pattern of racketeering activity.

[138] Third Am. Verified Compl., ¶ 508.

> (c) It shall be unlawful for any person to conspire or endeavor to violate any of the provisions of subsection (a) or (b) of this Code section. A person violates this subsection when: (1) He or she together with one or more persons conspires to violate any of the provisions of subsection (a) or (b) of this Code section and any one or more of such persons commits any overt act to effect the object of the conspiracy; or (2) He or she endeavors to violate any of the provisions of subsection (a) or (b) of this Code section and commits any overt act to effect the object of the endeavor.

"[A] private plaintiff under the RICO Act must 'show that the injury suffered flowed directly from the predicate offense.' In other words, [the plaintiff] must show that her injury was caused 'by reason of' a violation of one of the specific crimes listed in [O.C.G.A. §16-14-3]." *Nicholson v. Windham*, 257 Ga. App. 429, 430, 571 S.E.2d 466, 468 (2002) (quoting *Maddox v. S. Eng'g Co.*, 231 Ga. App. 802, 805, 500 S.E.2d 591, 594 (1998)).

A "racketeering activity," also known as a "predicate act," is the commission of, the attempt to commit, or the solicitation or coercing of another to commit a "crime which is chargeable by indictment" under certain laws of Georgia and the United States. O.C.G.A. §16-14-3(5). A "pattern of racketeering activity" means to "[e]ngag[e] in at least two acts of racketeering activity in furtherance of one or more incidents, schemes, or transactions that have the same or similar intents, results, accomplices, victims, or methods of commission or otherwise are interrelated by distinguishing characteristics and are not isolated incidents." O.C.G.A. § 16-14-3(4)(A).

i. Raybon's Incentive Compensation Payout

Plaintiffs assert Defendants violated the Georgia RICO statute by "forcing" AIMTrac to terminate the incentive compensation provision in Raybon's Amended Employment Agreement.[139] Defendants allegedly did so by (1) refusing to consider changes in AIMTrac's

[139] *See supra* Part I.C.

ownership,[140] (2) withholding the Georgia Keys incentive program,[141] and (3) delaying "lease orders" until AIMTrac paid out his incentive bonus.[142] Defendants, however, argue the RICO claim fails as a matter of law because there was no "enterprise" involving Defendants concerning Raybon's incentive compensation plan, Defendants did not commit extortion, and Raybon suffered no injury.

Under the Georgia RICO Act, an "enterprise" is defined as "any person, sole proprietorship, partnership, corporation, business trust, union chartered under the laws of this state, or other legal entity; or any unchartered union, association, or group of individuals associated in fact although not a legal entity; and it includes illicit as well as licit enterprises and governmental as well as other entities." O.C.G.A. §16-14-3(3). Although proof of an enterprise is expressly required to establish a RICO violation under O.C.G.A. §16-4-4(b), "a violation of O.C.G.A. §16-14-4(a) does not require that there be proof of an 'enterprise,' but only that the accused through a pattern of racketeering activity or proceeds derived therefrom, . . . acquire or maintain, directly or indirectly, any . . . , real property or personal property of any nature." *Cobb Cty. v. Jones Grp. P.L.C.*, 218 Ga. App. 149, 152–53, 460 S.E.2d 516, 520–21 (1995) (citing *Dover v. State*, 192 Ga. App. 429, 431, 385 S.E.2d 417 (1989)). Here, Plaintiffs' RICO Act claim premised on the premature surrender of Raybon's incentive compensation package appears to be brought under O.C.G.A. §16-14-4(a) and thus does not require proof of an enterprise.[143]

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140 *See* Third Am. Verified Compl., ¶¶ 512-15, 521, 576, 597, 605, 616.

141 *See id.*, ¶ 513.

142 *See id.*, ¶¶ 517-22, 606, 619.

143 Although Defendants argue Plaintiffs have not shown that Defendants "associated together for a common purpose" or formed an "ongoing organization" beyond the single share transaction by Gatewood Holdings and AT Legal, Georgia law does not require proof that predicate acts pose a threat of continued criminal activity in order to be actionable. *See Dover v. State*, 192 Ga. App. 429, 432, 385 S.E.2d 417, 420–21 (1989) ("[The Georgia] legislature intended to and did, by virtue of O.C.G.A. §§ 16-14-4(a) and 16-14-3[4], subject to the coverage of our RICO statute two crimes, included in the statute as designated predicate acts, which are part of the same scheme, without the added burden of showing that defendant would *continue* the conduct or had been guilty of like conduct before the incidents charged as a RICO violation." (emphasis added)). Moreover, "[w]here 'there is evidence that [an entity's] agents or

With respect to the alleged predicate act of extortion,[144] the federal Hobbs Act provides that: "Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by . . . extortion or attempts or conspires to do so . . . shall be fined under this title or imprisoned not more than twenty years, or both." 18 U.S.C. § 1951(a). Extortion is defined as "the obtaining of property from another, with his consent, induced by wrongful use of . . . fear . . ." 18 U.S.C. § 1951(b)(2) (emphasis added). *See United States v. Haimowitz*, 725 F.2d 1561, 1572 (11th Cir. 1984) ("The fear experienced by the victim does not have to be the consequence of a direct threat. Rather, extortion is found if the circumstances render the victim's fear reasonable. . . Fear of economic loss is a type of fear within the purview of § 1951." (citation omitted)).

Importantly,

> [t]he concept of property under the Hobbs Act, as devolved from its legislative history and numerous decisions, is not limited to physical or tangible property or things (*United States v. Provenzano*, 334 F.2d 678 (3d Cir. 1964), cert. denied, 379 U.S. 947, 85 S.Ct. 440, 13 L.Ed.2d 544 (1964); *United States v. Nedley*, 255 F.2d 350 (3d Cir. 1958)), but includes, in a broad sense, ***any valuable right considered as a source or element of wealth*** (*Bianchi v. United States*, 219 F.2d 182 (8th Cir. 1955), cert. denied, 349 U.S. 915, 75 S.Ct. 604, 99 L.Ed. 1249 (1955), reh. denied, *1076 349

employees committed predicate offenses . . . and there are material issues of fact with respect to whether [the entity] was a party to or involved in the commission of these offenses[,] the RICO enterprise may consist of a corporation and its agents or employees.'" *Duvall v. Cronic*, 347 Ga. App. 763, 774, 820 S.E.2d 780, 790 (2018) (quoting *Reaugh v. Inner Harbour Hosp.*, 214 Ga. App. 259, 264 (5) (a), 447 S.E.2d 617 (1994)). *See also Duvall*, 347 Ga. App. at 774 ("[A]n officer of a corporation may be in conspiracy with the corporation itself." (citing *Williams Gen. Corp. v. Stone*, 280 Ga. 631, 631-633 (1), 632 S.E.2d 376 (2006))).

[144] As to Plaintiffs' RICO claim premised on the premature surrender of Raybon's incentive compensation plan, Defendants' racketeering activity also allegedly consisted of acts of mail and wire fraud. Pls.' Resp. Br. to Defs.' Mot. for Summ. J., p. 33. *See* O.C.G.A. §16-14-3(B). The elements of mail and wire fraud are identical. "'Mail or wire fraud occurs when a person: (1) intentionally participates in a scheme to defraud another of money or property and (2) uses the mails or wires in furtherance of that scheme.'" *Cesnik v. Edgewood Baptist Church*, 88 F.3d 902, 906 n. 8 (11th Cir. 1996) (citing *Pelletier v. Zweifel*, 921 F.2d 1465, 1498 (11th Cir. 1991)). *See* 18 U.S.C. §1341 and §1343. *See also United States v. Calvert*, 523 F.2d 895, 903 (8th Cir. 1975) ("[T]he mail fraud statute reaches schemes in which the defendant did not himself place any matter in the mails; it is sufficient to show that he "caused" the mailings…The scope of the wire fraud statute is equally broad") (citations omitted); *Pollman v. Swan*, 289 Ga. 767, 768, 716 S.E.2d 191, 193 (2011) ("[T]he common-law requirement of justifiable reliance in fraud is not a requirement of the mail [or wire] fraud statute[s]").

> U.S. 969, 75 S.Ct. 879, 99 L.Ed. 1290 (1955)) and does not depend upon a direct benefit being conferred on the person who obtains the property (*United States v. Green*, 350 U.S. 415, 76 S.Ct. 522, 100 L.Ed. 494 (1956)).

United States v. Tropiano, 418 F.2d 1069, 1075–76 (2d Cir. 1969). Further, the "obtaining property" element of a Hobbs Act extortion claim can be met where a defendant directs property to a third party, even if defendant does not enjoy a personal benefit from that directed transfer. *See United States v. Brissette*, 919 F.3d 670, 676(III) (1st Cir. 2019) (vacating dismissal of indictment for extortion under the Hobbs Act based on allegations city officials threatened to withhold permits needed by a production company to put on a music festival, unless the company agreed to hire additional workers from a specific union to work at the event).

Here, Plaintiffs allege "Defendants engaged in extortion with the objective of forcing Raybon to surrender rights he held under his incentive compensation agreement with AIMTrac."[145] Essentially Plaintiffs allege Defendants forced Raybon to prematurely surrender *to AIMTrac* the "contingent liability" of his incentive compensation plan by refusing to consider Plaintiffs' stock transfer proposals and ultimately refusing to process "Q4 lease orders" until the plan was actually paid out. Plaintiffs have pointed to record evidence of the fear of economic harm this caused and which led AIMTrac's board to call an emergency meeting to discuss the immediate payout of Raybon's incentive compensation plan.[146] Construing the evidence in the light most favorable to Plaintiffs, a jury could find that Defendants used the fear of economic harm to force Raybon to prematurely surrender to AIMTrac his contractual interest in his incentive compensation plan.[147]

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145 Pls.' Resp. Br. to Defs.' Mot. for Summ. J., p. 35.

146 *See* Raybon Aff., ¶¶ 10-12; Gatewood Dep., p. 147; Greer Dep., p 112; Kelley Dep., p. 326; *see also* Taylor Report, p. 12.

147 *See* O.C.G.A. §16-1-3(13) (defining "property," for purposes of Title 16, as "anything of value, including but not limited to . . . tangible and intangible personal property, contract rights, . . . and other interests in or claims to wealth . . ."); *see also Arby's, Inc. v. Cooper*, 265 Ga. 240, 241, 454 S.E.2d 488, 489 (1995) ("To be enforceable, a promise of future compensation must be made at the beginning of the employment. . . . However, the promise of future compensation must also be for an exact amount or based upon a formula or method for determining the exact amount of the bonus." (citations and punctuation omitted)).

Under these circumstances and given this record, the Court is constrained to find that whether Defendants, through a pattern of racketeering activity (*i.e.*, extortion, mail fraud, wire fraud), acquired or maintained, directly or indirect, any interest in or control over Raybon's personal property (*i.e.*, his contract interest in the incentive compensation portion of his Amended Employment Agreement) and caused injury to Raybon presents a jury question. Defendants' Motion for Summary Judgment as to this claim is DENIED.

ii. Sale of Shares by Gatewood Holdings and AT Legal

Defendant argues Plaintiffs' RICO claim premised on the sale of shares by Gatewood Holdings and AT Legal fails as a matter of law because there is no evidence of any "enterprise" nor of any "predicate acts." Plaintiff, in turn, alleges Defendants engaged in extortion (*e.g.*, demanding an independent valuation before considering the May 2015 Proposal,[148] subsequently controlling or influencing Dr. Weber's opinion as to the value of AIMTrac,[149] then dictating the terms of the sale of Gatewood Holdings and AT Legal's shares[150]), mail and wire fraud (*e.g.*,

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148 *See supra* Part I.E.3.

149 *Id.*

150 *See, e.g.*, Kelley Dep., Ex. 59, p. 9 (Transcript of June 1, 2015 telephone call from Jim Walker and Melinda Griffin to Brian Kelley) ("I am not going to negotiate with a quorum. I can tell you that right now. You three together may own 51 percent, but I'll tell you: any change in ownership or management of that business has to be approved by Case IH. You can bully Bill all you want. It isn't gonna happen."); *id.*, pp. 13-14 ("The dealership has to - - the dealership has to take advantage of the funding and make it work. Don't get me wrong. But at the end of the day, I [sic] Jim Walker created the profitability in [AIMTrac] and Jim Walker's going to continue to generate the profitability in [AIMTrac]. But I'm not letting investors come in and think that - - that want to get out - - that think that because there's a certain valuation to the business [sic]. The valuation of the business, because of the used, because of the - - because of the parts or whatever it is, the valuation of the business hasn't changed since day one, basically. I mean, if anything, it's degraded. And you're not going to measure it on profitability because profitability has nothing to do with the value of the business because I created the profitability. . . . But you're going to have to measure the assets. You're going to have to measure the assets and that's it. Because if I want that thing to make no money next year, I can do that. If I want it to make three million dollars, I can do that."); Waterworth Dep., Ex. 13 (June 18, 2015 email from Walker to other CNH and Capital employees) ("I agree with endorsing the valuation. I think we need a plan on how [AIMTrac] would fund such an endeavor and what financial condition that would leave them in. in [sic] addition, do we really need to buy out both partners or just Brian Kelly [sic] to conserve cash outlay and still end up with controlling interest in the business."); Waterworth Dep., Ex. 14 (June 23, 2015 email from Walker to other CNH and Capital employees) ("As for the resulting share structure, the intent is to bring Richard Carver in as a 6% shareholder by reducing Randy Anderson's share. This would most likely be accomplished by Carver forfeiting part of his compensation in trade for shares over a 5 year period. Bill is still very confident that Kelly [sic] will agree to the offer

communicating with Dr. Weber to influence his valuation,[151] allegedly in an attempt to undervalue AIMTrac and, thus, Gatewood Holdings and AT Legal's shares), and perjury[152] (allegedly false testimony by Dr. Weber and Walker to conceal their racketeering activity).[153] Given the disputed evidence summarized herein, the Court finds questions of material fact preclude judgment as a matter of law on Plaintiffs' Georgia RICO claims. Defendants' Motion for Summary Judgment on these grounds is DENIED.

iii. Pattern of Racketeering Activity Between Raybon's Incentive Payment and AIMTrac's Share Repurchase

In their pleadings, Plaintiffs allege the "forced" sale of shares held by Gatewood Holdings, AT Legal, and Kelley were part of a pattern to: (1) conceal the incentive programs offered to AIMTrac,[154] (2) prevent outside equity investment in AIMTrac,[155] and (3) shift control of AIMTrac to insiders whom CNH could control.[156] However, Defendants argue the incentive compensation payment to Raybon and the share sale by Gatewood and AT Legal are two separate and distinguishable events that do not form a "pattern."

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and bring Gatewood with him. He is waiting on our review of the loan structure to officially approach Gatewood and Kelly with a hard offer.").

151 *See supra* Part I.E.3.

152 Under Georgia law, "[a] person to whom a lawful oath or affirmation has been administered commits the offense of perjury when, in a judicial proceeding, he knowingly and willfully makes a false statement material to the issue or point in question." O.C.G.A. §16-10-70(a). Perjury can form part of a pattern of racketeering activity, even if it is committed during the pendency of litigation. *See, e.g.*, *Dorsey v. State*, 279 Ga. 534, 541, 615 S.E.2d 512, 519 (2005) ("We read the statute [defining a pattern of racketeering activity] to mean that acts of racketeering may be related despite having different objectives as is evidenced by the legislature's inclusion of such crimes as influencing witnesses, . . . perjury, . . . and tampering with evidence[.]" (emphasis added)); *Rains v. Dolphin Mortg. Corp.*, 241 Ga. App. 611, 614, 525 S.E.2d 370, 374 (1999) (reversing summary judgment in favor of defendants on Georgia RICO claim, finding evidence that defendant engaged in a pattern of racketeering activity based on his forging a name on a quitclaim deed, delivering it at closing, and committing perjury by giving false testimony at his deposition).

153 *See* Pls.' Resp. Br. to Defs.' Mot. for Summ. J., pp. 38-43; *see also* Third Am. Verified Compl., ¶¶ 509, 523-543.

154 Third Am. Verified Compl., ¶¶ 62-63, 123-124, 324.

155 *See id.*, ¶¶ 45, 102-103, 127.

156 *See id.*, ¶¶ 63, 212, 263, 361-362, 509, 537-538.

To demonstrate a violation of O.C.G.A. §16-14-4, a plaitiff must "show an injury by a pattern of racketeering activity. A ***pattern*** requires at least two interrelated predicate offenses." *Mbigi v. Wells Fargo Home Mortg.*, 336 Ga. App. 316, 322, 785 S.E.2d 8, 16 (2016) (citing *Brown v. Freedman*, 222 Ga. App. 213, 217(3), 474 S.E.2d 73 (1996)). Pursuant to O.C.G.A. §16-14-3(4)(A), to constitute a "pattern of racketeering activity", the acts of racketeering must be taken "in furtherance of ***one or more*** incidents, schemes, or transactions that have ***the same or similar intents, results, accomplices, victims, or methods of commission*** or otherwise are interrelated by distinguishing characteristics and are not isolated incidents." (Emphasis added). *See Dorsey v. State*, 279 Ga. 534, 541, 615 S.E.2d 512, 519 (2005) ("We read the statute to mean that acts of racketeering may be related despite having different objectives as is evidenced by the legislature's inclusion of such crimes as influencing witnesses, . . . perjury, . . . and tampering with evidence." (citations omitted)).

Here, although Defendants argue the payout of Raybon's incentive compensation plan and the share sale of Gatewood Holdings and AT Legal's shares are separate events that do not constitute a "pattern," the requisite pattern for purposes of a Georgia RICO claim lies in the racketeering activities. While previously Georgia courts denied RICO claims on the basis that the alleged offenses were related to a single transactions rather than the necessary "pattern" of racketeering acts,[157] O.C.G.A. §16-14-3 was amended in 2001 to provide that predicate offenses must be taken "in furtherance of *one* or more incidents, schemes, or transactions," such that if two or more alleged predicate acts were taken in furtherance of one transaction, that is sufficient to state a civil RICO claim. *See Mbigi*, 336 Ga. App. at 323 (emphasis in original). *See also* 4 Ga.

[157] *See, e.g., Sec. Life Ins. Co. of Am. v. Clark*, 273 Ga. 44, 48, 535 S.E.2d 234, 238 (2000); *Stargate Software Int'l, Inc. v. Rumph*, 224 Ga. App. 873, 877, 482 S.E.2d 498, 503 (1997); *Raines v. State*, 219 Ga. App. 893, 894, 467 S.E.2d 217, 218 (1996); *Cobb v. Kennon Realty Servs., Inc.*, 191 Ga. App. 740, 741, 382 S.E.2d 697, 699 (1989).

Jur. Business Torts and Trade Regulation § 7:21 ("Prior to 2001, the defense that multiple acts created only a single transaction was recognized by several Georgia courts, including the Georgia Supreme Court [in *Sec. Life Ins. Co. of Am. v. Clark*, 273 Ga. 44, 48, 535 S.E.2d 234, 238 (2000)]" but "[i]n response to th[at] decision", the Georgia General Assembly amended the statute to provide that a pattern of racketeering activity means engaging in at least two racketeering acts in furtherance of "one or more" incidents, schemes, or transactions).

The premature payout of Raybon's incentive compensation plan and the share sale of Gatewood Holdings and AT Legal's are separate "incidents, schemes, or transactions," each allegedly furthered by racketeering acts, and which arguably share intents, results, and methods of commission, including the use of the threat of economic harm to maintain control over AIMTrac's business and ownership. As detailed herein, there is at least some evidence to support Plaintiffs' RICO claims. Defendants' Motion for Summary Judgment on these grounds is DENIED.

iv. Interest or Control of an Enterprise, Property, or Money

Defendants argue the RICO claims under O.C.G.A. § 16-14-4(a) and (b) also fail because there is no evidence that Defendants obtained any interest in or control of any enterprise[158] or property through the alleged racketeering activity. For the reasons described in Part II.D.3, the Court finds a dispute of material fact exists with respect to this element of Plaintiffs' RICO claims. Defendants' Motion for Summary Judgment is hereby DENIED.

v. RICO Conspiracy

Defendants assert the RICO conspiracy claim fails because the record does not support Plaintiffs' theories that Dr. Weber conspired with CNH or AIMTrac's Minority Shareholders to "undervalue" AIMTrac[159] or that there was a conspiracy among CNH and AIMTrac's Minority

158 *See supra* note 143.
159 Third Am. Verified Compl., ¶¶ 231-242.

Shareholders.[160] However, Plaintiffs' point to record evidence that raise questions regarding the communications between Dr. Weber, Defendants, other CNH employees, and the Minority Shareholders. Construed in the light most favorable to Plaintiffs, these communications suggest deliberate coordination and an attempt to manipulate or otherwise influence the resulting valuation. The Court finds questions of material fact preclude summary judgment and, thus, DENIES Defendants' Motion for Summary Judgment as to this claim.

4. Plaintiffs' Claims Under Agricultural Equipment Act

Plaintiffs contend Defendants' conduct violates various provisions of the Agricultural Equipment Act, each addressed below.

i. Claims under O.C.G.A. §13-8-15(a)

O.C.G.A. §13-8-15(a) prohibits manufacturers and their agents from engaging in "any action which is arbitrary, in bad faith, or unconscionable" and which causes damage "to any of the parties or to the public." Although Defendants have moved for summary judgment with respect to all of Plaintiffs' claims, their motion does not squarely address §13-8-15(a). Nevertheless, for the reasons summarized throughout this order, whether Defendants engaged in action which is "arbitrary, in bad faith, or unconscionable" and which caused damage to Plaintiffs presents questions of material fact that cannot be decided by the Court as a matter of law. Accordingly, Defendants' Motion for Summary Judgment with respect to this claim is DENIED.

ii. Claims under O.C.G.A. §13-8-15(c)(1)

Plaintiffs allege Defendants failed to deliver goods after receiving AIMTrac's equipment order in violation of O.C.G.A. §13-8-15(c)(1).[161] That Code Section provides in part:

> It shall be deemed a violation of Code Section 13-8-14 for a manufacturer, a distributor, a wholesaler, a distributor branch or division, a factory branch

[160] *See id.*, ¶¶ 89, 221, 227, 262.
[161] *See id.*, ¶¶ 337-346.

> or division, or a wholesale branch or division, or officer, agent, or other representative thereof: (1) ***To refuse to deliver in reasonable quantities and within a reasonable time after receipt of dealer's order to any dealer having a franchise or contractual agreement for the retail sale of new equipment sold or distributed by such manufacturer***, distributor branch or division, factory branch or division, or wholesale branch or division ***any item of equipment covered by such franchise or contract specifically advertised or represented by such manufacturer***, distributor, wholesaler, distributor branch or division, factory branch or division, or wholesale branch or division ***to be available for immediate delivery***; provided, however, that the failure to deliver any such unit of equipment shall not be considered a violation of this article if such failure is due to prudent and reasonable restriction on extension of credit by the franchisor to the dealer, an act of God, work stoppage or delay due to a strike or labor difficulty, a bona fide shortage of materials, freight embargo, or other cause over which the manufacturer, distributor, or wholesaler, or any agent thereof, shall have no control . . .

(Emphasis added). *See* O.C.G.A. §13-8-12(17) (defining "sale" as "the issuance, transfer, agreement for transfer, exchange, pledge, hypothecation, or mortgage in any form, whether by transfer in trust or otherwise, of any unit of equipment or interest therein or of any franchise related thereto; any option, subscription or other contract, or solicitation looking to a sale; or an offer or attempt to sell in any form, whether in oral or written form").

Defendants argue Plaintiffs' claim under §13-8-15(c)(1) fails as a matter of law because Plaintiffs have not submitted any evidence that Defendants refused to fulfill any order "for the retail sale of new equipment." Rather, Plaintiffs allege that Defendants threatened to withhold orders for leased equipment.

However, by its plain terms, §13-8-15(c)(1) is not strictly limited to instances of retail sales. Instead it addresses a specific contractual relationship—where a dealer has "a franchise or contractual agreement for the retail sale of new equipment" sold or distributed by a manufacturer—and applies to "any item of equipment covered by [that] franchise or contract that was "advertised or represented" as being available for "immediate delivery." *Id.*

Here, AIMTrac is a dealer which "ha[d] a franchise or contractual agreement for the retail sale of new equipment sold or distributed by [CNH]." *Id.*[162] As such, it was unlawful for CNH to refuse to deliver in reasonable quantities and within a reasonable amount of time items of equipment "covered by" the Sales Agreement that were advertised or represented to AIMTrac as being available for immediate delivery. As described above, there is record evidence from which a jury could find that, in July 2014, CNH withheld and/or refused to fulfill "Q4 lease orders" until AIMTrac paid out Raybon's incentive compensation plan (which did not occur until August 1, 2014) and agreed to the Remarketing Agreement (which did not occur until November 2014). There is at least some evidence the lease program was "published"[163] and that, although orders had already been placed and "were in the system,"[164] they were subsequently withheld pending

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[162] Indeed, under the Sales Agreement, AIMTrac had several "Sales and Service Responsibilities," including to, *e.g.,* "[p]romote and sell Products sufficient to achieve sales objectives" and "[s]ell Products only to other authorized Dealers or end users." *Id.*, §6(a), (h). The Sales Agreement defines "end user" as "any customer who *purchases* Products for use, *lease* or rent, but not for resale." *Id.*, §6(h). *See also* Pls.' SUMF, ¶ 5; Defs.' Resp. to Pls.' SUMF, ¶ 5; Defs.' SUMF, ¶ 22; Pls.' SUMF, ¶ 22; Greer Dep., p. 111.

[163] *See, e.g.,* Wright Dep., p. 174 ("Q. And there were published leasing programs that have been given to AIMTrac that AIMTrac was - - was using to sell leased equipment, right? A. Yes. Q. All right. And were they selling a lot - - were they making a lot of sales on leased equipment in 2014 at least up until July 24, 2014? A. Yes."); Raybon Dep., p. 294 ("The program for the lease was established as part of a published program that was printed in the Q3 writing [sic] program of 2014 that was available for every single dealer in the world. . . . It was a published program that was made available that dealers across the country entered into contracts with customers per the availability of that published program once it was published. . . .").

[164] *See, e.g.,* Greer Dep., pp. 111-112 ("Q. And with respect to this sentence, he says, in addition, we are not accepting any Q4 lease orders until the incentive is paid out. Explain to me what that mean [sic] to the company? A. Basically, we had, if memory serves me correct, we had already verbally sold, and to customers, lease orders, [sic] and the orders were in the system. Q. Meaning they had - - A. In the ordering system, had been placed. Q. They had been placed with the Case IH ordering system? A. That is correct. . . . Q. And so what was the financial risk to the company having placed those orders, and Mr. Walker communicating that you're not going to do anything with them unless and until the compensation package is paid out? . . . What would have been the impact on the company? . . . A. I mean, we would have certainly not generated the revenue that we were anticipating."); Weaver Dep., pp. 104-106 ("Q. With respect to these leases, Eric, are you familiar with once a lease is entered into with a customer, is it put into some type of database or is it put into some type of computer program and then sent to Capital or is it just done on paper at the dealership or do you know? . . . A. . . . My understanding, it's all done in a database with CNH Capital. Q. So once the - - once the agreement is reached with the customer, it's entered into a database or a system, a computer system that's sent to Capital? A. That would be my understanding. . . . Q. The next page there, next steps, the last bullet point there, 'Capital and Adam to address which 80 machines will be recourse. 40 of the 170 new leases were invoiced already in October' . . . .So Capital and Adam to address which 80 machines will be recourse, what is that referring to? A. So I'll reference the previous page, the last bucket as far as their 170, that they would change - - it's hard to read the number, but I think it's listed there as 60, but it could be 50, of them to recourse. So that was part of their new lease program saying that they would actually start to change from being nonrecourse, meaning they wouldn't take any machines back, to starting to take machines back and - - with the purpose to remarket them in their

execution of the Remarketing Agreement.[165] There is evidence from which a reasonable jury could find that Defendants violated §13-8-15(c)(1). Accordingly, Defendants' Motion for Summary Judgment as to that claim is DENIED.

iii. Claims under O.C.G.A. §13-8-15(c)(2)

O.C.G.A. §13-8-15(c)(2) provides in relevant part:

> It shall be deemed a violation of Code Section 13-8-14 for a manufacturer, a distributor, a wholesaler, a distributor branch or division, a factory branch or division, or a wholesale branch or division, or officer, agent, or other representative thereof: ***To coerce, or attempt to coerce, any dealer to enter into any agreement, whether written or oral, supplementary to an existing franchise with such manufacturer***, distributor, wholesaler, distributor branch or division, factory branch or division, or wholesale branch or division, or officer, agent, or other representative thereof; ***or to do any other act prejudicial to such dealer by threatening to cancel any franchise or any contractual agreement existing between such manufacturer***, distributor, wholesaler, distributor branch or division, factory branch or division, or wholesale branch or division, ***and such dealer***; provided, however, that notice in good faith to any dealer of such dealer's violation of any terms or provisions of such franchise or contractual agreement shall not constitute a violation of this article if such notice is in writing mailed by registered or certified mail or statutory overnight delivery to such dealer at his or her current business address . . .

(Emphasis added).

Plaintiffs allege Defendants violated §13-8-15(c)(2) by forcing AIMTrac to accede to the Remarketing Agreement regarding lease transactions.[166] Although Defendants argue lease

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area. . . . Q. Okay. So there was - - AIMTrac was being required to take 80 back under recourse; is that fair? A. As part of this plan, yes, that's fair. . . . Q. Okay. All right. And 40 of the 170 new leases were invoiced already in October, what does that mean? A. October 1 is the start of the new model year. So this was - - this discussion was happening, it looks like, on October 30. So there was [sic] already machines being delivered. . . Q. All right. So AIMTrac already had in process the 170 that they were going to be leasing in Q4, and 40 of those had already been delivered as of October 30?. . . A. I would say delivered to the dealer so not actually to the customer yet. I don't - - I wouldn't have that information."); *see also* Pls.' Resp. to Defs.' SUMF, ¶¶ 55-58.

