STATE OF MICHIGAN
IN THE SUPREME COURT
ON APPEAL FROM THE COURT OF APPEALS

LaFONTAINE SALINE, INC. d/b/a
LaFONTAINE CHRYSLER JEEP DODGE RAM,

Plaintiff-Appellee,

vs.

CHRYSLER GROUP, LLC and IHS
AUTOMOTIVE GROUP, LLC d/b/a CHRYSLER
JEEP OF ANN ARBOR,

Defendants-Appellants

Supreme Court Nos. 146722, 146724
Court of Appeals No. 307148
Washtenaw County Circuit Court
LC No. 10-1329-CZ

**JOINT AMICUS CURIAE BRIEF
OF THE DETROIT AUTO DEALERS ASSOCIATION AND THE
MICHIGAN AUTO DEALERS ASSOCIATION**

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INTEREST OF AMICI CURIAE

The Detroit Auto Dealers Association ("DADA") and the Michigan Auto Dealers Association ("MADA") are the joint proposed amici curiae herein. DADA is a regional trade association representing the interests of its members, which are 198 new motor vehicle dealers that own 210 dealerships selling a variety of different vehicle lines in cities throughout the greater Detroit area. MADA is a statewide trade association headquartered in East Lansing, Michigan. MADA represents the interests of its nearly 700 members, which are franchised new motor vehicle dealers located throughout Michigan's Lower and Upper Peninsulas. MADA's membership includes many dealers that are also members of DADA.

This matter involves a ruling by the Michigan Court of Appeals in a declaratory judgment action filed by Plaintiff/Appellee LaFontaine, seeking to invoke the statutory "elbow-room" protections afforded to existing franchised new motor vehicle dealers under the Michigan Dealer Act, MCL 445.1561, *et seq.*, a dealer-protection statute that regulates the relationships between motor vehicle dealers and manufacturers. The Court of Appeals properly reversed the ruling of the Washtenaw County Circuit Court and held that a "letter of intent" is not a "dealer agreement," as defined by the Michigan Dealer Act. The Appellants are seeking a reversal of the Court of Appeals decision, which would have the effect of denying LaFontaine and the vast majority of existing new motor vehicle dealers in Michigan the enhanced protections enacted by the Michigan Legislature when it amended the Michigan Dealer Act effective August 4, 2010, including the expanded statutory protection of a 9 mile relevant market area for a metropolitan dealer such as LaFontaine. The Appellants also urge this Court to adopt the erroneous reasoning of the Sixth Circuit Court of Appeals in *Kia Motors America Inc v Glassman Oldsmobile Saab Hyundai Inc*, 706 F3d 733 (6th Cir 2013), which held that dealers who entered into dealer

agreements before August 4, 2010 cannot receive the benefit of the 2010 Michigan Dealer Act amendments.

The Amici Curiae contend that the Michigan Court of Appeals correctly reversed the trial court and properly accorded LaFontaine the protection of the 9 mile statutorily-protected relevant market area. The Amici Curiae further contend that the Sixth Circuit Court of Appeals missed the mark in analyzing Michigan law in holding that dealers that executed dealer agreements before the enactment of the 2010 Michigan Dealer Act amendments are precluded from receiving the benefit of such amendments. Accordingly, the Amici Curiae respectfully request that this Court affirm the decision of the Court of Appeals and decline the invitation to adopt the erroneous reasoning of the 6th Circuit Court of Appeals in *Kia Motors America Inc v Glassman Oldsmobile Saab Hyundai Inc*, 706 F3d 733 (6th Cir 2013).

COUNTER-STATEMENT OF QUESTIONS PRESENTED

I. WHETHER THE SIXTH CIRCUIT COURT OF APPEALS IN *KIA MOTORS AMERICA INC v GLASSMAN OLDSMOBILE SAAB HYUNDAI INC*, 706 F3d 733, 735 (6TH CIR 2013) INCORRECTLY ANALYZED MICHIGAN LAW IN HOLDING THAT THE APPLICABLE PROVISIONS OF THE MICHIGAN DEALER ACT ARE "FROZEN IN PLACE" FOR EACH EXISTING DEALER AT THE TIME IT EXECUTES A DEALER AGREEMENT, CREATING A MYRIAD OF DIFFERENT "CLASSES" OF DEALERS, WITH VARYING RIGHTS AND OBLIGATIONS, NOTWITHSTANDING THE REMEDIAL AND DEALER-PROTECTIVE INTENT OF THE MICHIGAN DEALER ACT?

The Amici Curiae, Detroit Auto Dealers Association and Michigan Auto Dealers Association, answer: Yes.

II. WHETHER THE MICHIGAN COURT OF APPEALS CORRECTLY HELD THAT A LETTER OF INTENT IS NOT A "DEALER AGREEMENT" AS DEFINED BY THE MICHIGAN DEALER ACT AND, THEREFORE, THAT THERE IS NO ISSUE OF RETROACTIVITY IN ACCORDING LAFONTAINE THE PROTECTION OF THE 9 MILE STATUTORILY-PROTECTED RELEVANT MARKET AREA IN THE VERSION OF THE MICHIGAN DEALER ACT THAT WAS IN EFFECT WHEN LAFONTAINE RECEIVED STATUTORY NOTICE FROM CHRYSLER UNDER MCL 445.1576?

The Amici Curiae, Detroit Auto Dealers Association and Michigan Auto Dealers Association, answer: Yes.

STATEMENT OF JURISDICTION

This Court granted leave to appeal the November 27, 2012 judgment of the Court of Appeals by its Order dated October 2, 2013. MCR 7.302. In that Order, the Court directed that "persons or groups interested in the determination of the issue presented in this case may move the Court for permission to file briefs amicus curiae." The joint proposed Amici Curiae have moved for leave to file this brief pursuant to MCR 7.212(H) and this Court's October 2, 2013 Order.

STATEMENT OF FACTS

The Amici Curiae, MADA and DADA, rely upon and incorporate herein by this reference the Statements of Facts by the Plaintiff/Appellee LaFontaine in its Briefs on Appeal filed under Docket Nos. 146722 and 146724.

