STATE OF MICHIGAN

IN THE SUPREME COURT

(ON APPEAL FROM THE COURT OF APPEALS)

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

Plaintiff-Appellee,

v

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

Defendant-Appellant,

and

CHRYSLER GROUP, LLC

Defendant. /

Supreme Court No. 146724

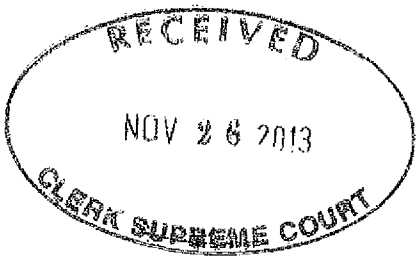
COA No. 307148

L. C. No. 10-1329-CZ

DEFENDANT-APPELLANT IHS AUTOMOTIVE GROUP, LLC D/B/A CHRYSLER JEEP OF ANN ARBOR'S BRIEF ON APPEAL

ORAL ARGUMENT REQUESTED

PROOF OF SERVICE



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STATEMENT OF THE BASIS OF JURISDICTION

Pursuant to MCR 7.302, Defendant-Appellant IHS Automotive Group LLC sought review of the Court of Appeals November 27, 2012 opinion (**App 183a-190a**) and the January 11, 2013 order denying rehearing (**App 191a**). The Court of Appeals reversed the Washtenaw County Circuit Court's order granting summary disposition to IHS and Defendant-Appellant Chrysler Group. This Court granted leave in an order dated October 2, 2013, and therefore has jurisdiction pursuant to MCR 7.301(A)(2).

STATEMENT OF THE QUESTION PRESENTED

Did the Court of Appeals err in holding that the 2010 PA 139 definition of "relevant market area," applied to enable LaFontaine to challenge the future dealer agreement between Chrysler and IHS under MCL 455.1576(3) where the legislature intended the amendment to operate prospectively only and where retrospective application of the August 2010 amendment improperly impairs Chrysler's and IHS's vested contract rights?

Plaintiff-Appellee LaFontaine answers, "No"

Defendant-Appellant IHS answers, "Yes."

Defendant Chrysler answers, "Yes."

The Court of Appeals answers, "No."

The Washtenaw Circuit Court answers, "Yes."

STATEMENT OF FACTS

A. Nature of the action.

This declaratory and equitable relief action brought pursuant to the Motor Vehicle Manufacturers, Distributors, Wholesalers, and Dealers Act, MCL 445.1561 *et seq.*, ("the Dealer Act") arises out of Plaintiff-Appellee, LaFontaine Saline Inc.'s, d/b/a LaFontaine Chrysler Jeep Dodge Ram ("LaFontaine"), challenge to Defendant-Appellant Chrysler Group's ("Chrysler") efforts to contract for the sale of the Dodge line of vehicles with Defendant-Appellant IHS Automotive Group LLC ("IHS"). The Washtenaw County Circuit Court granted summary disposition to Chrysler and IHS, finding that the August 2010 amendment to MCL 445.1566(1)(a), which redefined "relevant market area," should not be applied retrospectively to prevent IHS from selling Dodge vehicles. On November 27, 2012, the Court of Appeals issued a decision that reversed the circuit court's order and remanded for further proceedings. (**App 183a-190a**, Court of Appeals Docket No. 307148, 11/27/12).

Both IHS and Chrysler sought leave to appeal and this Court granted the applications on October 2, 2013. IHS now argues that the Court of Appeals decision failed to consider that retrospective application of the August 2010 amendment deprived IHS and Chrysler Group of vested contractual rights set forth in an agreement entered into on February 2, 2010. Further, retrospective application of the amendment

to the Chrysler-LaFontaine sales and service agreement improperly imposed new substantive rights and duties on those parties.

B. Statement of material facts.

Chrysler and LaFontaine entered into a sales and service agreement for a Dodge franchise on September 24, 2007. (**App 48a-51a**, Chrysler-LaFontaine Sales and Service Agreement). The sales and service agreement grants LaFontaine the non-exclusive right to sell Dodge vehicles from its location at 900 West Michigan Avenue, Saline, Michigan. (**App 49a**). The agreement further provides that Chrysler may establish additional dealers within LaFontaine's "Sales Locality," which is defined as "the area designated in writing to [LaFontaine] by [Chrysler] from time to time as the territory of [LaFontaine's] responsibility for the sale of [Dodge] vehicles, vehicle parts and accessories." (*Id.*). Chrysler's right to establish additional Dodge dealers is limited, however, by the "relevant market area" provision of the Dealer Act. Pursuant to MCL 445.1576(2):

> Before a manufacturer or distributor enters into a dealer agreement[1] establishing or relocating a new motor vehicle dealer

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[1] The amended version of the Dealer Act defines a "dealer agreement" as

> an agreement or contract in writing between . . . a manufacturer and . . . a new motor vehicle dealer . . . that purports to establish the legal rights and obligations of the parties to the agreement or contract and under which the dealer purchases and resells new motor vehicles and conducts service operations. The term includes the sales and service agreement, regardless of the terminology used to describe that agreement, and any addenda to the dealer agreement, including all schedules, attachments, exhibits, and agreements incorporated by reference into the dealer agreement. [MCL 445.1562(3), as amended by 2010 PA 140].

> 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 the relevant market area.

In September 2007, when Chrysler and LaFontaine entered into the sales and service agreement, "relevant market area" was defined as the area within a six-mile radius of the intended site of the proposed or relocated dealer. MCL 445.1566(1).

Likewise, this definition of relevant market area was in effect on February 2, 2010 when IHS and Chrysler entered into a "Letter of Intent to Add Vehicle Line" to allow IHS to enter into a dealer agreement to sell Dodge vehicles at 2060 West Stadium Boulevard in Ann Arbor, Michigan. (**App 61a-64a**, Letter of Intent). Pursuant to the letter of intent, IHS offered to sell and service Dodge vehicles from its Ann Arbor location. (**App 61a**). Chrysler agreed to accept this offer subject to IHS updating its facility according to certain requirements set forth in the letter of intent with a specified time frame. (*Id.*). The letter of intent also contains specific terms relating to financial and licensing requirements. (**App 61a-63a**). The letter of intent further states that it constitutes the parties' "entire agreement concerning the establishment of the Facility."

The previous version of the Dealer Act defined a dealer agreement as "an agreement or contract in writing between . . . a manufacturer and a . . . new motor dealer . . . which purports to establish the legal rights and obligations of the parties to the agreement or contract with respect to the purchase and sale of new motor vehicles and accessories for motor vehicles." MCL 445.1562(2), as amended by 1998 PA 456.

(**App 64a**). It is undisputed that, after executing the letter of intent, IHS began performing under its terms.

Effective August 4, 2010, nearly six months after Chrysler and IHS entered into their agreement, and almost three years after the execution of the Chrysler-LaFontaine Dodge sales and service agreement, the legislature amended the Dealer Act. The 2010 Amendment changed the definition of "relevant market area" from a six-mile radius to a nine-mile radius. MCL 445.1566(1)(a). It is undisputed that IHS's Ann Arbor location is outside a six mile radius of LaFontaine's Saline location, but within a nine-mile radius.

C. Statement of material proceedings.

LaFontaine filed a complaint (**App 18a-23a**) against Chrysler and IHS under the Dealer Act seeking declaratory and equitable relief prohibiting Chrysler from assigning the Dodge vehicle line to IHS. LaFontaine alleged that it had standing to sue under the Dealer Act because it was located within the "relevant market area," as that term is defined under the 2010 Amendment to the Dealer Act.

Chrysler and IHS filed motions for summary disposition pursuant to MCR 2.116(C)(8) and (C)(10). Chrysler argued that the August 2010 amendment could not be applied retrospectively to its sales and service agreement with LaFontaine or its agreement with IHS as a matter of law. (**App 40a**). Chrysler further argued that retrospective application of the amendment was unconstitutional in that it would strip

Chrysler and IHS of vested contract rights. (**App 44a-45a**). IHS likewise argued that retrospective application of the amendment to both the Chrysler-LaFontaine sales and services agreement and the Chrysler-IHS agreement was improper and unconstitutional. (**App 73a-78a**).

LaFontaine responded, inter alia, that the letter of intent was not a binding contract and did not afford Chrysler and IHS any vested rights, and further, any sales and service agreement entered into between Chrysler and IHS would not occur until after the 2010 amendment took effect. (**App 103a-111**).

After a hearing (**App 126a-150a**, Tr 7/27/11), the circuit court granted the motions for summary disposition (**App 151a-157a**, Order Granting Defendants' Motion for Summary Disposition, 9/16/11). The court found that statutory amendments are generally presumed to operate prospectively and such should be the case with the 2010 amendment to the Dealer Act. (**App 156a-157a**). The court noted that, in this instance, the legislature provided a specific, future effective date and omitted any reference to retroactivity, which supported the conclusion that the amendment should be applied prospectively only. (**App 157a**). The court further found that the letter of intent constituted a dealer agreement under the Dealer Act. (**App 155a-156a**).

LaFontaine filed a motion for reconsideration. (**App 158a-170a**). The trial court denied the motion, first maintaining that the letter of intent constituted a dealer agreement under either the 2007 or 2010 version of the statute. (**App 181a**). The court

further ruled that, even if the "unsigned 'final agreement' raises 'issues pertinent to this case,' (as argued by LaFontaine) including whether it is the operative 'dealer agreement,' it is clear that Plaintiff's action rests on contingent future events that may not occur as anticipated or may not occur at all." (**App 182a**). Thus, the court held that LaFontaine's action was precluded under the doctrine of ripeness and was properly dismissed. (*Id.*).

LaFontaine appealed and the Court of Appeals reversed. (**App 183a-190a**, Court of Appeals Opinion, 11/27/12). The Court first reasoned that because LaFontaine did not argue for a retrospective application of the 2010 amendment, "the central issue in this case is whether the [letter of intent] is a dealer agreement under the [Dealer Act]." (**App 187a**). The Court found that the letter of intent did not constitute a dealer agreement under the pre-amended version of MCL 445.1562(2), because the subject matter of the agreement was the establishment of a new facility, rather than the legal right to purchase and sell the Dodge vehicle line. (**App 188a.**) The Court thus concluded that any future dealer agreement between Chrysler and IHS would be executed after the 2010 amendment took effect, and therefore, LaFontaine was located within the "relevant market area" and could maintain an action under MCL 445.1576(3) to determine whether good cause existed to establish the proposed Dodge vehicle line at IHS. (*Id.*) The Court likewise concluded that the letter of intent did not amount to a dealer agreement under the amended version of the Dealer Act. (*Id.*, n 1).

The Court added that the trial court further erred by denying LaFontaine's motion for reconsideration by concluding that LaFontaine's claim was not ripe for adjudication. (**App 189a**). "The genuine case or controversy here is whether good cause exists for establishing the Dodge vehicle line at IHS. . . . Contrary to the trial court's conclusion, the fact that no dealer agreement had been executed between Chrysler and IHS is irrelevant to the issue of ripeness." (*Id.*) The Court of Appeals subsequently denied Chrysler's and IHS's motions for reconsideration. (**App 191a**).

Chrysler and IHS sought leave to appeal and this Court granted their applications in orders dated October 2, 2013.

STANDARD OF REVIEW

A trial court's decision on a motion for summary disposition is reviewed de novo on appeal. *Driver v Naini*, 490 Mich 239, 246; 802 NW2d 311 (2011). A motion for summary disposition under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. *Corely v Detroit Bd of Ed*, 470 Mich 274, 278; 681 NW2d 343 (2004). This Court reviews a motion brought under this rule by considering the pleadings, admissions, and other evidence submitted by the parties in the light most favorable to the nonmoving party. *Latham v Barton Malow Co*, 480 Mich 105, 111; 746 NW2d 868 (2008). Summary disposition is appropriate if there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law. (*Id.*). A genuine issue of material fact exists when reasonable minds could differ on an issue after viewing the record in the light most favorable to the nonmoving party. *Allison v AEW Capital Mgmt*, LLP, 481 Mich 419, 425; 751 NW2d 8 (2008).

A motion under MCR 2.116(C)(8) is properly granted if the complaint fails to state a claim on which relief can be granted. *A & E Parking v Detroit Metro Wayne Co Airport Auth*, 271 Mich App 641, 643-44; 723 NW2d 223 (2006). "A motion for summary disposition under MCR 2.116(C)(8) tests the legal sufficiency of a claim by the pleadings alone. All factual allegations in support of the claim are taken as true, as well as any reasonable inferences or conclusions drawn from the facts." *Lane v KinderCare Learning Centers, Inc*, 231 Mich App 689, 692; 588 NW2d 715 (1998). The motion should be

granted only where the claim is so clearly unenforceable as a matter of law that no factual development could justify a right to recovery. (*Id.*).

ARGUMENT

The Court Of Appeals Erred In Holding That The 2010 PA 139 Definition Of "Relevant Market Area," Applied To Enable LaFontaine To Challenge The Future Dealer Agreement Between Chrysler And IHS Under MCL 445.1576(3) Because The Legislature Intended The Amendment To Operate Prospectively Only and Retrospective Application Of The August 2010 Amendment Improperly Impairs Chrysler's And IHS's Vested Contract Rights.

A. The relationship between automotive manufacturers and their licensed dealerships is established by contract within the context of a regulatory framework

This case involves a dispute between an automobile manufacturer, an established dealer, and a prospective dealer. "Historically and internationally, the relationship between dealers and manufacturers is governed by contract, commonly known as the dealer agreement. The dealer agreement outlines the rights and responsibilities of both parties." Carla Wong McMillian, What Will It Take To Get You In A New Car Today?: A Proposal For A New Federal Automobile Dealer Act, 45 Gonz L Rev 67, 69 (2009-10). A dealer's responsibilities typically include, "selling and servicing the manufacturer's products, meeting certain sales and customer service objectives, providing an adequate facility and performing warranty service." (*Id.*). The manufacturer, in turn, "must supply the vehicles and parts needed for sales and service and must reimburse the dealer for performing warranty service, for the warranty is a contractual obligation from the manufacturer to the customer." (*Id.*). The dealer agreement also "generally gives manufacturers the right to approve transfers of the dealership and to terminate

under certain conditions." (*Id.*). Importantly, and as is relevant in this case, federal and state statutes also govern the automobile manufacturer-dealer relationship, "[a]dding to and often superseding the terms of the dealer agreement." (*Id.* at 70). These "dealer acts" address "virtually every aspect of the manufacturer-dealer relationship." (*Id.* at 73).

Although otherwise diverse, most state dealer laws have encroachment provisions that "generally prohibit a manufacturer from appointing additional dealers in an existing dealer's 'market area' . . . ." Jefferson I. Rust, Regulating Franchise Encroachment: An Analysis of Current And Proposed Legislative Solutions, 19 Okla City U L Rev 489, 503 (Fall 1994). Generally, these laws "stipulate that an automobile franchisor may not appoint a new franchisee within the relevant market area of an existing franchisee without first notifying the existing franchisee. The existing franchisee may then challenge the appointment before a state administrative board or court, which will determine whether there is 'good cause' for the appointment of the new franchisee." (*Id.*). Representative factors that courts consider include: "whether the establishment of the new franchisee is injurious or beneficial to the public welfare, and whether there is a growth or decline in the population in the relevant market area."[2]

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[2] Other state statutes establishing relevant market area include: Ala Code § 8-20-4(3)(l); Alaska Stat § 45.25.180; Ariz Rev Stat Ann § 28-4452(B); Ark Code Ann §§ 23-112-31; Cal Veh Code § 3062(a)(1); Conn Gen Stat Ann § 42-133dd(a); Del Code Ann tit 6, §

Like the many relevant market area provisions in dealer statutes throughout the country, the purpose of Michigan's Dealer Act in particular is to protect existing dealerships. *Pung v Gen Motors Corp*, 226 Mich App 384, 387; 573 NW2d 80, 82 (1997).[3] However, while the act "is designed to prevent a manufacturer from abusing those with whom it has chosen to do business," it does not "abrogate the manufacturer's right to choose with whom to do business." (*Id.*).

B. The Michigan legislature intended the August 2010 amendment to the Dealer Act to operate prospectively only.

Effective August 4, 2010, nearly six months after Chrysler, the automotive manufacturer, and IHS, the prospective dealer, entered into their agreement, and almost three years after the execution of the Chrysler-LaFontaine Dodge sales and service

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4915(a); Fla Stat Ann § 320.642; 815 Ill Comp Stat Ann 710/4(e)(8); Kan Stat Ann § 8-2430(a); Ky Rev Stat Ann § 190.047(6)(c); La Rev Stat Ann § 32:1257; Me Rev Stat Ann tit 10, §§ 1174-A(1); Mass Ann Laws ch 93B, § 6(d); Minn Stat Ann § 80E.14; Miss Code Ann § 63-17-116(3); Mo Rev Stat § 407.817; NH Rev Stat Ann § 357-C:9; NJ Stat Ann § 56:10-19; Ohio Rev Code Ann § 4517.50(A); Okla Stat Ann tit 47, § 578.1(A), (C) (West 2000 & Supp 2009); Or Rev Stat Ann § 650.150(1); 63 Pa Cons Stat Ann § 818.27(a)(1); RI Gen Laws § 31-5.1-4.2(a); Vt Stat Ann tit 9, § 4098(a); W Va Code § 17A-6A-12; Wyo Stat Ann § 31-16-111.

[3] In 2012, there were an estimated 636 new-car and -truck dealers in Michigan. Total sales of all Michigan new-car and -truck dealerships was $13.5 billion in 2012, which represents 12.6 percent of total retail sales in the state. The annual payroll of these dealerships in Michigan in 2012 was $1.60 billion, with average annual earnings for dealership employees at $54,860. In 2012, these dealerships provided 29,249 jobs in Michigan, employing an average of 46 people per dealership. See www.nada.org/NR/rdonlyres/1DA827C1-81BB-47DF-BDA5-5488C58D2464/0/2012Michigan.pdf. On a national level, there were an estimated 17,635 new-car and -truck dealers in the United States in 2012. Total sales of all U.S. new-car and -truck dealerships was $676.4 billion in 2012, representing 14.9 percent of total retail sales in the United States. (*Id.*).

agreement, the legislature amended the Dealer Act. The 2010 Amendment changed the definition of "relevant market area" from a six-mile radius to a nine-mile radius. MCL 445.1566(1)(a).

"As a general, almost invariable rule, a legislature makes law for the future, not for the past. . . . This point is basic to our rule of law. Even when they do not say so (and they rarely do), statutes will not be interpreted to apply to past events." Antonin Scalia and Bryan A. Garner, Reading Law: The Interpretation of Legal Texts (Thompson West, 2012), p 261. Accordingly, amendments of statutes are generally presumed to operate prospectively unless the Legislature clearly manifests a contrary intent. *Selk v Detroit Plastic Products*, 419 Mich 1, 9; 345 NW2d 184 (1984); *Hansen-Snyder Co v Gen Motors Corp*, 371 Mich 480; 124 NW2d 286 (1963).

In determining the legislature's intent, this Court considers whether the legislature includes express language regarding retroactivity, a lack of which demonstrates an intent that the law apply only prospectively. *Frank W Lynch & Co v Flex Technologies, Inc*, 463 Mich 578, 584; 624 NW2d 180 (2001). This is true because the Legislature has shown on several occasions that it knows how to make clear its intention that a statute apply retroactively. (*Id.*, citing MCL 141.1157 ("This act shall be applied retroactively ..."); MCL 324.21301a ("The changes in liability that are provided for in the amendatory act that added this subsection shall be given retroactive application")). No such language is included in the 2010 Amendment. To the contrary,

it was set to become effective on August 4, 2010. 2010 Mich Legis Serv PA 139 (SB 1309) (West). This Court has recognized that "providing a specific, future effective date and omitting any reference to retroactivity supports a conclusion that a statute should be applied prospectively only." *Brewer v AD Transp Exp, Inc*, 486 Mich 50, 56; 782 NW2d 475 (2010). Thus, the legislature intended the 2010 Amendment to apply prospectively only.

It is true that the presumption against retrospective application of a statute does not apply to statutory amendments that are classified as remedial or procedural in nature. *Spencer v Clark Tp*, 142 Mich App 63, 67; 368 NW2d 897 (1985). But this Court has explained:

> Legislation which has been regarded as remedial in its nature includes statutes which abridge superfluities of former laws, remedying defects therein, or mischiefs thereof implying an intention to reform or extend existing rights, and having for their purpose the promotion of justice and the advancement of public welfare and of important and beneficial public objects, such as the protection of the health, morals, and safety of society, or of the public generally. [*Rookledge v Garwood*, 340 Mich 444, 453; 65 NW2d 785 (1954), quoting 50 American Jurisprudence, § 15, pp. 33-34.]

The 2010 Amendment changing the definition of relevant market area from six to nine miles is not remedial in nature under this definition because it is not trying to fix a defect in the law nor does it address public health, morals, or safety. It merely reflects a policy choice with respect to regulating competition among automotive dealers.

This Court has further instructed that

> Another common use of the term 'remedial statute' is to distinguish it from a statute conferring a substantive right, and to apply it to acts relating to the remedy, to rules of practice or courses of procedure, or to the means employed to enforce a right or redress an injury. It applies to a statute giving a party a remedy where he had none or a different one before. [*Rookledge*, 340 Mich at 453.]

See also *Hansen-Snyder*, 371 Mich at 484-85 ("[R]emedial statutes, or statutes related to remedies or modes of procedure, which do not create new or take away vested rights, but only operate in furtherance of a remedy or confirmation of rights already existing, do not come within . . . the general rule against retrospective operation of statutes."); *Spencer*, 142 Mich App at 67 (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 attaches a new disability with respect to transactions or considerations already past); *In Re Certified Questions from the United States Court of Appeals for the Sixth Circuit (Karl v Bryant Air Conditioning Co)*, 416 Mich 558, 570-571; 331 NW2d 456 (1982) (same). The right to protest a new dealer within a specific market area is likewise not a "remedy" under this second definition; rather, it is a substantive right. Therefore, retrospective application of the 2010 amendment operates both to create new duties and destroy existing rights with respect to the two contracts at issue here.

C. Settled expectations among all three parties at the time of the two contracts at issue in this case allowed Chrysler to enter into an agreement with IHS, the prospective dealer

Chrysler and LaFontaine entered into a sales and service agreement for a Dodge franchise on September 24, 2007. (**App 48a-51a**). The sales and service agreement

grants LaFontaine the non-exclusive right to sell Dodge vehicles, parts, accessories and other products from its location at 900 West Michigan Avenue, Saline, Michigan. (**App 49a**). LaFontaine agreed to "actively and effectively sell and promote the retail sale" of these products. (*Id.*). As such this agreement constitutes a "dealer agreement" as defined in the Dealer Act at that time: "an agreement or contract in writing between . . . a manufacturer and a . . . new motor dealer . . . which purports to establish the legal rights and obligations of the parties to the agreement or contract with respect to the purchase and sale of new motor vehicles and accessories for motor vehicles." MCL 445.1562(2), as amended by 1998 PA 456.