[165] Pls.' Resp. Br. to Defs.' Mot. for Summ. J., p. 29-31. *See, e.g.,* Weaver Dep., Ex. 30 (August 1, 2014 email from Jim Walker) ("Next step is for [Raybon], Adam, Richard, Eric Weaver and Capital figure [sic] out final disposition of the returning Lease tractors and then we can finalize the Q4 program"); *id.*, pp. 104

[166] Although addressed elsewhere in the Third Amended Complaint (*see id.*, ¶¶ 186-190), the parties' dispute regarding the Remarketing Agreement is not specifically cited as a basis for Plaintiffs' §13-8-15(c)(2) claim. *See id.*, ¶¶ 347-358. Nevertheless, it is raised in Defendants' Motion for Summary Judgment and thus is addressed here. *See* Defs.' Mot. for Summ. J., pp. 35-38.

transactions were offered through Capital, not CNH, the "Q4'14 Magnum Lease Remarketing Agreement" executed by Raybon on behalf of AIMTrac on November 21, 2014 states that it is an agreement between AIMTrac and "CASE IH / CNHi Capital." Further, although Defendants contend the new agreement was only with respect to prospective leases, not existing leases, this is disputed insofar as Plaintiffs point to record evidence that orders had been placed in Capital's system pursuant to an existing, published lease program.[167]

Defendants' also assert Plaintiffs' §13-8-15(c)(2) claim predicated on any purported threat to terminate the Sales Agreement pursuant to §12 thereof for proceeding with a stock transaction without CNH's permission fails, because there is no evidence that Defendants actually threatened to invoke that termination provision. However, construing the evidence in the light most favorable to Plaintiffs as the non-movants and given the disputed evidence regarding the proposed stock transactions, the Court finds that a jury question exists as to whether Defendants "d[id] any other act prejudicial to [AIMTrac] by threatening to cancel any franchise or any contractual agreement existing between" AIMTrac and CNH.[168] Defendants' Motion for Summary Judgment as to this claim is DENIED.

iv. Claims under O.C.G.A. §13-8-15(c)(7), (8), (8.2)

It is a violation of the Agricultural Equipment Act:

> (7) To prevent…by contract or otherwise, any dealer from ***changing the capital structure of his or her dealership or the means by or through which he or she finances the operation*** of his or her dealership, provided such dealer at all times meets any reasonable capital standards agreed to between the dealership and the manufacturer…and provided such change by the dealer does not result in a change in the executive management of the dealership…

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167 *See supra* Part II.D.4.ii.

168 *See supra* Part I.E; *see also* Kelley Dep., Ex. 59, p. 9 (Transcript of June 1, 2015 telephone call from Jim Walker and Melinda Griffin to Brian Kelley) cited in note 150, *supra*.

> (8) To prevent or attempt to prevent, by contract or otherwise, any dealer or any officer, partner, or stockholder of any dealer ***from selling or transferring any part of the interest of any of them to any other person or persons or party or parties***; ***provided, however, that no dealer***, officer, partner, or stockholder ***shall have the right to sell, transfer, or assign the franchise or power of management or control thereunder without the consent of the manufacturer***, distributor, or wholesaler, except that such consent shall not be unreasonably withheld; [or]
>
> (8.2) To impose, directly or indirectly, ***unreasonable restrictions*** on the dealer relative to transfer, sale, renewal, termination, location, or site control…

O.C.G.A. §13-8-15(c)(7), (8), (8.2) (emphasis added).

Specifically with respect to Raybon, Defendants argue his claims under §13-8-15(c)(7, (8), and (8.2) fail because Raybon's alleged injuries (*i.e.*, the premature termination of the incentive portion of his Amended Employment Agreement,[169] that he was prevented from becoming an AIMTrac shareholder,[170] and his constructive discharge[171]) were not caused "by reason of" CNH's actions. Importantly, O.C.G.A. §13-8-20(a) provides in relevant part:

> ***[A]ny person who shall be injured in his or her business or property by reason of anything forbidden by or in noncompliance with the requirements of this article may bring an action*** therefor in the appropriate superior court of this state and shall recover the actual damages sustained and the costs of such action, including a reasonable attorney's fee.

(Emphasis added). Raybon alleges Defendants unlawfully exercised dominion and control over AIMTrac, forced the *premature* payout of his incentive compensation plan *without* any associated stock options or other benefits previously proposed, and attempted to unlawfully dictate whether and the terms under which AIMTrac's shareholders could transfer their stock. As detailed herein, there is record evidence from which a jury could find that Raybon's "business or property" was injured as a result of Defendants' actions, *e.g.*, preventing transactions that otherwise would have

169 Third Am. Verified Compl., ¶¶ 179, 193.
170 *Id.*, ¶¶ 129, 136, 138.
171 *Id.*, ¶¶ 147, 165-166, 174.

resulted in Raybon acquiring an interest in AIMTrac and/or by unreasonably or arbitrarily imposing restrictions on AIMTrac such as the premature payout of Raybon's incentive compensation plan.

Further, for the reasons cited above and construing the evidence in the light most favorable to Plaintiffs as the non-moving parties, the Court finds questions of material fact preclude summary judgment with respect to Plaintiffs' claims that Defendants violated O.C.G.A. §13-8-15 by: preventing AIMTrac from changing the capital structure of the company or the means through which it is financed (paragraph (c)(7))[172]; preventing or attempting to prevent AIMTrac (or Gatewood Holdings or AT Legal as AIMTrac stockholders) from selling or transferring their interest[173]; and imposing unreasonable restrictions on AIMTrac relative to transfer or sale.[174] Defendants' Motion for Summary Judgment with respect to these claims is DENIED.

5. Plaintiffs Gatewood Holdings and AT Legal's Claims for Breach of Contract and Breach of the Duty of Good Faith and Fair Dealing

Plaintiffs Gatewood Holdings and AT Legal allege Defendant CNH breached the Sales Agreement as well as its duty of good faith and fair dealing by failing to give "good faith consideration" to Plaintiffs' various stock transaction proposals.[175] However, having considered the heavily disputed factual record and for the reasons detailed above in Part II.B, the Court finds questions of material fact preclude judgment as a matter of law with respect to Plaintiffs Gatewood Holdings and AT Legal's contract-related claims. Accordingly, Defendants' Motion for Summary Judgment with respect to those claims is DENIED.

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172 Third Am. Verified Compl., ¶¶ 359-383.
173 *Id.*, ¶¶ 384-413.
174 *See supra* Part I.E, Part II(B), and Part II(C).
175 *See supra* Part I.E.

6. Conclusion

Having considered the entire record and all arguments related thereto, the Court hereby DENIES Defendants' Motion for Summary Judgment.

III. MOTIONS TO EXCLUDE EXPERT TESTIMONY

A. Standard Regarding Expert Testimony

O.C.G.A. §24-7-702(b) generally governs the admission of expert evidence. It provides in relevant part:

> If 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 upon 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 which have been or will be admitted into evidence before the trier of fact.

O.C.G.A. §24-7-702(b).

As summarized by the Supreme Court of Georgia in *Scapa Dryer Fabrics, Inc. v. Knight*, 299 Ga. 286, 788 S.E.2d 421 (2016), when construing §24-7-702(b)'s predecessor (O.C.G.A. §24-9-67.1(b))[176]:

> Generally speaking, a trial court must assess three aspects of proposed expert testimony—the qualifications of the expert, the reliability of the testimony, and the relevance of the testimony—to discharge its responsibilities as a gatekeeper under former O.C.G.A. § 24–9–67.1 (b). *See HNTB Ga., Inc. v. Hamilton–King*, 287 Ga. 641, 642, 697 S.E.2d 770 (2010) ("In determining the admissibility of expert testimony, the trial court acts as a gatekeeper, assessing both the witness'[s] qualifications to testify in a particular area of expertise and the relevancy and reliability of the proffered testimony." (Citations omitted))…

[176] As noted in *Scapa Dryer Fabrics, Inc.*, "the provisions of former O.C.G.A. § 24-9-67.1(b) were carried forward into the new Evidence Code and now can be found in O.C.G.A. § 24-7-702 (b)." *Id*. at 289.

> As for qualifications, the trial court must examine the credentials of the expert to ascertain the extent to which he is "qualified to testify competently regarding the matters he intends to address," [*Seamon v. Remington Arms Co., LLC*, 813 F.3d 983, 988(III)(A) (11th Cir. 2016)] (citation omitted), whether by "knowledge, skill, experience, training, or education." Former O.C.G.A. § 24–9–67.1(b).
>
> As for reliability, the trial court must consider whether "the methodology by which the expert reaches his conclusions is sufficiently reliable." *Seamon*, 813 F.3d at 988 (III) (A) (citation omitted). To this end, the trial court must ask whether the conclusions of the expert "[are] based upon sufficient facts or data," former O.C.G.A. § 24–9–67.1(b)(1), whether the expert drew those conclusions by use of "reliable principles and methods," former O.C.G.A. § 24–9–67.1(b)(2), and whether the expert "applied [those] principles and methods reliably to the facts of the case," former O.C.G.A. § 24–9–67.1(b)(3). *See also* [*Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 592, 113 S. Ct. 2786, 2796, 125 L. Ed. 2d 469 (1993)] (trial court must consider "whether the reasoning or methodology underlying the testimony is scientifically valid and ... whether that reasoning or methodology properly can be applied to the facts in issue").
>
> And as for relevance, the trial court must consider the "fit" between the expert testimony and the issues in dispute. Seamon, 813 F.3d at 988 (III) (A). To properly be admissible, expert testimony must "assist the trier of fact…to understand the evidence or to determine a fact in issue," former O.C.G.A. § 24–9–67.1(b), and expert testimony is helpful to the trier of fact only to the extent that "the testimony is relevant to the task at hand and logically advances a material aspect of [the] case." *Boca Raton Community Hosp. v. Tenet Health Care Corp.*, 582 F.3d 1227, 1232 (II) (11th Cir. 2009) (citation and punctuation omitted).

Scapa Dryer Fabrics, Inc., 299 Ga. at 289–90. *See, e.g., Med. Ctr., Inc. v. Bowden*, 348 Ga. App. 165, 170, 820 S.E.2d 289, 300 (2018), reconsideration denied (Nov. 14, 2018).

"Provided an expert witness is properly qualified in the field in which he offers testimony, and the facts relied upon are within the bounds of the evidence, whether there is sufficient knowledge upon which to base an opinion…goes to the weight and credibility of the testimony, not its admissibility." *Woodland Partners Ltd. P'ship v. Dep't of Transp.*, 286 Ga. App. 546, 548, 650 S.E.2d 277, 280 (2007) (citations omitted). *See also Med. Ctr., Inc. v. Bowden*, 348 Ga. App. 165, 170, 820 S.E.2d 289, 299 (2018), *reconsideration denied* (Nov. 14, 2018), *cert. granted* (Oct.

7, 2019), *aff'd in part, rev'd in part on other grounds*, 845 S.E.2d 555 (Ga. 2020) ("The trial court may not exclude an otherwise sufficient expert opinion "simply because it believes that the opinion is not—in its view—particularly strong or persuasive. The weight to be given to admissible expert testimony is a matter for the jury") (*citing Seamon v. Remington Arms Co., LLC*, 813 F.3d 983, 990 (III) (A) (2) (11th Cir. 2016)); *Putnam v. Henkel Consumer Adhesives, Inc.*, No. CIV.A.1:05CV2011BBM, 2007 WL 4794115, at *8 (N.D. Ga. Oct. 29, 2007) ("When, as here, the parties' experts rely on conflicting sets of facts, it is not the role of the trial court to evaluate the correctness of facts underlying one expert's testimony") (*citing Micro Chem., Inc. v. Lextron, Inc.*, 317 F.3d 1387, 1392 (Fed.Cir.2003)).

B. Plaintiffs' Motion to Exclude Testimony of George Russell

Plaintiffs move to exclude the expert testimony of George Russell. Mr. Russell was engaged by Defendants to provide "an informed, independent, and impartial perspective on the dynamics of the relationships between farm equipment manufacturers and their dealers, with specific opinions about the situation of the [Original Equipment Manufacturers] brand, Case IH, and its dealer, AIMTRAC, whose challenge together was to create a sustainable business in South Georgia."[177] According to his Expert Report, Mr. Russell intends to opine the following:

> 1. AIMTRAC did not seek or achieve the factors for dealer success: [a] balanced dealership; [h]igh absorption; and [a] strong [u]sed equipment business.
> 2. CNH's high-risk investment was not reciprocated by its partner, AIMTRAC…
> 3. The pending down-cycle and unbalanced risk should have, and did, concern CNH…[and]
> 4. The CEO's [Raybon] [i]ncentive [c]ompensation formula was extraordinary…[178]

[177] Pls.' Mot. to Exclude Expert Testimony of George Russell, Ex. A (Expert Report) at p. 3.
[178] *Id.*

Id. Mr. Russell further opines regarding why the business opportunity arising from the relationship between CNH and AIMTrac failed.[179]

In seeking to exclude Mr. Russell's expert testimony, Plaintiffs assert Mr. Russell's "industry-related opinions" are not expert in nature and have nothing to do with Plaintiffs' claims and alleged damages or Defendants' potential defenses to liability such that the opinions are irrelevant and will not assist the trier of fact.[180] Further, Plaintiffs urge Mr. Russell's opinions regarding the "unusual" nature of Raybon's executive contract and incentive compensation plan are irrelevant as there is no evidence the contract was invalid, void, or unenforceable, and should also be excluded because Mr. Russell is not qualified to render an opinion about the incentive compensation formula in Raybon's contract.[181]

Having considered the entire record, the Court finds no basis to exclude Mr. Russell as an expert witness. According to Mr. Russell's Expert Report, he has over 44 years of experience in the agricultural equipment industry, having worked 25 years "on the wholesale side of the business" with Original Equipment Manufacturers ("OEM") and for 18 years "on the retail dealer side, either as a dealer or a dealer consultant."[182] Since 2007, Mr. Russell has "consulted directly with farm and construction equipment dealers to provide performance improvement consulting, including providing advice in connection with [m]ergers [and] [a]cquisitions."[183] Further, Mr. Russell leads five "Best Practice groups" who meet regularly "to share their performance experience and dealership best practices," and he writes a regular column for Farm Equipment Magazine (72 articles as of the submission of his Expert Report) on topics that range from strategy

179 *Id.* at pp. 20-21.
180 *Id.* at pp. 10-11, 15-18.
181 *Id.* at pp. 18-19.
182 *Id.*, Ex. A (Expert Report) at p. 2.
183 *Id.*

to performance improvement.[184] In short, Mr. Russell has ample "knowledge, skill, experience, training, [and] education" in the agricultural equipment industry and specifically with respect to agricultural equipment dealers to provide expert testimony regarding same. *See* O.C.G.A. §24-7-702(b). *See also Watson v. State*, 303 Ga. 758, 760–61, 814 S.E.2d 396, 399 (2018) ("A witness can be qualified as an expert in a particular field if he demonstrates 'special knowledge . . . derived from experience'") (citing *Billings v. State*, 293 Ga. 99, 104–105, 745 S.E.2d 583 (2013)).

Further, Mr. Russell based his opinions on record evidence and industry data as cited in his report. Plaintiffs' objections as to the factual bases of those opinions go to the weight of the evidence rather than its admissibility and both it and Mr. Russell's methodology and depth of knowledge of incentive compensation plans in the industry can be explored through voir dire of the witness and through cross-examination at trial.[185] *Woodland Partners Ltd. P'ship*, 286 Ga. App. at 548; *Med. Ctr., Inc.*, 348 Ga. App. at 170; *Putnam*, 2007 WL 4794115, at *8.

Finally, the Court finds Mr. Russell's testimony at least somewhat relevant to the claims and defenses at issue in this litigation and would be beneficial to the trier of fact. Although Plaintiffs broadly contends Mr. Russell's opinions are not beyond the understanding of the average lay person, the dynamics of the agricultural equipment industry and the economic and industry related factors that inform the profitability and viability of a dealership (*e.g.*, its cash position, absorption rate, leasing programs, mix of new versus used equipment, etc.) bear some relevance to the claims, defenses, and allegations at issue, particularly given Plaintiffs' position that AIMTrac was wildly successful and that Defendants did not give due consideration to their

184 *Id.*

185 Notably, it appears Mr. Russell has not been deposed. *See* Defendants' Opposition to Plaintiffs' Motion to Exclude Expert Testimony of George Russell, p. 2 n.1.

investment proposals, among other allegations of misconduct.[186] Indeed, Plaintiffs' claims put the reasonableness and good faith of Defendants' actions squarely at issue—matters which may be informed by the industry-specific dynamics and economic environment during the relevant period. Plaintiff's Motion to Exclude Testimony of George Russell is hereby DENIED.

C. Defendants' Motion to Exclude Testimony of Robert J. Taylor IV

Defendants seek to exclude the expert testimony of Robert J. Taylor IV, a consultant at Bennett Thrasher LLP who Plaintiffs have retained to provide an opinion regarding "the amounts of additional consideration due and potential damages to Robert S. Raybon, Gatewood Holdings, LLC, and AT Legal, LLC."[187] According to Mr. Taylor's Damages Report:

> [He has] over thirty years' experience as a consultant and expert specializing in accounting, financial consulting, damages modeling, and valuation issues. [He has] nine years of consulting experience with Ernst and Whinney (now Ernst and Young), twenty-six years with Taylor Consulting Group, and four years with Bennett Thrasher LLP. [His] engagement experience relating to damages calculations, valuations, and accounting issues include involvement with both publicly trade and privately held companies in [a] wide range of industries, including work with companies in the manufacturing and distribution industries.[188]

In their motion, Defendants challenge Mr. Taylor's estimate of damages allegedly owned to Mr. Raybon for early termination of his incentive compensation agreement and Mr. Taylor's opinion of damages allegedly owed to Gatewood Holdings and AT Legal for the value of AIMTrac shares they sold back to AIMTrac in July 2015. Defendants assert neither opinion "fits" the undisputed facts of this case.

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186 Nevertheless, the Court cautions that experts will not be permitted to testify regarding the actual intent or motivations of the parties, as the parties themselves will be able to testify regarding same based on personal knowledge, to the extent relevant, at trial.

187 Defs.' Mot. to Exclude Testimony of Robert J. Taylor IV, Ex. 1 at p. 1.

188 *Id.* at pp. 3-4 (footnote omitted).

With respect to the damages allegedly owed to Mr. Raybon, Mr. Taylor opines: "The amount of additional incentive compensation that is due to Plaintiff Raybon based on measurement as of February 28, 2015 is $2,968,897."[189] This estimate is premised on the additional sum that allegedly would be owed to Mr. Raybon, "assuming he was not forced to prematurely execute his incentive compensation plan under the terms of his Amended Employment Agreement dated July 25, 203 with Progressive Solutions Holdings, Inc."[190] However, Defendants contend: it was Mr. Raybon who first suggested that AIMTrac pay out his incentive compensation in February, 2014; he prepared several additional proposals calling for the liquidation of the incentive plan; on July 9, 2014, he submitted his final written proposal to CNH that included payment of his incentive compensation package in the amount of $1,010,000, which CNH ultimately agreed to; and there is evidence Mr. Raybon was "in a state of 'euphoria' concerning the 'substantial amount of money'" he would receive from the payout. [191] Given this, Defendants contend Mr. Taylor's damages estimate is falsely based on an assumption that Mr. Raybon was "forced to prematurely execute his incentive compensation plan" and, thus, does not fit the undisputed facts of this case.

However, in response, Plaintiffs point to record evidence indicating a factual dispute as to whether CNH prematurely "forced" the payout of Mr. Raybon's incentive compensation package as a condition precedent to ownership changes and whether CNH improperly threatened to withhold certain lease orders pending the actual payout.[192] Although Defendants contend Raybon voluntarily initiated proposals for an early payout of his incentive compensation plan, Plaintiffs note that before doing so Defendants frustrated attempts for AIMTrac to obtain outside

189 *Id.*, Ex. 1 at p. 1.
190 *Id.*, Ex. 1 at p. 3.
191 *Id.* at pp. 6-7.
192 Pls.' SUMF, ¶¶ 52-53, 56-57, 67-73, 84-87; Raybon Dep., pp. 64, 235-236; Wright Dep., pp. 122-125, Ex. 14; Walker Dep., pp. 189-203; Greer Dep., pp. 110-113, Ex. 29; Weaver Dep., pp. 144-158, Ex. 31; Griffin Dep., pp. 181-186, Ex. 25. *See supra* Part II.D.1.

investors,[193] changed the terms of the Proposed Financing Agreement,[194] and denied proposals pertaining to seller financing for the repurchase of AT Legal's shares.[195] Further, none of the 2014 proposals that included a payout of Raybon's incentive plan involved simply a monetary payout but rather each proposal was tied either to a purchase of AT Legal's shares or to stock options that could be utilized once the money was paid.[196]

With respect to the damages allegedly owed to Gatewood Holdings and AT Legal, Mr. Taylor opines: "The amount of additional consideration that is due to Gatewood [Holdings] and At Legal as shareholders of AIMTrac based on a valuation as of May 31, 2015 is $1,759,298 and $3,225,379, respectively."[197] However, Defendants argue Mr. Taylor's damages calculation is based on "a valuation that no purchaser ever agreed to pay and that Plaintiffs never submitted to Defendants for approval.[198] Specifically, in April 2105, AIMTrac's Board approved and Plaintiffs submitted a proposal to Defendants for AIMTrac to repurchase Gatewood Holdings and AT Legal's 51,000 shares for $3,950,000—a proposal Defendants rejected. Rather than relying on the value of the proposed sale that was rejected, Mr. Taylor, using a discounted cash flow analysis, contends AIMTrac was worth $14,773,877 as of May 31, 2015 and from that imputes a value for Plaintiffs' shares of $7,534,677. Even assuming that valuation is correct, Defendants argue Gatewood Holdings and AT Legal never received an offer for that amount and never submitted that amount for approval by CNH. Insofar as Mr. Taylor's opinion estimates damages higher than the proposal Gatewood Holdings and AT Legal allege was improperly rejected, Defendants contend the opinion does not fit the facts of the case or the issues in dispute.

193 *See supra* notes 35 & 78.
194 *See supra* note 78.
195 Pls.' SUMF, ¶¶ 46-48.
196 Pls.' SUMF, ¶¶ 49-50, 54, 58, 79-80. *See supra* Part I.E.
197 Defs.' Mot. to Exclude Testimony of Robert J. Taylor IV, Ex. 1 at p. 1.
198 *Id.* at p. 1.

However, Plaintiffs contend: they previously received an indication of interest from Everwatch in 2013 based on a total valuation of $13,300,000; they received an indication of interest from NGP based on a book value of $10,500,000; and there is evidence of discussions with a private equity firm at the time Dr. Weber conducted his valuation of AIMTrac in 2015 but Dr. Weber was told by Wright that CNH preferred a deal with AIMTrac's minority shareholders.[199]

Because the facts upon which Mr. Taylor relied in forming his opinions are "within the bounds of the evidence" and, as detailed throughout this order, the record presents factual disputes that are for the jury to assess and determine, the Court finds Defendants' arguments regarding Mr. Taylor's expert testimony "[go] to the weight and credibility of the testimony, not its admissibility." *Woodland Partners Ltd. P'ship*, 286 Ga. App. at 548. Accordingly, Defendants' Motion to Exclude Testimony of Robert J. Taylor, IV is DENIED.