STATEMENT OF MATERIAL PROCEEDINGS

The Amici Curiae, MADA and DADA, rely upon and incorporate herein by this reference the Statements of Material Proceedings by the Plaintiff/Appellee LaFontaine in its Briefs on Appeal filed under Docket Nos. 146722 and 146724.

ARGUMENT

I. THE SIXTH CIRCUIT COURT OF APPEALS INCORRECTLY ANALYZED MICHIGAN LAW IN *KIA MOTORS AMERICA INC v GLASSMAN OLDSMOBILE HYUNDAI INC,* 706 F3d 733 (6th Cir 2013) IN HOLDING THAT THE APPLICABLE PROVISIONS OF THE MICHIGAN DEALER ACT ARE "FROZEN IN PLACE" FOR EACH EXISTING DEALER AT THE TIME IT EXECUTES A DEALER AGREEMENT, CREATING A MYRIAD OF DIFFERENT "CLASSES" OF DEALERS, WITH VARYING RIGHTS AND OBLIGATIONS, NOTWITHSTANDING THE REMEDIAL AND DEALER-PROTECTIVE INTENT OF THE MICHIGAN DEALER ACT.

A. The Approach Suggested by Chrysler and IHS Would Produce an Absurd Result.

It is impossible to dispute the fact that the Michigan Dealer Act is a dealer protection statute. *See Pung v GMC,* 226 Mich App 384, 387; 573 NW2d 80 (1997); *Eastern Sport Car Sales Inc v Fiat Motors of North America,* 1988 WL 73449 (ED Mich 1988). In *Eastern Sport Car Sales*, the court reviewed the Michigan Dealer Act's legislative history, which discussed concern regarding the practice of manufacturers in establishing new dealerships in areas which are already being served by existing dealers, threatening the economic well-being of existing dealers. *Id.* The Michigan Court of Appeals in *Pung* recognized the day-to-day reality of every franchised new motor vehicle dealer throughout the country --while "the dealership is wholly

dependent on the franchise from the manufacturer, the manufacturer can easily exist without any individual dealership." *Pung*, supra, at 387. The Court of Appeals therefore concluded that because "of this economic domination, the [Michigan Dealer Act] is designed to protect dealerships." *Id.* It is only logical that because "the Dealer Act was intended to protect dealers, an interpretation that provides such protection is more likely to be correct." *Bright Power Sports v BRP US Inc*, 2009 WL 4250698 (ED Mich 2009). However, despite the ample evidence that the Michigan Dealer Act is remedial and designed to protect all new motor vehicle dealers from oppressive conduct by manufacturers, in *Kia Motors America Inc v Glassman Oldsmobile Saab Hyundai Inc*, 706 F3d 733 (6th Cir 2013), the Sixth Circuit Court of Appeals inappropriately and without legal basis radically limited the application of the 2010 amendments to the Michigan Dealer Act only to dealers who enter into a dealer agreement with a manufacturer after August 4, 2010 (the effective date of the 2010 statutory amendments).

In *Glassman*, the Sixth Circuit held, inter alia, that the "triggering event" for purposes of determining which version of the Michigan Dealer Act applies is the date that the manufacturer's dealer agreement with the existing dealer is signed. Therefore, in the *Glassman* case, the Sixth Circuit held that because Glassman (the existing dealer) entered into a dealer agreement with Kia before the Michigan Dealer Act was amended in 2010, Glassman could not receive the protection of the new 9 mile relevant market area provision because doing so would cause an impermissible retroactive application of the statute. In reaching this conclusion, the Sixth Circuit (and the District Court) disregarded the plain language of MCL 445.1576, which clearly provides that the "triggering event" is the intention of the manufacturer to enter into a dealer agreement with a proposed dealer.

The result of the Sixth Circuit's flawed interpretation of Michigan law is the creation of an untenable patchwork of different dealer "classes" based upon the date when a dealer enters into a dealer agreement with a manufacturer, and secondarily, the manufacturer's decision regarding whether to enter into a "perpetual" dealer agreement or a "term" agreement. It is important to understand the use of perpetual and term agreements by different manufacturers in a variety of different circumstances. The Amici Curiae submit that this Court can take judicial notice of the fact that it is standard industry practice for Chrysler to enter into "perpetual" dealer agreements that have no expiration date. Other manufacturers enter into "term" dealer agreements for a period of years, where nearly all dealer agreements across the country expire on the same schedule. For example, General Motors currently enters into 5 year term agreements with its dealers, all of which will next expire in 2015. Further, as dealerships are bought and sold, manufacturers enter into dealer agreements with the "new" dealers, sometimes even placing a dealer on a "term agreement" for a period of time while the dealer works to complete facility upgrades or other requirements before the manufacturer agrees to enter into a longer term agreement. Based upon these facts, under the Sixth Circuit's reasoning in *Glassman* that the applicable law is frozen at the time the dealer agreement is signed, there is potentially an infinite number of dealer classes due to the different business practices of manufacturers, dealership buy-sell transactions, and the four times that the Legislature amended the Michigan Dealer Act.

For example, with respect to the 2010 amendments alone, dealers that signed dealer agreements before August 4, 2010 would be bound by the pre-amendment statute, while dealers that signed dealer agreements after August 4, 2010 would be bound by the post-amendment statute. This means that if all of the facts of this case remained the same, but LaFontaine had sold its dealership to a different entity which signed a new Chrysler dealer agreement on August 5, 2010, the post-

