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 REPLY BRIEF ON APPEAL

ORAL ARGUMENT REQUESTED

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ARGUMENT I

Contrary To LaFontaine's Argument, The Legislature Did Not Intend The 2010 PA 139 Amendment Enlarging the "Relevant Market Area" To Enable LaFontaine to Challenge the Future Dealer Agreement Between Chrysler and IHS Automotive Under MCL 445.1576(3).

A. This Court should not ignore the critical question on which it granted leave, whether 2010 PA 139, which amended MCL 445.1576, applies retroactively.

LaFontaine urges this Court to avoid the question of whether the 2010 amendment to the Motor Vehicle Manufacturers, Distributors, Wholesalers, and Dealers Act ("the Dealer Act") should be given retroactive effect. LaFontaine apparently believes that the amendment has no impact on IHS Automotive and Chrysler's vested rights as a result of their pre-existing contractual agreement. But under Michigan law, a letter of intent, such as Chrysler and IHS Automotive's agreement, is a legally enforceable contract that gives rise to vested rights. *Opdyke Investment Co v Norris Grain* Co,413 Mich 354, 359; 320 NW2d 836 (1982); *Midland Cogeneration Venture Ltd Partnership v Naftaly*, 489 Mich 83, 92-93; 803 NW2d 674 (2011). Despite these vested contract rights, LaFontaine urges this Court to apply the changed radius to permit a challenge to Chrysler and IHS Automotive's plans to add a new vehicle line to an existing dealership. The 2010 amendment will expand the area within which LaFontaine is entitled to bring a challenge.[1] Thus, the key question of retroactivity is squarely before the Court.

Both LaFontaine and amici err when they assert that because there was arguably no "dealer

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[1] LaFontaine also suggests in passing that Chrysler waived its argument about whether the statute applies by sending its October 8, 2010 letter to LaFontaine advising that it intended to approve the establishment of the Dodge car and truck vehicle lines at 2060 Stadium Blvd, in Ann Arbor. A waiver is the voluntary and intentional relinquishment of a known right. *Reed Estate v Reed*, 293 Mich App 168, 176; 810 NW2d 284, 290 (2011). Chrysler's letter fails to satisfy this definition and, in any event, Chrysler cannot waive IHS Automotive's vested contract rights. See generally, *La Valley v Pere Marquette Emp Credit Union*, 342 Mich 639, 646; 70 NW2d 798 (1955).

agreement" as defined by the Dealer Act, there is no issue of retroactivity.[2] They contend that the statute creates 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 same line-make dealers." (Joint Amicus Curiae Brief of the Detroit Auto Dealers Ass'n and the Michigan Auto Dealers Ass'n, p 17; LaFontaine's Brief, p 17). From that, they insist that any changes to the radius are properly applied to enlarge existing dealers' rights to challenge new dealers or vehicle lines as long as a dealer agreement as defined in MCL 445.1562(3) has not yet been signed.[3] The trial court in this case concluded that Chrysler and IHS Automotive's agreement satisfied this definition but the Court of Appeals disagreed. But the Court of Appeals was wrong to conclude that the letter of intent does not also satisfy the definition established in 1998 PA 456. The future dealer agreement specifies within it the terms for the purchase and sale or resale of vehicles by referencing "an Agreement in its then-customary form...." Thus, it does qualify even under the prior statutory definition.

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[2] Logicians describe a fallacy, known in Latin as *ignoratio elenchi*, for "arguments whose premises lead logically to a conclusion irrelevant to the matter at issue, or to no conclusion at all." Logic and Legal Reasoning, Douglas Lind, pg 270. Such arguments in common language are said to "miss the point." That is the case here where the issue is whether the retroactive application of the enlarged rights created by 2010 PA 139 to Chrysler and IHS Automotive's agreement to add a vehicle line more than six but less than nine miles from LaFontaine's existing dealership amounts to an interference or impairment of vested contract rights.

[3] 2010 PA 140 currently provides: "'Dealer agreement' means an agreement or contract in writing between ... a manufacturer and a distributor or 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).

1998 PA 456 previously defined "dealer agreement" as "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).

Regardless of whether the letter of intent, a future dealer agreement between Chrysler and IHS Automotive, falls within the 1998 definition of "dealer agreement," the application of the 2010 amendment to it amounts to a retroactive application of the change in the law. In other words, LaFontaine seeks retroactive application of the statute to a pre-existing and legally enforceable contract between Chrysler and IHS Automotive. By stating the issue as purely statutory, LaFontaine and amici focus on the wrong question and wrong date, thus obscuring the retroactivity issue. The key question before this Court is not whether Chrysler and IHS Automotive have a dealer agreement within the meaning of the Dealers Act. The question is whether to apply the 2010 amendment to enlarge LaFontaine's right to challenge a new vehicle line more than six miles from its facility. Doing so impairs IHS Automotive's vested contract right to add a vehicle line to its dealership if it completes specified conditions set forth in the letter of intent. It also impairs Chrysler's vested contract rights with LaFontaine and with IHS Automotive.

Under pre-2010 law, