NEW YORK AUTOMOBILE LEASING BROKERS ASSOCIATION ("NYABA")

MEMORANDUM OF OPPOSITION

S. 4332-A (SAVINO) /A. 1932 (CARROLL)
"AUTOMOBILE BROKER BUSINESS"

May 10, 2022

The NYABA is strongly opposed to Senate Bill 4332-A and Assembly Bill 1932-B ("Bill"). This 6th iteration of the Bill in three years is spearheaded by auto dealers to put auto brokers out of business. Notably, dealers' activities continue to top the list of consumer complaints in New York State. Dealers ranked 5 of the top 10 consumer fraud complaints in 2021 for the second year in a row on the Attorney General of the State of New York ("AG") press release dated March 7, 2022, with 2,283 complaints. Once again, no reference to brokers appears in the AG press release. Moreover, recently dealers have been admonished by manufacturers to stop price gauging consumers. See GM and Ford article. In fact, dealers are making a fortune taking advantage of consumers and low inventory. See nytimes.com/2022/04/02.

A. TOP REASONS AGAINST THIS BILL

1. Brokers help consumers.
2. The Bill will put brokers out of business.
3. The Bill is anti-competitive.
4. Dealers have a history of anti-trust activities against brokers since at least 1995.
5. There are no complaints against brokers.
6. The Bill creates an action against brokers for non-consumer/non-public impact violations.
7. The Bill requires all lessors to obtain a motor vehicle dealer's license.
8. The AG already has jurisdiction over the brokers under the General Business Law.
9. NY State already requires broker licensing under the General Business Law.

This broker Bill is bad for New York State for several reasons: it is anti-consumer and creates dealer protection instead of consumer protection; it will put automobile brokers out of business including leasing companies, used car dealers, and internet companies that broker deals in New York; part of the automobile market that generates revenue and creates jobs in New York will be destroyed; the Bill violates the U.S. and New York Constitutions; there is no evidence of unlawful deceptive practices by brokers prior to and since the law that regulates automobile brokers was amended four years ago.

B. BROKER BUSINESS

Automobile brokers are a key part of the auto market. They are a trusted intermediary between customer and dealer, often speak the customer's language and explain the deal terms. Brokers assist disabled customers who need special accommodations, are unable to visit a dealership or require extra assistance to obtain vehicle conversion accessories. Brokers in business for more than 40 years have developed clientele whom they service for the life of the car. Broker business depends on repeat

customers and word of mouth. Bad practices will lead to losing customers. Brokers search out the best deal for the consumer, so the consumer spends less on a car. Without brokers, customers likely will pay more. This is the opposite of consumer protection. This is dealer protection at its worst.

C. DEALER ANTI-TRUST ISSUES

In 1995, the National Automobile Dealers Association ("NADA") entered into a consent decree with the United States Department of Justice ("DOJ") as a result of a complaint brought against the NADA alleging anticompetitive practices designed to lessen competition among car dealers. U.S. v. National Automobile Dealers Association, Civil Action No. 95-1804 (HHG) (D.D.C.) Among the practices alleged was urging dealers to boycott auto brokers. Dealers sought to keep brokers out of the auto market because brokers were able to create transactions for consumers at lower cost to the consumer. The NADA Reduced Margins Task Force Report in 1994 recommended: "Refuse to do business with brokers or buying services. They inevitably do harm to new vehicle gross margin potential." In the consent decree, the NADA agreed to abstain from such anticompetitive practices for 10 years. Just 15 years after consent decreed expired, the Greater New York Automobile Dealers Association ("GYNADA") has taken up where the NADA left off. GYNADA's March 4, 2021 Legislative Update provides: "[t]his week, the Association took another step forward in its effort to curtail this industry [brokers] by forming a special committee with the single task of passing sorely needed broker reform legislation." Nowhere in the GNADA newsletter and no memorandum in support of the Bill explains which broker activities require reform. The Bill is just a sweeping measure to put the brokers out of business thereby removing any competition against dealers.

D. BILL ANALYSIS

Section 1 of the Bill defines the "automobile broker business" under the General Business Law ("GBL") as a person who for a fee offers to provide, provides or represents that he/she will provide a service of arranging the purchase or lease of "an automobile" as an intermediary for a consumer. As drafted this provision covers brokering used automobiles although it exempts new car dealers and qualified dealer. This is untenable as it will prevent all automobile brokers including those who use the internet as their platform from brokering deals in the State of New York without obtaining a license.

Section 2 of the Bill requires any person engaged in the automobile broker business to obtain a license from the DMV. This provision also prohibits the broker from being paid for its services by a dealer, distributor or factory branch. In current practices brokers are most often paid by the dealer for the broker services. This is impossible as the brokers are expected to provide a service and not get paid by the party that controls all of the funds for the transaction.

By only permitting the consumer to pay the broker's fee directly to the broker, the consumer, the broker, the dealer and New York State all lose out on the transaction. The consumer loses as the broker's fee will not be included in the total capitalized cost of the vehicle. This means that the consumer can no longer opt to "sign and drive" without making a payment and therefore, the consumer will be forced to pay cash down (to the broker) even if it does not want to do so. A segment of deals likely will be lost to both the brokers and the dealers if this provision is implemented. Further, if for example on day 5 of the lease there is a total loss of the vehicle, such as the vehicle is stolen, the customer will be out the broker's fee and the New York State mandated GAP insurance will not cover the broker's fee. If the consumer wants to obtain another vehicle through a broker, it will have to pay the fee all over again. Finally, New York State will lose sales tax

revenues as the broker's fee will not be included in the total cost of the leased or purchased vehicle when the vehicle is registered.

Section 2 of the Bill also purports to amend §415(1)(a) of the Vehicle and Traffic Law ("VTL") without properly denoting the same and provides that any person that sells or leases five or more motor vehicles in a calendar year through one or more automobile broker businesses "shall be deemed to be dealing in motor vehicles". This language seems to require that a person who brokers a transaction must be licensed as a dealer.[1]

Section 3 of the Bill requires the broker to obtain a bid for each consumer from at least 3 different "new motor vehicle dealers" of the same "line-make" meaning make, model and level of trim (accessory package) that meets the customer's specifications including from the dealer that is closest to the customer's home or in the case of an entity, in proximity to its business. The broker is required to deliver the bids to the consumer.[2] At the same time, Section 4 gives the consumer the right to cancel the broker contract within thirty days if the vehicle cannot be procured by the broker.

These provisions in Section 3 and 4 will absolutely put the brokers out of business. First, it is contrary to general business practices: the broker often shops multiple makes, models and trim levels of vehicles at the same time in a particular price range. This is done to optimize consumer choice and awareness of what is available in a particular price range. This Bill provision mandates if the broker is shopping 5 different types of vehicle makes and models, the broker will be required to solicit 15 separate bids for the customer—3 for each type of vehicle, including from the dealer closest to the consumer. If the consumer wants to acquire more than 1 vehicle at the same time, it further complicates matters. What happens if the dealer closest to the consumer does not come up with a bid—surely the broker and consumer should not be penalized therefor. The concept of the bids is anti-competitive in nature as the dealers will always know they have a good chance of not getting the deal. Why will they want to spend the time to prepare multiple bids for one customer without a realistic chance of making a deal. Furthermore, the broker is permitted to solicit the bids only from new vehicle dealers and accordingly, if the consumer is seeking a used vehicle, the broker will be limited to finding a used vehicle only from a new vehicle dealer and not from a used vehicle dealer. Finally, once the bids are delivered to the consumer, the consumer can cut out the broker and go directly to the dealers. Insofar as the dealers are not permitted under Section 1 of the Bill to pay the brokers, once the customer cuts out the broker, the broker will not be paid for its service and will go out of business. This is untenable insofar as it is unconstitutional and creates an unacceptable restraint of trade.

Section 4 of the Bill wrongfully contains a provision requiring the brokers to guaranty that the vehicles are manufactured in accordance with United States safety and environmental specifications. The brokered transaction is simply to connect a consumer to a vehicle that is sold or leased by a motor vehicle dealer. There is absolutely no reason the broker should be required to make such a guaranty. Moreover, this provision relates to the problem of grey market vehicles that has largely been eradicated in this country. Even if some such vehicles are illegally sold, it is the New York vehicle dealer that is violating the law, not the broker. This provision is untenable and imposes an unreasonable burden on the brokers.

[1] This is confirmed in Section 10 of the Bill as described in this Memorandum below.

[2] It should be noted that the automobile broker business as defined in Section 1 above and under current General Business Law §736 applies to brokering for "consumers" that are defined as natural persons and not entities. As drafted, this provision improperly applies to consumers and entities. This error is repeated throughout the Bill.

Section 5 of the Bill imposes a $250,000 surety bond on brokers whereas dealers' bonds only range up to $100,000 for dealers that have sold more than 50 cars in the prior calendar year. This is discriminatory and serves no purpose other than to penalize the brokers.

Section 6 of the Bill provides that it is a fraudulent business practice for the broker to include pricing or financing offers or promotions in any advertisements. This provision is unconstitutional.

Section 7 of the Bill provides that prior to execution of the lease or the contract, the broker must disclose to the consumer all disclosures required be made by the dealer. New York law, including the Personal Property Law and the GBL and a myriad of federal law and attendant regulations contain the disclosures mandated for dealers in and related to the lease forms, retail installment sales contract forms and other sale forms. This body of laws has been developing for over 40 years. The Bill now makes all of those laws applicable to the brokers. This is completely untenable. The broker is not a party to the lease or sales transaction and accordingly, there is no reason for the broker to be required to make disclosures that only apply to the seller or lessor of a vehicle. For example, the seller of the vehicle must comply with the lemon law, proper disclaimer of warranties, odometer requirements, financial disclosures with respect to the cost of the vehicle, the various fees, title and registration fees, sales tax, assignments, liens, security deposits, trade in allowance and on and on. None of this has anything to do with the broker's transaction which is simply introducing the parties to a deal. The costs associated with crafting a broker compliant disclosure form will create a huge financial burden that will put the brokers out of business. This is unconstitutional.

Section 8 contains onerous provisions concerning protection of private information. It requires the brokers to certify annually to the DMV compliance with 8 sections of the GBL including newly enacted GBL §899-bb concerning data security. Under §899-bb, small businesses comply with data security protections if the program contains reasonable safeguards given the size, nature and scope of the business and the consumer's information. Most broker businesses are small. Remarkably, the Bill abrogates the exemption under GBL § 899-bb for small businesses so it does not apply to the brokers. The Bill requires all brokers to implement data safety requirements mandated for large businesses of (i) over 50 employees; or (ii) with gross revenues in excess of $3,000,000 or (iii) with year-end total assets of $5,000,000. Thus, the broker business with 2 or 26 employees will be required to meet the same data protection standards as a bank or other financial institution. No justification is offered for treating brokers differently than other small businesses in New York. Once again this provision is unconstitutional and designed to put the brokers out of business.

Section 9 creates a private right of action for "any persons that are or may be injured by any violation of this article". So that any person, including anyone who has not even sustained an injury, can enforce the provisions of the law. This would include when the dealer in closest proximity to the customer is not allowed to bid on the transaction. The provision gives the plaintiff the right to obtain damages "includ[ing] but not … limited to, lost sales and the value of incentive payments, bonuses, holdbacks or similar payments that would have been realized had a lessee or purchaser purchased or leased a vehicle from the new motor vehicle dealer in closest proximity to such lessee or purchaser." As such, the Bill creates an inherent right to a dealer to have deals presented to it on a silver platter and the right to sue for damages if the broker does not comply. The dealer benefits from a right of action without having its sales force do the work necessary to bring in the customer. Moreover, this private right of action provision states **"[s]uch actions may be brought regardless of whether or not the underlying violation is consumer-oriented or has public impact."** The cat is out of the bag—the provision is meant to protect the dealer, not the consumer. This is unsustainable and demonstrates the Bill's anti-consumer purpose: to protect dealers and drive brokers out of business.

Section 9 of the Bill contains enforcement provisions allowing the attorney general, local municipalities and private parties to enforce the broker licensing law. This will lead to inconsistent and conflicting application of the laws that will burden the New York State Courts.

Section 10 of the Bill amends §415(1)(a) of the VTL to include all lessors in the definition of a dealer. **This means that all independent, bank and captive leasing companies leasing more than five motor vehicles in one year, will need a New York State motor vehicle dealers license.** Further, this section includes the definition of broker activities in the definition of a "dealer" thereby requiring all brokers to obtain dealers licenses. Therefore, only licensed dealers in New York State will be permitted to lease vehicles and conduct broker activities. Why bother concocting such a lengthy Bill when you could just amend this one section of the VTL?

Section 12 of the Bill makes it a fraudulent practice for brokers to advertise the services that brokers provide in connection with new vehicles. This is unconstitutional.

Section 13 permits the Motor Vehicle Commissioner to bring action against previously unlicensed brokers with civil penalties of up to $10,000 for each vehicle sold or leased without a license. This is an onerous penalty.

The broker licensing law was last amended in 2017 and became effective in June 2018. Supporters of the Bill have not identified any deceptive practices to be remedied by the proposed amendments. The 2018 amendment increased the brokers' surety bond to $100,000 which is the same amount as a dealer that sells 50 or more vehicles in a year. Why don't the dealers have a bond increase to $250,000? No evidence has been put forth by the supporters to demonstrate the incidence of deceptive and unlawful practices by brokers. A search of cases in the New York and related Federal LEXIS database in the period from 1960 to present, revealed one case involving an allegedly unlicensed broker. A search in the New York Attorney General Opinions LEXIS database did not reveal any New York Attorney General opinions concerning these brokers. Similarly, the AG has confirmed that there are no complaints against brokers in the past year. A search in all counties of the New York State Supreme Court docket for active and disposed cases where "broker" was in either the name of the plaintiff or defendant revealed 160 cases, none of which involve brokers engaged in unfair or deceptive practices.[3] Obviously, the Bill does not seek to "decrease the incidents of unlawful deceptive practices" but rather to eradicate automobile brokers.

This new version of the Bill, just like the last 5 iterations of the Assembly Bill, reveals its underlying purpose: not consumer protection but dealer protection. Ironically, the dealers seek to put the brokers out of business, but if the dealers truly did not want to deal with brokers, they would have already put the brokers out of business by not doing business with them. Brokers will not be paid for their services and dealers will have the ability to enforce provisions of the law that benefit dealers—not consumers. Dealers are behind this scheme to put major segments of the automobile market in New York out of business to protect dealers' turf even while dealers have made out like bandits during the pandemic. To think that customers will automatically come to their local dealers in the absence of brokers flies in the face of the modern technological world. Dealers have defaulted in their ability to attract consumers. Consumers will seek out the best deals and therefore, dealers must work at generating sales. Brokers bring sales and lease deals to consumers and dealers. Every car leased or sold by a broker in New York brings revenue to the State of New York and its municipalities in

[3] Copies of research results will be provided on request.

several ways.[4] New cars mean auto mechanics will have cars to service in service departments across the state. All of this creates jobs and revenues in New York. How does destroying an important part of the automobile market in the face of declining sales help consumers?

[4] Among them, New York State sales and local sales tax must be paid in full in order to register a new car in New York and the sale of vehicles inures to the multiple businesses involved in the transaction which in turn creates corporate tax revenue.