amendment statute would apply and the new dealer would receive the benefit of the 9 mile relevant market area. Taking this analysis to its logical conclusion, if this Court adopts the erroneous *Glassman* reasoning, when the dealer agreements for General Motors dealers expire and new agreements are executed in 2015, all General Motors dealers will have the benefit of the 2010 amendments, while dealers such as LaFontaine who signed perpetual agreements may never receive the protections of the 2010 amendments. At least one court has considered, and rejected, a similar attempt by Chrysler to selectively enforce amendments to the Wisconsin motor vehicle franchise law. *Kolosso*, infra. In rejecting Chrysler's arguments, the 7th Circuit stated that the "literal interpretation would impede governmental efforts to regulate for the future, by grandfathering economic rights that would give their holders a competitive advantage over new firms. ***Chrysler is seeking a degree of freedom of action in dealing with its dealers that is denied to automobile manufacturers that having made their dealership contracts after the relocation amendment went into effect cannot seek relief under the contracts clause."*** *Kolosso*, infra, at 894 (Emphasis added). Adopting the 6th Circuit's flawed reasoning in *Glassman* would establish the dangerous precedent that parties can immunize themselves from future regulation simply by entering into private contracts. *United States Trust Co v New Jersey*, 431 US 1, 22 (1977). The United States Supreme Court has noted that "one whose rights, such as they are, are subject to state restriction, cannot remove them from the power of the State by making a contract about them. The contract will carry with it the infirmity of the subject-matter." *Home Building & Loan Ass'n v Blaisdell*, 290 US 398 (1934). The Amici Curiae submit that this Court should carefully question why Chrysler is asking this Court to sanction its attempts to avoid application of the 2010 Michigan Dealer Act amendments, when there is no compelling evidence that the Michigan legislature did not intend for the 2010 amendments to benefit all new motor vehicle dealers in Michigan.

It would be logically inconsistent for this Court to adopt *Glassman*, which stands for the proposition that in order to invoke its rights under the Dealer Act -- that was enacted to protect dealers from over-reaching by manufacturers -- a dealer would have to undertake a complicated analysis of the timing and terms of the dealer agreement it signed and determine which of five different versions of the Dealer Act apply. This is obviously an absurd result, and cannot be the intent of the Michigan legislature. As the Michigan Court of Appeals properly recognized in *Anderson's Vehicle Sales*, infra, the legislature's "broad legislative power includes the power to make the enactment effective immediately so as to prevent the evils which the statute aims to correct." *Id.* at 414. This Court should not accept Chrysler's invitation to ignore the fact that the Michigan legislature unambiguously directed that the 2010 amendments to the Michigan Dealer Act were made immediately effective, presumably to ensure that all new motor vehicle dealers received the protection of such amendments as expeditiously as possible.

This Court is well aware that federal court interpretations of state law are not binding or controlling on state courts. *Van Buren Twp v Garter Belt Inc*, 258 Mich App 594, 604; 673 NW2d 111 (2003); *Ryder Truck Rental Inc v Auto-Owners Ins Co Inc*, 235 Mich App 411, 416; 597 NW2d 560 (1999). A federal court is bound by, and defers to, a state court's construction of the statutes of its own state. *Banner v Davis*, 886 F2d 777 (6th Cir 1989); *Missouri v Hunter*, 459 US 359 (1983). This Court should affirm the decision of the Court of Appeals, which reached the common sense conclusion that the August 4, 2010 effective date of the 2010 amendments to the Michigan Dealer Act makes the amendments applicable to conduct that occurs after the effective date, such as Chrysler's statutory notice to LaFontaine in this case. In reaching this conclusion, the Court of Appeals properly followed the precedent of *Anderson's Vehicle Sales Inc v OMC-Lincoln,* 93 Mich App 404; 287 NW2d 247 (1979), which held that the

date of the underlying dealer agreement between the parties was irrelevant because the statutory amendment at issue regulated conduct occurring after the effective date of the amendments. The Court of Appeals' reasoning in *Anderson's* is particularly on point here because it involved a similar close reading of the plain language of the amended statute and determination that the amended statutory language was not triggered until after the effective date of the amendments. The Court of Appeals' distinction in *Anderson's* between the time when a notice of termination was provided and when the termination occurred (i.e., the statutory triggering event) is no different from the Court of Appeals' finding here that the statutory trigger is Chrysler's decision to enter into a dealer agreement and its statutory notice to LaFontaine of such intent. In both cases, the Court of Appeals properly found that where the statutory trigger did not occur until after the amendment became effective, there was no issue of retroactivity.

It is anticipated that Chrysler and IHS will argue that *Anderson's* is no longer good law, based upon a misguided interpretation of Michigan law by the Sixth Circuit in *Dale Baker Oldsmobile Inc v Fiat Motors of North America Inc*, 794 F2d 213 (6th Cir 1986) and a later Michigan Court of Appeals decision that followed *Dale Baker*. *Joe Dwyer Inc v Jaguar Cars Inc*, 167 Mich App 672 (1988). *Dale Baker* and *Joe Dwyer* are factually distinguishable from *Anderson's* because they involve application of statutory amendments changing the amount of termination compensation to which a dealer was entitled, while *Anderson's* involved the timing of a statutory notice of termination of a franchise. The instant case is factually analogous to *Anderson's*. Therefore, the Michigan Court of Appeals properly followed the *Anderson's* precedent, since it is not bound by a lower federal court's interpretation of Michigan law. *Van Buren Twp*, supra.

Furthermore, in *Dale Baker*, the Sixth Circuit relied heavily upon this Court's retroactivity analysis in *In re Certified Questions from the US Court of Appeals for the Sixth Circuit*, 416 Mich 558; 331 NW2d 456 (1982), where this Court held that the Michigan comparative negligence statute applied retroactively to litigation where the plaintiff's injury had occurred and his lawsuit had been filed prior to the statute's enactment. This Court found no issue with the retroactive application of the statute, even though it reduced the jury verdict by 95% (the amount of his comparative negligence), because it held the plaintiff had no vested rights in the prior state of the law. In this case, if this Court is persuaded to undertake a retroactivity analysis (an analysis which the Amici Curiae believe is unnecessary for reasons discussed below), the Amici Curiae submit that it is bound by *In re Certified Questions*. Under the *In re Certified Questions* analysis, there is no colorable basis upon which Chrysler may argue that it had a vested right in the 6 mile relevant market area provision that existed prior to the 2010 amendments to the Michigan Dealer Act. A careful reading of *Dale Baker* and its progeny reveals that the Sixth Circuit misapplied this Court's holding in *In re Certified Questions*, and then further compounded its error in *Glassman* by relying upon its erroneous analysis in *Dale Baker*. Thus, *Anderson's* remains good law, and this Court can correct the confusion caused by the Sixth Circuit in the *Dale Baker* line of cases by simply relying upon *In re Certified Questions* to the extent it concludes that a retroactivity analysis is required.