IV. PLAINTIFFS' MOTION TO COMPEL REMOVAL OF CONFIDENTIALITY DESIGNATION

On February 28, 2018, the Court entered a Consent Protective Order and Clawback Order ("Consent Protective Order") to govern the production of confidential information during the course of this litigation.[200] Therein the parties agree that any party providing discovery has the right to designate information as "Confidential" provided the person producing it believes in good faith that the information being produced contains "non-public, confidential or proprietary information, including but not limited to, proprietary research, analysis, development, marketing, financial, trade secret, or other commercially or personally sensitive information."[201] The Consent Protective Order permits both parties to use all documents designated as confidential in depositions, preparation of the experts, motions, and at trial. It also permits a party who wishes to

199 *See supra* notes 35 & 78; Pls.' SUMF, ¶¶ 89-91; Raybon Dep., pp. 280-282.
200 Consent Protective Order, 1.
201 *Id.*

challenge a confidential designation to seek a determination by this Court whether the designation was appropriate.[202] In the event that a party challenges the confidential designation, the burden of establishing the designation falls on the designating party.[203]

In May 2018, Defendants completed production of 17,227 pages of documents. Initially, Defendants designated almost all of the pages as confidential.[204] On January 9, 2019, Plaintiffs' counsel contacted Defendants' counsel objecting to the confidential designations on approximately 308 pages of produced documents.[205] Plaintiffs identified the documents they objected to and stated their reason for objecting, including that certain documents contain facts that were disclosed in the pleadings or information that has been communicated to third parties.[206]

CNH and its outside counsel conducted a document-by-document review of the challenged material.[207] On February 7, 2019, Defendants agreed to remove the confidentiality designation on approximately 147 pages; however, they maintained such designations on the remaining pages (the "Remaining Challenged Documents"), because Defendants assert they involve "sensitive internal discussions about CNH's pricing, its business strategies, its competitive promotional programs, and the equipment it sells in competition with companies like John Deere."[208]

Thereafter, Plaintiffs filed the instant Motion to Compel Removal of Confidentiality Designation on Documents Improperly Designated as Confidential and Memorandum of Law in Support ("Motion to Compel"). Plaintiffs ask the Court to: compel Defendants to remove the confidentiality designation on certain documents for which Plaintiffs contend no "good faith" basis for the designation exists; require Defendants to review and reclassify all of their confidentiality

202 *Id.* at p. 2.
203 *Id.* at p. 3.
204 Lawrence Aff., ¶ 5.
205 Pls.' Mot. to Compel, p. 2, Ex. C (January 9, 2019 Letter).
206 *Id.*
207 Lawrence Aff., ¶ 8.
208 Pls.' Mot. to Compel, pp. 2-3, Ex. D (February 7, 2019 Letter); Lawrence Aff., ¶ 8.

designations in compliance with the Consent Protective Order; and award Plaintiffs their attorney's fees and costs.

Having considered the expansive record, the Court denies the relief requested in Plaintiffs' Motion to Compel. CNH's in-house attorney, Emily Lawrence, avers that, following a four-month review for responsive documents, CNH produced 17,227 pages of documents but designated nearly all of that production confidential "[i]n light of the copies number of documents containing confidentiality and proprietary content."[209] This appears to be supported by the record insofar as Plaintiffs objected to the designations on only 308 pages, or approximately 1.79% of Defendants' production.[210] As noted above, following the conferral process contemplated by the Consent Protective Order, CNH subsequently removed the confidentiality designation on approximately 150 pages.[211] The Court has reviewed the remaining pages being challenged and, for the reasons stated in Defendants' response brief, finds those confidentiality designations to be well founded.

Given the considerable amount of discovery produced in this litigation and the relatively small pool of documents for which it appears a confidential designation was not warranted (at least from the materials presented to the Court), and insofar as it appears that all responsive documents were produced (albeit with confidentiality designations) and Plaintiffs have not articulated any prejudice they have suffered from the improper designations, the Court DENIES Plaintiffs' Motion to Compel.[212]

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209 Lawrence Aff., ¶5.

210 Although Plaintiffs have suggested that additional documents in Defendants' production were improperly designated as confidential, the Court can only assess and rule based on the documents and information presented, and declines to make assumptions or order sanctions based on materials not before the Court.

211 Lawrence Aff., ¶8. CNH has also agreed to remove the confidential designation with respect to Exhibit J (CNH-00003827-28) and Exhibit L (CNH-00006147-49). *Id.*, ¶¶ 13, 15.

212 Nevertheless, the Court strongly cautions that, given the multiple opportunities afforded during this litigation to ensure that confidentiality designations were proper and made in good faith, if during the final adjudication of this case it is determined that documents were improperly designated as confidential without a good faith basis therefor in violation of the Consent Protective Order, the Court may consider appropriate remedies or sanctions.

V. PRE-TRIAL SCHEDULING ORDER

Insofar as there remain claims to be tried, the following deadlines shall govern the final adjudication of this matter.

A. Mediation

The parties previously reported that they participated in non-binding mediation on April 30, 2019 but were unable to resolve this dispute. However, the parties expressed willingness to engage in further negotiation after the instant motions are decided. In light of the Court's rulings herein, the parties are ordered to confer regarding the possibility of pursuing additional alternative dispute resolution mechanisms within sixty (60) days of this order.

B. Consolidated Pre-Trial Order

A proposed, fully consolidated pre-trial order that substantially complies with Uniform Superior Court Rule 7.2 shall be submitted to the Court's Chambers no later than 5:00 p.m. on **May 24, 2021**. (Please do not present pre-trial orders to the Clerk of Court for filing unless they have been signed by the Court).

Plaintiffs shall be responsible for consolidating the pre-trial order. All other parties shall provide their portions of the consolidated pre-trial order to the Plaintiffs no later than two (2) business days prior to the due date above. No party shall submit their own individual portion of a pre-trial order to the Court without written certification detailing their good faith efforts to present the Court with a fully consolidated pre-trial order.

C. Motions in Limine

Counsel are required to confer with each other prior to filing motions in limine so that only those issues to which the parties cannot agree are raised in a motion in limine. All motions in

limine shall be made in writing and filed no later than 5:00 p.m. on **June 24, 2021**. All responses to motions in limine must be filed no later than 5:00 p.m. on **July 23, 2021.**

D. Trial

Due to the COVID-19 pandemic, on March 14, 2020, the Honorable Harold D. Melton, Chief Justice of the Supreme Court of Georgia, issued an order declaring a statewide judicial emergency which limits in-court proceedings and suspends jury trials. *See* Order Declaring Statewide Judicial Emergency (issued and amended March 14, 2020), pp. 1-2. To date, the order has been extended eleven times and remains in effect. *See generally* Eleventh Order Extending Declaration of Statewide Judicial Emergency. Most notably, jury trials are currently suspended throughout the State and it is unclear when they will resume. Thus, the Court will schedule a jury trial in this matter at the earliest opportunity once jury trials resume in the Superior Court of Fulton County.

SO ORDERED this 2nd day of March, 2021.

/s/ Alice D. Bonner
ALICE D. BONNER, SENIOR JUDGE
Fulton County Superior Court
Business Case Division
Atlanta Judicial Circuit

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Attorneys for Plaintiffs	**Attorneys for Defendants**
John C. Stivarius, Jr. **Stanford G. Wilson** **Justin B. Connell** ELARBEE, THOMPSON, SAPP & WILSON, LLP 800 International Tower 229 Peachtree Street, N.E. Atlanta, GA 30303 Tel.: (404) 659-6700 Fax: (404) 222-9718 stivarius@elarbeethompson.com	**Bobby R. Burchfield (*pro hac vice*)** **Matthew M. Leland (*pro hac vice*)** **Kathleen Sacks** KING & SPALDING LLP 1700 Pennsylvania Avenue, NW, Suite 200 Washington, D.C. 20006 Tel: (202) 737-0500 Fax: (202) 626-3737 bburchfield@kslaw.com mleland@kslaw.com ksacks@kslaw.com

swilson@elarbeethompson.com connell@elarbeethompson.com	**Julia C. Barrett** KING & SPALDING LLP 1180 Peachtree St. NE Atlanta, GA 30309 Tel: (404) 572-4600 Fax: (404) 572-5100 jbarrett@kslaw.com