The agreement further provides that Chrysler may establish additional dealers within LaFontaine's "Sales Locality," which is defined as "the area designated in writing to [LaFontaine] by [Chrysler] from time to time as the territory of [LaFontaine's] responsibility for the sale of [Dodge] vehicles, vehicle parts and accessories." (**App 49a**). Chrysler's right to establish additional Dodge dealers is limited, however, by the "relevant market area" provision of the Dealer Act. Pursuant to MCL 445.1576(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 the relevant market area.

In September 2007, when Chrysler and LaFontaine entered into the sales and service agreement, "relevant market area" was defined as the area within a six-mile radius of the intended site of the proposed or relocated dealer. MCL 445.1566(1).

Accordingly, at the time Chrysler Group entered into the sales and service agreement with LaFontaine, LaFontaine had no right to protest the addition of any additional franchise that was not within the six-mile radius of its location. Likewise, Chrysler Group had no obligation to put LaFontaine on notice of its intent to enter into a new dealership agreement unless the new dealership was within the six-mile radius. Applying the 2010 amendment retrospectively would improperly place additional duties on Chrysler Group and create new substantive rights for LaFontaine, the existing dealer, that were not part of the parties' contract. *Karl*, 416 Mich at 572; *Spencer*, 142 Mich App at 67; *Hansen-Snyder*, 371 Mich at 484-85.

Likewise, relying on the Dealer Act's then six-mile relevant market area provision, IHS, the new dealer, and Chrysler entered into a "Letter of Intent to Add Vehicle Line" on February 2, 2010, to allow IHS to sell Dodge vehicles at 2060 West Stadium Boulevard in Ann Arbor, Michigan. (**App 61a-64a**). Pursuant to this agreement, IHS offered to sell and service Dodge vehicles from its Ann Arbor location. (**App 61a**). Chrysler agreed to accept this offer subject to IHS updating its facility according to certain requirements set forth in the letter of intent with a specified time frame. (*Id.*). Accordingly, this letter of intent represented an agreement to enter into a

Dealer Agreement as defined by the Dealer Act. Chrysler and IHS were agreeing to enter into a contract which would "establish the legal rights and obligations of the parties . . . with respect to the purchase and sale of new motor vehicles and accessories for motor vehicles." MCL 445.1562(2).

IHS entered its agreement with Chrysler and began investing in and constructing its new facility in performance thereof. It relied on the law then in effect, with the understanding that the new IHS dealership did not run afoul of the Dealer Act as it was not within LaFontaine's relevant market area. In fact, the letter of intent noted in paragraph 1 that Chrysler would "give notice to the state and/or dealers as may be required by state law." (**App 61a**). No existing dealers required notice as of February 2, 2010.

D. Retrospective application of the August 2010 amendment improperly impairs Chrysler's and IHS's vested contract rights set forth in the February 2010 agreement.

Provisions added by an amendment that affect substantive rights "will not be construed to apply to transactions and events completed prior to its enactment unless the legislature has expressed its intent to that effect . . . ." *Hurd v Ford Motor Co*, 423 Mich 531, 535; 377 NW2d 300 (1985). Retrospective application of statutory amendments implicates due process. "The concern regarding the retroactivity of statutes arises from constitutional due process principles that prevent retrospective laws from divesting rights to property or vested rights, or the impairment of contracts." *City*

of Detroit v Walker, 445 Mich 682, 698-699; 520 NW2d 135 (1994), citing *Hansen-Snyder*, 371 Mich 480; US Const art I, § 10; Const 1963, art 1, § 10[4]; *Stott v Stott Realty Co*, 288 Mich 35; 284 NW 635 (1939). See also *Cusick v Feldpausch*, 259 Mich 349, 352; 243 NW 226 (1932), quoting 2 Cooley, Constitutional Limitations (8th ed.), p. 749 ("a right cannot be considered a vested right, unless it is something more than such a mere expectation as may be based upon an anticipated continuance of the present general laws; it must have become a title, legal or equitable, to the present or future enjoyment of property, or to the present or future enforcement of a demand, or a legal exemption from a demand made by another."); *Midland Cogeneration Venture Ltd Pship v Naftaly*, 489 Mich 83, 92-93; 803 NW2d 674 (2011) (a vested right is "an interest that the government is compelled to recognize and protect of which the holder could not be deprived without injustice.").

The Court of Appeals here based its decision on a determination that the letter of intent did not constitute a dealer agreement pursuant to the Dealer Act, and thus failed to even conduct an analysis of the implications of retrospectively applying the statute to the letter of intent. But the letter of intent was an agreement to enter into an agreement which would "establish the legal rights and obligations of the parties to the agreement

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[4] Const 1963, art 1, § 10 provides that no law "impairing the obligation of contract shall be enacted." Likewise, US Const., art I, § 10 states that no state shall 'pass any ... Law impairing the Obligation of Contracts...'" The Contract Clause imposes some limits upon the power of a state to abridge existing contractual relationships, "even in the exercise of its otherwise legitimate police power." *Allied Structural Steel Co v Spannaus*, 438 US 234, 242; 98 S Ct 2716; 57 L Ed 2d 727 (1978).

or contract with respect to the purchase and sale of new motor vehicles and accessories for motor vehicles," i.e., a dealer agreement. MCL 445.1562(2). Thus, such retrospective application of the 2010 amendment, IHS submits, has impaired its contract and violates due process.

1. *IHS has a valid contract, performance of which enables it to obtain a Dodge sales and service agreement.*

A letter of intent is a valid contract under Michigan law. *Opdyke Investment Co v Norris Grain Co*, 413 Mich 354, 359; 320 NW2d 836 (1982). To be enforceable, a contract to enter into a future contract must specify all its material and essential terms and leave none to be agreed upon as the result of future negotiations. *Socony-Vacuum Oil Co v Waldo*, 289 Mich 316, 323-24; 286 NW 630 (1939). In Michigan, the essential elements of a valid contract are (1) parties competent to contract, (2) a proper subject matter, (3) a legal consideration, (4) mutuality of agreement, and (5) mutuality of obligation. *Detroit Trust Co v Struggles*, 289 Mich 595, 599; 286 NW 844 (1939). Mere discussions and negotiations cannot be a substitute for the formal requirements of a contract. *Kirchhoff v Morris*, 282 Mich 90, 95; 275 NW 778 (1937).

In this case, the letter of intent between Chrysler and IHS is an agreement or contract to enter into a dealer agreement. *Socony-Vacuum Oil Co*, 289 Mich at 323-24. It explicitly states that Chrysler will accept IHS's offer to enter into a Dodge sales and service agreement "in its then-customary form," which would authorize IHS to sell Dodge vehicles from its Ann Arbor location, if IHS provided a new facility and

performed all terms of the agreement in a timely manner. (**App 61a**). Although the Court of Appeals seems to have dismissed this contract as merely an agreement to construct a new facility (**App 188a**), the letter of intent makes clear from the outset that this new facility was not being built in a vacuum, but rather, for the specific purpose of obtaining a Dodge sales and service agreement, i.e., a dealer agreement. (**App 61a**) The new facility was to be for "the exclusive display, sale, and service of Chrysler, Jeep, and Dodge vehicles." (*Id.*)

The letter of intent goes on to specify all of the material and essential terms for constructing the facility; in fact, the agreement referred to the requirements and deadlines therein as "material terms," violation of which would be considered a breach of contract. (**App 62a**). It expressly states that the signing and delivery of the agreement indicated "acceptance of all of the [terms of the letter of intent]." (**App 64a**). The letter of intent contains a list of 14 detailed items required to be included in IHS's facility plans and specifications:

- Use of standardized materials and finishes in accordance with [Chrysler's] material guidelines.
- Street front service entrance
- Branded customer lounge
- Branded enclosed service drive
- Branded designated customer delivery area
- Branded vehicle salons
- Showroom branding equal to 33% of the total showroom square footage
- Reception desk
- Children's play area
- Refreshment area

- Mopar accessory display and/or Mopar accessorized vehicles
- P2100 corporate dealer identity
- Exterior directional signage
- Service menu board and brochures. **[App 62a]**.

The agreement also incorporates (1) specific square footage requirements for the overall land area, building, showroom, parts department, and service department; (2) construction deadlines; (3) an obligation to meet Chrysler's financial requirements for a dealership, which included a working capital requirement; (4) the necessity of a five-year minimum lease; (5) satisfaction of state licensing requirements; and (6) satisfaction of Chrysler's planning potential. **(App 62a-63a)**. Accordingly, the letter of intent is a contract because it contains all of the material and essential terms, as well as consideration and mutuality of agreement and obligation. *Socony-Vacuum Oil Co*, 289 Mich at 323-24; *Detroit Trust Co*, 289 Mich at 599.

Furthermore, it is undisputed that, after entering into the agreement, IHS began work on its facility to fulfill its end of the bargain and obtain the Dodge sales and service agreement, which it had the contractual right to obtain as of February 2, 2010. But, without any retroactivity analysis, the Court of Appeals improperly applied the 2010 Amendment to the letter of intent, merely because the actual Dodge sales and service agreement would be entered into after the amendment took effect.

2. ***Applying the 2010 Amendment to the agreement between IHS and Chrysler impaired IHS's contract with Chrysler and thus violated due process.***

"Retroactive legislation presents problems of unfairness that are more serious than those posed by prospective legislation, because it can deprive citizens of legitimate expectations and upset settled transactions." *Downriver Plaza Group v City of Southgate,* 444 Mich 656, 666; 513 NW2d 807 (1994), quoting *Gen Motors Corp v Romein,* 503 US 181, 191; 112 S Ct 1105; 117 L Ed 2d 328 (1992). Thus, "[a] statute cannot be retroactive so as to change the substance of a contract previously entered into." *Byjelich v John Hancock Mut Life Ins Co,* 324 Mich 54, 61; 36 NW2d 212 (1949). In *Byjelich,* this Court decided that a statute could not legislatively change provisions in an insurance contract between a insurer and one of the parties to a divorce action. In that case, a life insurance policy provided that any assignment of the policy was void and gave the insured the right to payment of cash surrender value *or* to continue the policy as extended term insurance. A statute enacted after issuance of the policy provided that every decree of divorce must determine the rights of the wife to proceeds of a life insurance policy in which she is named as a beneficiary. This Court held that if the statute were construed to give a court the power in a divorce action to compel an insured to assign the policy to his wife so as to enable her to recover cash surrender value, it would unconstitutionally impair obligations under the insurance contract. (*Id.*, pp 60-61).

The Court of Appeals also recognized this concept in *Health Care Ass'n Workers Comp Fund v Dir of the Bureau of Worker's Comp, Dept of Consumer & Indus Services*, 265 Mich App 236, 238-39; 694 NW2d 761 (2005). There, the plaintiff was a self-insurer group that contracted annually with member employers to fund worker's compensation liability. The plaintiff sought to prohibit the defendant director of the Bureau of Worker's Compensation from enforcing amendments to provisions in MCL 500.2016(1)(a) and (3), which precluded the plaintiff from withholding dividends (refunds of surplus funds), from an employer who decided to discontinue participation with the plaintiff. The plaintiff sought a ruling that the statute was unconstitutional, either in its entirety or as applied to contracts that preexisted the statutory amendment. The Court of Appeals reasoned that the statute could not be applied to contacts entered into before it was enacted even if the contracts related to conduct that would occur after enactment. The Court said:

> [I]t is self-evident that applying a statute to contracts entered into before the effective date of the provision constitutes "retroactive" application of the statute, even if the contracts are related to conduct that occurred after the effective date of the amendments of MCL 500.2016. For that reason, we conclude that the proper application of MCL 500.2016 requires that conduct related to contracts that were entered into before the effective date of the pertinent provisions of MCL 500.2016 be excepted from the application of the statute. [*Id.* at 245 (emphasis added)].

That same retroactivity analysis applies to the present situation. Thus, the same result should follow. Instead, the Court of Appeals erroneously focused on whether the letter

of intent constituted a dealer agreement. But the relevant consideration was whether retrospectively applying the 2010 amendment to the letter of intent between Chrysler Group and IHS, entered into on February 2, 2010, before the amendment was effective, impaired the parties' contract. The Court of Appeals decision deprived Chrysler and IHS of the legitimate expectation to enter a dealer agreement in the future, and upset a settled transaction. *Walker,* 445 Mich at 698-99; *Downriver Plaza Group,* 444 Mich at 666; *Romein,* 503 US at 191. As recognized in *Health Care Ass'n Workers Comp Fund,* the fact that the letter of intent addressed conduct that would occur after the amendment went into effect is immaterial. 265 Mich App at 245. Retroactive application of the amendment impairs a valid contract and thus violates due process. *Byjelich,* 324 Mich at 61.

E. Other courts, including the Sixth Circuit have recognized that retrospective application of the 2010 amendment, and other similar amendments, improperly imposes new substantive rights and duties with respect to agreements between manufacturers and existing dealers

Other courts have applied the Michigan law discussed above and reached the correct conclusion that retrospective application of similar amendments to Michigan's Dealer Act is improper because it would impose substantial new duties on the manufacturer and would give the existing dealer new substantive rights which had not previously existed. In fact, in *Joe Dwyer, Inc v Jaguar Cars, Inc,* 167 Mich App 672, 684; 423 NW2d 311 (1988), a previous panel of the Court of Appeals held that retrospective application of an amendment to the current version of the Dealer Act was improper,

and it relied on the reasoning and interpretation of Michigan case law found in *Dale Baker Oldsmobile, Inc v Fiat Motors of N Am, Inc*, 794 F2d 213 (CA 6 1986); the same section of the Dealer Act was at issue in both the state and federal case.

In *Dale Baker*, the Sixth Circuit found that an amendment to the dealer act was substantive and thus should not be applied retrospectively. There, the plaintiff dealer sought application of the newly enacted Dealer Act to the termination of its franchise agreement with the defendant automobile distributor. Section 11 of the act provided that, upon termination of a dealer agreement, the dealer shall be paid fair and reasonable compensation for several items, including new current model year motor vehicle inventory; supplies and parts inventory purchased from the manufacturer or distributor; equipment, furnishings and signs purchased from the manufacturer or distributor; and special tools purchased from the manufacturer or distributor within three years of the date of termination. (*Id.* at 215). Moreover, if Section 11 were applied in that case, the distributor would be required to pay the plaintiff dealer a sum equal to the current, fair rental value of the dealer's established place of business for a period of one year from the effective date of termination. (*Id.*).

Like Chrysler in this case, the defendant distributor moved to dismiss the plaintiff dealer's complaint alleging that section 11 did not apply to contracts executed before the effective date of the statute and that retrospective application would violate the contract clauses of both the Michigan and the United States Constitutions. *Dale*

Baker, 794 F2d at 215. The trial court determined, based on *Karl*, that retrospective application of the Act would create a new and substantial obligation for the defendant distributor and a duty with respect to a transaction already past, i.e., execution of the dealer agreement. (*Id.*). The Sixth Circuit agreed.

After discussing several Michigan Supreme Court cases[5], the Sixth Circuit explained that, under Michigan law, "statutes which are considered remedial, and thus retrospectively applicable, have affected procedural rights or rights incident to substantive rights. In this sense, remedial statutes involve procedural rights or change the procedures for effecting a remedy. They do not, however, create substantive rights that had no prior existence in law or contract." *Dale Baker*, 794 F2d at 217. The Court thus found that application of section 11 "would impose substantial new duties" on the defendant distributor and would give the plaintiff dealer substantive rights, "neither of which existed by law or contract." (*Id.* at 219-20).

Similarly to LaFontaine in this case, the plaintiff dealer in *Dale Baker* argued that the defendant distributor "had no vested rights which were impaired by the 1981 Act" because termination did not occur until after the effective date of the statute, and therefore, "defendant's right to terminate free of penalties was inchoate until it actually

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[5] *Guardian Depositors Corp v Brown*, 290 Mich 433; 287 NW 798 (1939); *Rookledge v Garwood*, 340 Mich 444; 65 NW2d 785 (1954), *Hansen-Snyder*, 371 Mich 480; *Ballog v Knight Newspapers, Inc*, 381 Mich 527; 164 NW2d 19 (1969); *Gormley v General Motors*, 125 Mich App 781; 336 NW2d 873 (1983).

sought to exercise the termination clause." 794 F2d at 220. The Sixth Circuit dismissed this argument, stating that it "ignores the fact that defendant acquired contract rights at the time the parties entered the dealer agreement. Whether defendant had any vested statutory rights is irrelevant. Contracts rights are clearly protected under Michigan law." (*Id.*, citing *Karl*, 416 Mich at 573).

The Sixth Circuit relied on its reasoning in *Dale Baker* and reached the same conclusion – that an amendment to the dealer act was substantive and thus not properly applied retrospectively – when addressing the very 2010 amendment at issue in this case under a substantially similar set of circumstances. In *Kia Motors Am, Inc v Glassman Oldsmobile Saab Hyundai, Inc*, 706 F3d 733 (CA 6 2013), plaintiff dealer Glassman and defendant manufacturer Kia entered into a sales and service agreement similar to the agreement here between Chrysler and LaFontaine. Kia and Glassman contracted in 1998, when the relevant market area was six miles. After the 2010 amendment increased the distance to nine miles, Kia, like Chrysler in this case, sought to establish a new dealership more than six miles but less than nine miles from Glassman's location. The federal district court in *Kia* found that the 2010 Amendment is not retrospective and the Sixth Circuit affirmed. (*Id.* at 736).

Unlike the Court of Appeals in this case, the Sixth Circuit in *Kia* applied Michigan law in determining whether the 2010 Amendment should be applied retrospectively to the Glassman-Kia agreement. The federal court recognized that the

Michigan Supreme Court has in fact, "repeatedly observed that the Michigan Legislature 'knows how to make clear its intention that a statute apply retroactively,' so the absence of express retroactive language is a strong indication that the Legislature did not intend a statute to apply retroactively." (*Kia*, 706 F3d at 739, quoting *Brewer*, 486 Mich at 56). The court observed that "[t]he 2010 Amendment is silent as to whether it operates retroactively or only prospectively. There is thus no clear legislative intent that the Amendment should be applied retroactively." (*Id.* at 740). Noting the exception for remedial or procedural laws that do not destroy substantive rights, the Sixth Circuit reasoned:

> Before the Amendment, the statute allowed Kia to establish a new dealer more than six miles from Glassman without restriction. After the Amendment, Kia must provide notice before doing so, and that notice allows Glassman to bring a declaratory judgment action to protest the new dealer. Clearly, the Amendment imposes a new substantive duty and provides a new substantive right that did not previously exist. Rather than change the mechanics or time frame for objecting to a new dealer, the Amendment gives Glassman the substantive right to object. Therefore, it cannot be viewed as procedural, and the presumption against retroactivity applies. [*Id.*]

Glassman also argued as does LaFontaine here that, since Kia sought to establish the new dealer after the 2010 Amendment, requiring Kia to comply with the Amendment would require applying it prospectively only. The Sixth Circuit dismissed this argument, stating that "it ignores the fact that the Amendment affects Kia's rights under a contract that predates the Amendment . . . ." (*Kia*, 706 F3d at 740). The Court

further explained that, "[t]o require Kia to comply with the 2010 Amendment would clearly require us to apply the Amendment retroactively because it would take away Kia's previously unrestricted contractual right to establish a new dealer more than 6 miles from Glassman." (*Id.* at 740-741) As in *Dale Baker*, the court also clarified that Kia in fact had a vested contract right and not just a statutory right to establish a new dealership within six miles of Glassman's location. (*Id.* at 741). Finally, noting that Kia had also raised a Contracts Clause argument, the Sixth Circuit stated, "[t]he fact that retroactive application would raise a significant constitutional question provides an additional reason for applying the 2010 Amendment prospectively only," but the Court chose not to reach the constitutional issue since it determined that the 2010 Amendment is not retroactive. (*Id.*).

The Court of Appeals in this case chose not to conduct any retroactivity analysis nor did it consider the constitutional implications of retrospectively applying the 2010 amendment; had it done so, the same result as in *Kia* would follow. At the time Chrysler Group entered into the sales and service agreement with LaFontaine, LaFontaine had no right to protest the addition of any additional franchise that was not within the six-mile radius of its location. Likewise, Chrysler Group had no obligation to put LaFontaine on notice of its intent to enter into a new dealership agreement unless the new dealership was within the six-mile radius. Applying the 2010 amendment retrospectively would improperly place additional duties on Chrysler Group and create

new substantive rights for LaFontaine that were not part of the parties' contract. *Karl*, 416 Mich at 572.

Other states and federal jurisdictions have considered retrospective application of amendments to dealer acts, including amendments establishing relevant market area, and have reached results comparable to *Kia*. See *Yakubinis v Yamaha Motor Corp, USA*, 365 Ill App 3d 128; 847 NE2d 552 (2006) (Holding that amendments to the state's Motor Vehicle Franchise Act in 1995 created not only a new procedure for relocation protests but also created the substantive right to protest the relocation of a dealer into an existing franchisee's market area without good cause; therefore, "[b]ecause the amendment created a new right, it was clearly substantive and should operate prospectively only."); *Ace Cycle World Inc v American Honda Motor Co*, 788 F2d 1225 (CA 7 1986) (The 1983 amendments to the Illinois dealer act did not apply to franchise contract in existence at time of the amendments, and the franchisor had a vested right under 1983 franchise contract to establish new dealership in proximity to franchisee's existing franchise); *In re Kerry Ford, Inc.*, 106 Ohio App 3d 643, 648; 666 NE2d 1157 (1995) (Statute requiring franchisors of motor vehicle dealerships to show good cause before locating franchise in market area of existing franchise did not apply; statute did not contain language indicating that it could be applied retroactively to parties' franchise agreement which existed before enactment of statute.). See also *Fireside Chrysler-Plymouth Mazda, Inc v Chrysler Corp*, 129 Ill App 3d 575; 472 NE2d 861 (1984)

(Recognizing that retrospective application of an amendment of the definition of "relevant market area" also impermissibly interferes with vested substantive rights of the manufacturer and the new dealer.); *Antwerpen Dodge, Ltd v Herb Gordon Auto World, Inc*, 117 Md App 290; 699 A2d 1209 (1997) (Fact that prospective automobile dealership had not yet been awarded contract by manufacturer did not prevent it from having a protectible interest; manufacturer had informed prospective dealer that it intended to award dealership, and prospective dealership met all of manufacturer's requirements).

These persuasive authorities provide support for IHS's argument that the better reasoned approach is to apply the 2010 Amendment prospectively only. IHS therefore urges this court to reverse the Court of Appeals and conclude that the 2010 Amendment does not apply here.

RELIEF

WHEREFORE, Defendant-Appellant IHS Automotive Group LLC, d/b/a/ Chrysler Jeep of Ann Arbor, respectfully requests this Court reverse the Court of Appeals November 27, 2012 opinion and to grant it such other relief as is warranted in law and equity.

Respectfully submitted,

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