B. Because the Sale of New Motor Vehicles through Franchised Dealers Is a Heavily Regulated Industry, Chrysler Is Charged with Knowing and Anticipating Future Changes in the Michigan Dealer Act.

This Court should recognize the fallacy of Chrysler's argument that the 2010 amendments to the Michigan Dealer Act were completely unanticipated and, therefore, unenforceable as impermissibly retroactive or in violation of the contracts clauses of the Michigan and United States Constitutions. There is no blanket prohibition on legislative

enactments that may affect or even alter the terms and conditions of a contractual relationship, ***particularly in industries that are heavily regulated.*** *Energy Reserves Group Inc v Kansas Power & Light Co*, 459 US 400 (1983) (Emphasis added). Foreseeability is even more apparent where the same topic was already subject to regulation -- as is the case here, where an existing dealer was entitled to the protection of a 6 mile relevant market area prior to August 4, 2010, when that statutory area of protection was expanded to 9 miles. In *Veix v Sixth Ward Building & Loan Ass'n*, 310 US 32, 38 (1940), the United States Supreme Court noted that when one "purchased into an enterprise already regulated in the particular to which he now objects, he purchased subject to further legislation upon the same topic." In addressing the foreseeability of future regulation of the relationship between manufacturers and automobile dealers, the United States District Court for the Eastern District of Michigan has noted that "the automobile manufacturer-dealer industry is one that can reasonably expect to be regulated. It has historically been regulated, by virtue of the 1978 Act and its predecessors." *Eastern Sport Car Sales Inc v Fiat Motors of North America Inc*, 1988 WL 73449 (ED Mich 1988). *See also Paw Paw Wine Distributors Inc v Joseph E. Seagram & Sons Inc*, 34 FSupp 2d 550 (WD Mich 1987) (Holding that the Michigan Wine Franchise Act applied to contracts executed prior to the enactment of the Act and that the retroactive application of the Act did not violate the Contracts Clause).

To better understand the absurdity of Chrysler's claim that it could not have been expected to anticipate a three-mile expansion of the Michigan relevant market area statutory provision, it is worth reviewing Judge Posner's analysis in a factually analogous case from the 7th Circuit Court of Appeals. In *Chrysler Corp v Kolosso Auto Sales Inc*, 148 F3d 892 (7th Cir 1998), Chrysler requested a judicial determination that an amendment to the Wisconsin Motor Vehicle Dealers Law which gave an existing dealer the right to protest a manufacturer's refusal

to permit the existing dealer to relocate violated the contracts clause. Chrysler argued that the statutory amendment was an unenforceable impairment of its prior "unqualified" contractual right under the dealer agreement to require the dealer to remain at the same location. The trial court found in favor of the dealer and the 7th Circuit Court of Appeals affirmed. The 7th Circuit noted that in determining whether application of the amended Wisconsin Motor Vehicle Dealers Law violated the contracts clause, it is paramount to determine "the foreseeability of the law when the original contract was made; for what was foreseeable then will have been taken into account in the negotiations over the terms of the contract." *Kolosso* at 894. The 7th Circuit recognized that foreseeability is largely dependent upon whether an industry was heavily regulated when a contract was made and was unpersuaded by Chrysler's contract clause arguments because the change in the franchise law "was not a major change - was rather the sort of fine tuning of the statute that Chrysler would have expected to take place from time to time because the statute regulates in such detail a complex commercial relationship." *Kolosso* at 896.

The same is true here. The expansion of LaFontaine's statutorily protected relevant market area by three miles was nothing more than a minor "fine tuning" that Chrysler should have anticipated, since the trend of amendments to the Michigan Dealer Act has been to consistently expand dealer-protective provisions in the Act.

It is disingenuous for Chrysler to suggest that the 2010 amendments to the Michigan Dealer Act came as a complete surprise and/or that a change to a statutory relevant market area provision is a novel occurrence. The reality is that Chrysler is a sophisticated entity that is expected to know the nuances of the provisions of the motor vehicle franchise laws in each state. It is no secret that relevant market area provisions vary widely from state to state. For example, a Montana dealer has a statutory relevant market area measured by the county or county in which

the dealer is located (Mont. Code Ann. 61-4-201), a New Jersey dealer's relevant market area is 20 miles (N.J.S.A. 56:10-19), Ohio and Minnesota dealers have relevant market areas of 10 miles (Minn. Stat. 80E.14; Ohio Rev. Stat. 4517.01), Georgia dealers have a relevant market area of 8 miles (Ga. Code Ann. 10-1-664), while Illinois, like Michigan, distinguishes between metropolitan and rural dealers, providing statutory relevant market areas of 10 and 15 miles, respectively. A survey of all fifty states would show even greater diversity in statutory provisions regarding relevant market area. Chrysler operates in each of these markets, and routinely makes business decisions within the parameters of the peculiarities of each state's motor vehicle franchise law, with regard to establishment of new dealers, relocation of existing dealers, and termination of existing dealers. There is nothing new here; state motor vehicle franchise laws have been in place for decades, and have been amended numerous times over the years as state legislatures have continued to hone protections for dealers in the face of arbitrary and capricious conduct by manufacturers.

In the ordinary course of business and management of its dealer network, Chrysler routinely analyzes the motor vehicle franchise laws of each state, including Michigan. It is common industry practice for manufacturers such as Chrysler to conduct market studies that may or may not be shared (in whole or in part) with the dealer network. A market study is a review of population demographics, market characteristics, and vehicle registrations, with a view toward market trends and analysis of whether a market is being adequately served by its existing dealers and whether more dealers should be established, either presently or in anticipation of future demand. Market studies are often the basis for a manufacturer's decision to expand or contract its dealer network. A manufacturer's decision to establish a competing dealer (such as Chrysler's decision here to establish IHS to compete with LaFontaine) is more often than not the

result of sophisticated analysis of numerous variables, including market studies and the effect of the applicable state franchise law on the subject of protest rights for existing dealers and statutorily protected relevant market areas.

Against this backdrop, it should be abundantly clear to this Court that the manufacturers, including Chrysler in this case, are "calling the shots" when it comes to the decision to establish a competing dealer, while the existing dealers with all of the risk and investment in bricks and mortar wait to see if they will be accorded the protection of their state motor vehicle franchise law. Indeed, it is worth noting that in *New Motor Vehicle Bd of California v Orrin W Fox Co*, 439 US 96 (1978), the United States Supreme Court cited Congressional legislative findings regarding the historical need for dealer protective motor vehicle franchise laws:

> "Dealers are with few exceptions completely dependent on the manufacturer for their supply of cars. ***When the dealer has invested to the extent required to secure a franchise, he becomes in a real sense the economic captive of his manufacturer. The substantial investment of his own personal funds by the dealer in the business, the inability to convert easily the facilities to other uses, the dependence upon a single manufacturer for supply of automobiles, and the difficulty of obtaining a franchise from another manufacturer all contribute toward making the dealer an easy prey for domination by the factory.*** On the other hand, from the standpoint of the automobile manufacturer, any single dealer is expendable. The faults of the factory-dealer system are directly attributable to the superior market position of the manufacturer." *Orrin W. Fox Co.*, supra, at fn 4, citing S.Rep.No. 2073, 84th Cong., 2d Sess., 2 (1956) (Emphasis added).

As a sophisticated business operating in a heavily-regulated industry, it is inconceivable that Chrysler did not analyze the impact of the Michigan Dealer Act and its relevant market area provisions in connection with its decisions to first enter into a letter of intent with IHS and to later provide statutory notice to LaFontaine of its intention to establish a dealership within LaFontaine's relevant market area. Chrysler was well aware throughout 2010 that amendments to the Michigan Dealer Act were coming. Chrysler, along with eleven other car and light truck manufacturers, are members of the Alliance of Automobile Manufacturers, a lobbying and

advocacy organization that argued as amicus curiae in support of Chrysler and IHS's applications for leave to appeal in this matter. In its lobbying function, the Alliance is actively involved any time motor vehicle franchise law amendments are pending in state legislatures, and the 2010 amendments to the Michigan Dealer Act were certainly no exception. In their briefs, Chrysler, IHS, and the Alliance hide behind clever spinning of technical arguments that misapply the law, invite the Court to create issues of retroactivity where there are none, and stubbornly refuse to concede that the plain language of the 2010 amendments to the Michigan Dealer Act compels a decision that affords LaFontaine the protection of the 9 mile relevant market area. Chrysler, IHS, and the Alliance must hide behind these arguments because they have no answer for the practical absurdity that would result from a literal adoption by this Court of the erroneous *Glassman* holding.

It is worth considering whether Chrysler would adopt the same interpretation of the law if the Michigan Legislature had determined that the relevant market area provisions were too generous to dealers and had reduced the protected territory for existing dealers in the 2010 amendments. Would Chrysler still argue that all dealers that had signed a dealer agreement prior to the effective date of such amendments remained entitled to the more expansive relevant market area provision under the prior version of the statute? If this Court adopts the erroneous *Glassman* holding, this is the only possible conclusion. Such a hypothetical scenario demonstrates the absurdity of the positions taken by Chrysler, IHS, and the Alliance in this case. It illustrates the fact that the only logical conclusion that faithfully enforces the intent of the legislature is to ignore the date upon which an existing dealer's dealer agreement was signed and focus instead on the triggering events set forth in the statute -- the manufacturer's intention to

enter into a dealer agreement with a proposed dealer and preceding statutory notice to the existing dealer under MCL 445.1576. *Anderson's Vehicle Sales*, supra.[1]

II. THE COURT OF APPEALS CORRECTLY HELD THAT A LETTER OF INTENT IS NOT A "DEALER AGREEMENT" AS DEFINED BY THE MICHIGAN DEALER ACT; THEREFORE, THERE IS NO ISSUE OF RETROACTIVITY IN ACCORDING LAFONTAINE THE PROTECTION OF THE 9 MILE STATUTORILY-PROTECTED RELEVANT MARKET AREA IN THE VERSION OF THE MICHIGAN DEALER ACT THEN IN EFFECT WHEN LAFONTAINE RECEIVED STATUTORY NOTICE FROM CHRYSLER UNDER MCL 445.1576.

A. There Was Absolutely No Basis for the Trial Court's Erroneous Ruling that the Letter of Intent between Chrysler and IHS was a "Dealer Agreement" under the Michigan Dealer Act.

The trial court's erroneous ruling in this case was premised on an incorrect determination that the letter of intent ("LOI") entered into by Chrysler and IHS on February 2, 2010 constituted a "dealer agreement" as defined by the Michigan Dealer Act. When IHS and Chrysler executed the LOI, the Michigan Dealer Act defined "dealer agreement" in pertinent part as follows: "Dealer agreement" means the agreement or contract in writing between . . . . a manufacturer and a . . . new motor vehicle dealer . . . which purports to establish the legal rights and obligations of the parties to the agreement or contract with regard to the purchase and sale or resale of new motor vehicles and accessories for motor vehicles. [MCL 445.1562(2), as amended by 1998 PA 456.][2]

The Court of Appeals correctly noted that "the LOI does not purport to establish the legal rights and obligations regarding the sale of new motor vehicles and accessories. Rather, the LOI

[1] In its amicus brief in support of Chrysler and IHS's applications for leave to appeal, the Alliance argued that this Court should adopt the erroneous *Glassman* reasoning because failing to do so would allow manufacturers to engage in forum-shopping. This argument fails on its face, because to the extent that this Court affirms the Court of Appeals, *Glassman* will be, at the very least, called into question, and the lower federal courts will be compelled to follow this Court's interpretation of Michigan law.

[2] Despite its own ruling that the Michigan Dealer Act could not be applied retroactively, the trial court used the amended definition of "dealer agreement" from the 2010 Michigan Dealer Act amendments in conducting its analysis of whether the LOI was a dealer agreement. The Amici Curiae submit that this is further evidence that the trial court opinion is substantially devoid of logic; however, the error is moot for purposes of this Court's review because the Court of Appeals noted the error of the trial court's reasoning, but held that under either definition of "dealer agreement," the Court of Appeals would reach the same conclusion -- that the LOI is unequivocally not a dealer agreement.

concerns the construction of a "new facility...for the exclusive display, sales and service of Dodge, Chrysler and Jeep vehicle lines." The Court of Appeals aptly referred to the LOI as a "prelude" to an "ultimate dealer agreement" that Chrysler and IHS anticipated entering at some point in the future and accordingly held that the LOI was not a dealer agreement.

B. The Court of Appeals Correctly Recognized that the "Triggering Event" for Determining Whether a Retroactive Application of the Relevant Market Area Definition in the Michigan Dealer Act Is Implicated Is the Date when the Manufacturer Will Enter Into a Dealer Agreement.

While the trial court's decision was fatally flawed because it concluded that the IHS/Chrysler LOI was a dealer agreement (and therefore concluded that Chrysler and IHS had entered into a dealer agreement on February 2, 2010, prior to the effective date of the August 4, 2010 amendments to the Michigan Dealer Act), the trial court's focus on the time when the dealer agreement between the manufacturer and prospective dealer is entered was substantively correct. MCL 445.1576 sets forth the "elbow-room" market area protections for existing new motor vehicle dealers:

> (2) ***Before a manufacturer or distributor enters into a dealer agreement*** establishing or relocating a new motor vehicle dealer within a relevant market area where the same line make is represented, the manufacturer or distributor shall give written notice to each new motor vehicle dealer of the same line make in the relevant market area ***of its intention to establish an additional dealer or to relocate an existing dealer within that relevant market area.***
>
> (3) Within 30 days after receiving the notice provided for in subsection (2), or within 30 days after the end of any appeal procedure provided by the manufacturer or distributor, a new motor vehicle dealer may bring a declaratory judgment action in the circuit court for the county in which the new motor vehicle dealer is located to determine whether good cause exists for the establishing or relocating of a proposed new motor vehicle dealer. Once an action has been filed, the manufacturer or distributor shall not establish or relocate the proposed new motor vehicle dealer until the circuit court has rendered a decision on the matter. An action brought pursuant to this section shall be given precedence over all other civil matters on the court's docket. (Emphasis added).

The trial court erred in concluding that LaFontaine was seeking to apply the 2010 amendments to the Michigan Dealer Act retroactively because the trial court incorrectly viewed the February 2010 LOI as a "dealer agreement." If the trial court had not reached this unsupported conclusion that the LOI was a dealer agreement and had instead focused upon the fact that the date upon which Chrysler and IHS would enter into a dealer agreement would necessarily be after the effective date of the 2010 Michigan Dealer Act amendments, it seems that the trial court likely would have correctly concluded, as the Court of Appeals did, that there is no issue of retroactivity.

The Court of Appeals correctly seized upon the plain language timing set forth in MCL 445.1576(2). When examining a statutory provision, the Court is required to "give the words of a statute their plain, ordinary meaning unless the Legislature employs a term of art." *Bukowski v City of Detroit*, 478 Mich 268, 274; 732 NW2d 75 (2007). The Court of Appeals held that the "triggering events" were Chrysler's written notice to LaFontaine of its intent to establish an additional dealer within LaFontaine's relevant market area, and the act of IHS and Chrysler entering into a dealer agreement. The Court of Appeals then concluded that the "triggering events" had occurred (in the case of Chrysler's October 8, 2010 statutory notice to LaFontaine) or would necessarily occur after the effective date of the August 4, 2010 amendments to the Michigan Dealer Act (in the case of a dealer agreement between Chrysler and IHS). As such, the issue of the alleged retroactive application of the 2010 amendments to the Michigan Dealer Act is simply a red herring.

MCL 445.1576 clearly states that a manufacturer is required to provide statutory notice of its intent to establish or relocate a new dealer within the relevant market area of an existing dealer of the same line make before its enters into a dealer agreement. MCL 445.1576 further references

the "intention" of the manufacturer to establish or relocate a new dealer. There can be no dispute that the "intention" of a manufacturer is a subject uniquely within the purview of the manufacturer -- it is not something that existing motor vehicle dealers could be expected to anticipate. It is apparent from the plain language of the statute that the legislature placed the burden of determining the appropriate time to provide the required statutory notice to an existing dealer upon the manufacturer because the manufacturer is the only entity that knows when it develops the subjective intent to enter into a dealer agreement. As such, MCL 445.1576 requires that once a manufacturer develops this intent to enter into a dealer agreement, it must send the required statutory notice. Naturally, as the Court of Appeals held, it is only logical to apply the version of the Michigan Dealer Act that was in effect on the date Chrysler announced its intention to enter into an "ultimate" dealer agreement with IHS by providing statutory notice to LaFontaine. Because Chrysler provided the required statutory notice on October 8, 2010, after the August 4, 2010 effective date of the 2010 Michigan Dealer Act amendments, there is no issue of retroactive application of the 2010 Michigan Dealer Act amendments. The "triggering events" -- when Chrysler provided statutory notice and when an "ultimate" dealer agreement may be executed between Chrysler and IHS -- necessarily occurred (or may occur) after the effective date of the amendments. LaFontaine, as an existing dealer, enjoys statutory relevant market area protections pursuant to the plain language of MCL 445.1576. Therefore, LaFontaine was entitled to rely upon Chrysler's October 2010 statutory notice of its intention to enter into a dealer agreement and establish a competing dealership within LaFontaine's relevant market area. This statutory notice triggered LaFontaine's right to initiate this action for declaratory judgment.

C. Even Assuming Arguendo that Chrysler or IHS Could Demonstrate that the 2010 Amendments to the Michigan Dealer Act Are Being Applied Retroactively, Their Attempts to Block LaFontaine from Receiving the Benefit of the Statutory Protection Still Would Fail Because the Amendments Do Not Impair Any Vested Rights of Chrysler or IHS.

A dealer agreement is essentially an adhesion contract drafted by the manufacturer and not subject to any meaningful negotiation by a dealer. This is just one example of the unequal bargaining power between dealers and manufacturers, which led to the development of motor vehicle franchise laws throughout the United States to provide dealers some modicum of protection from arbitrary and capricious actions taken by manufacturers.

Here, Chrysler argues that affording LaFontaine the protection of the enhanced statutorily-protected 9 mile relevant market area would impair Chrysler's vested contractual rights under its dealer agreement with LaFontaine, which was executed in 2007.[3] This argument conveniently ignores the fact that the dealer agreement between Chrysler and LaFontaine does not mention the concept of "relevant market area." Indeed, "relevant market area" is an entirely statutory concept under Michigan law. It is a *statutory area of protection*, which affords existing dealers an opportunity to protect their exclusivity in the territory surrounding their dealership in the face of competition from other same line-make dealers. Chrysler and IHS's arguments regarding retroactivity ignore the legal principle that a "retrospective law is one which takes away or impairs vested rights acquired under existing laws, or creates a new obligation and imposes a new duty, or a attaches a new disability with respect to transactions to considerations already past." *Hughes v Judges Retirement Board*, 407 Mich 75, 85; 282 NW2d 160 (1979); *Ballog v Knight Newspapers Inc*, 381 Mich 527, 533-534; 164 NW2d 19 (1969). It is well-settled under Michigan law that vested rights are more than "a mere expectation as may be based upon an anticipated continuance of the

[3] Of course, in making this argument, Chrysler is positing that it has the ability to freeze the state of regulation with which it must comply each time it executes a dealer agreement with a dealer. The absurdity of this argument was discussed in detail above.

present general laws..." *Minty v Bd of State Auditors*, 336 Mich 370, 390; 58 NW2d 106 (1953). In other words, a party cannot claim to have a vested right in the mere expectation that existing law will not be modified. *GMAC LLC v Dept of Treasury*, 286 Mich App 365, 377; 781 NW2d 310 (2009); *Harsha v City of Detroit*, 261 Mich 586, 594; 246 NW 849 (1933) (Holding that there "can be no vested right in an existing law which precludes its change or repeal"). *See also Hansen-Snyder Co v General Motors Co*, 371 Mich 480; 124 NW2d 286 (1963) (Holding that no one could claim a vested right in the shorter time period for a mechanic's lien filing that existed prior to a statutory amendment that increased the filing time period from 60 to 90 days).

Chrysler and IHS's arguments also disregard this Court's binding precedent with regard to the interpretation of statutory amendments:

> Where a section of a statute is amended, the original ceases to exist, and the section as amended supersedes it and becomes a part of the statute for all intents and purposes as if the amendment had always been there.
>
> Nevertheless, the old section is deemed stricken from the law, and the provisions carried over have their force from the new act, not from the former.
>
> It is plain from the authorities in this state and elsewhere that the effect of an act amending a specific section of a former act, in the absence of a saving clause, is to strike the former section from the law, obliterate it entirely, and substitute the new section in its place. This effect is not an arbitrary rule adopted by the courts. It is the natural and logical effect of an amendment 'to read as follows.' It accomplishes precisely what the words import. Any other contraction would do violence to the plain language of the Legislature. *Lahti v Fosterling*, 357 Mich 578, 588; 99 NW2d 490 (1959).

Furthermore, retrospective laws are not necessarily invalid or unconstitutional: "As the constitution does not prohibit the passing of retrospective laws, except when they are of the class technically known as *ex post facto*, congress may unquestionably pass them, even though private rights are affected thereby, unless they are invalid for some other reason than their retrospective character." *Lahti* at 594. Indeed, the general presumption that statutory amendments apply

prospectively is turned on its head where "statutes which operate in furtherance of a remedy or mode of procedure and which neither create new rights nor destroy, enlarge, or diminish existing rights are generally held to operate retrospectively unless a contrary legislative intent is manifested." *Frank W Lynch & Co v Flex Technologies Inc*, 463 Mich 578, 583-584; 624 NW2d 180 (2001). Where a statutory amendment does not affect a vested right, it is not invalid despite its retroactive effect. *Lahti* at 594. There can be no doubt that the 2010 Michigan Dealer Act amendments fall precisely in the foregoing category of amendments to remedial statutes that do not affect vested rights; as such, Chrysler and IHS's arguments that application of the amendments should be restricted to dealers who sign dealer agreements after the effective date of the amendments must necessarily fail.

This concept of a statutory area of protection stands in stark contrast to the only reference to LaFontaine's market territory within its Chrysler dealer agreement. The dealer agreement provides LaFontaine a non-exclusive right to sell Chrysler vehicles within a "Sales Locality." The dealer agreement further provides that Chrysler may change the "Sales Locality" at any time and may require LaFontaine to share the Sales Locality with other dealers, in Chrysler's sole discretion. The dealer agreement places no restrictions on Chrysler's right to establish new dealers within the Sales Locality, but obligates LaFontaine to "actively and effectively" promote the sale of Chrysler vehicles within the Sales Locality. LaFontaine, along with all other dealers, is judged by performance metrics such as sales penetration within its Sales Locality. In sum, the Sales Locality is nothing more than a *contractual area of responsibility* for LaFontaine.

For all of the foregoing reasons, it is disingenuous for Chrysler to suggest that it had a vested right under its 2007 dealer agreement with LaFontaine that it could establish competing same line-make dealerships anywhere outside of the 6 mile statutory relevant market area that was in effect in 2007. To the extent Chrysler had any vested right under the 2007 dealer agreement, it was a right to

establish a competing dealer wherever it wished. LaFontaine is not arguing that this right has changed. In 2007, Chrysler's unqualified contractual right to establish competing dealers was subject to applicable state law, which established a statutorily protected 6 mile relevant market area for a metropolitan dealer such as LaFontaine. When the Michigan legislature amended the Dealer Act in 2010 to expand the statutorily-protected relevant market area, Chrysler's unqualified contractual right to establish competing dealers was subject to the then-effective Michigan law, which provided for a 9 mile statutorily-protected relevant market area.

For similar reasons, the argument that Chrysler and/or IHS had vested rights under their February 2010 LOI that would be impaired by affording LaFontaine the expanded protections under the 2010 Michigan Dealer Act amendments also must fail. The LOI, as discussed above, is not a "dealer agreement" that triggered Chrysler's duty under MCL 445.1576 to provide statutory notice to LaFontaine. It was a preliminary agreement between Chrysler and IHS setting forth, inter alia, a variety of conditions for IHS to satisfy before Chrysler would consider entering into a dealer agreement. Further, the LOI was subject to withdrawal by Chrysler in its sole discretion in the event that an existing dealer invoked its statutory protest rights under state law. Under the LOI, Chrysler has no obligation to defend a statutory protest by an existing dealer such as LaFontaine.

Simply put, IHS had no "vested right" to enter into a dealer agreement with Chrysler under the February 2010 LOI, and Chrysler had no "vested right" to offer a dealer agreement to IHS. MCL 445.1576 is clear that Chrysler was obligated to provide statutory notice to LaFontaine of its "intention" to enter into a dealer agreement with a same line-make dealer within LaFontaine's relevant market area, before entering into such dealer agreement. There is nothing in the February 2010 LOI that discusses the statutory concept of relevant market area, or otherwise purports to offer an actual dealer agreement – the act that triggers the statutory requirement for the manufacturer to

provide notice to existing dealers. Because the LOI does not address the statutory concept of relevant market area, it certainly could not have provided any "vested rights" to either Chrysler or IHS that would be impaired by according LaFontaine the protection of the 9 mile statutory area of protection.

D. Concluding that this Matter Involves Only the Prospective Application of the Michigan Dealer Act Is the Only Logical Result that Effectuates the Intent of the Legislature in Expanding Protections for Existing Dealers Such As LaFontaine under the 2010 Amendments to the Michigan Dealer Act.

Chrysler and IHS encourage this Court to reverse the Michigan Court of Appeals decision in this case which logically upheld the application of the 2010 Michigan Dealer Act amendments to conduct that took place after the effective date of those amendments. As discussed above, Chrysler and IHS would also have this Court adopt the Sixth Circuit Court of Appeals' misinterpretation of the Michigan Dealer Act in the *Glassman* case. Adopting the erroneous reasoning in *Glassman* would effectively gut the expanded protections for dealers enacted by the Michigan legislature and instead make these protections available only to a limited class of dealers and leave the choice of which regulations apply almost entirely to the whim of the manufacturers. This was not the intent of the Michigan legislature, and this Court should reject the flawed analysis of the Sixth Circuit and affirm the Michigan Court of Appeals in this case, which followed the only logical reasoning -- that the 2010 Michigan Dealer Act amendments apply to conduct that occurs after their effective date, when there is no impairment of vested contractual rights, because the contracts at issue do not address the subject matter of the statutory amendments.

Furthermore, this Court should note the utter lack of factual and/or legal support for Chrysler's dire prediction that it will never be able to expand its dealer network if this Court holds that LaFontaine is able to invoke the protection of the 9 mile statutory relevant market area in this case. It is worth noting that Michigan law does not afford existing dealers absolute, unqualified

protection from competition from same line make dealers in their relevant market area. Existing dealers simply have a statutory right to file a declaratory judgment action to ask a court to determine whether there is "good cause" (as defined by the statute) for the establishment of an additional dealership in the existing dealer's relevant market area. In Michigan, the good cause factors include: (a) the permanency of the investment, (b) effect on the retail new motor vehicle business and the consuming public in the relevant market area, (c) whether the establishment or relocation of the proposed dealer would be injurious or beneficial to the public welfare, (d) whether the new motor vehicle dealers of the same line make in that relevant market area are providing adequate competition and convenient consumer care for the motor vehicles of that line make in the market area, including the adequacy of motor vehicle sales and qualified service personnel, (e) whether the establishment or relocation of the new motor vehicle dealer would promote competition, (f) growth or decline of the population and the number of new motor vehicle registrations in the relevant market area, and (g) the effect on the relocating dealer of a denial of its relocation into the relevant market area. As such, if the market and other conditions indicate that there is "good cause" for an additional dealership in the existing dealer's relevant market area, the statutory protest will not succeed. Then, the manufacturer is free to establish an additional dealer notwithstanding the existing dealer's relevant market area.

The Amici Curiae submit that these protections against "over-dealering" are undeniably in the public interest. It is worth recalling that in 2010, when the Michigan Legislature undertook the process of considering amendments to the Michigan Dealer Act, the fallout from the 2009 bankruptcies of General Motors and Chrysler LLC was fresh in its memory. The General Motors and Chrysler bankruptcies resulted in the closure of in excess of 1,500 dealerships throughout the United States as the manufacturers were left with no choice but to dramatically downsize their

dealer networks in order to secure federal government "bail out" TARP funds. The federal government concluded that bloated dealer networks would hamper General Motors and Chrysler from returning to profitability.

Although the Michigan Legislature could not provide after-the-fact remedies for the numerous dealers that were terminated in bankruptcy in 2009, it could, and did, act to try to prevent manufacturers from "over-dealering" again. By increasing the statutory relevant market area, the legislature acted in response to market conditions that mitigated in favor of granting existing dealers incrementally larger protected territories surrounding their dealerships, in order to combat future efforts by manufacturers that could result in the market being "over-dealered" again. There is absolutely no question that the Legislature intended for the 2010 amendments to apply to afford such increased protections to all existing new motor vehicle dealers in Michigan.

RELIEF REQUESTED

For all of the foregoing reasons, the Amici Curiae, Detroit Auto Dealers Association and the Michigan Auto Dealers Association, respectfully request this Court affirm the November 27, 2012 judgment of the Michigan Court of Appeals.

Dated: January 17, 2014

Respectfully submitted,

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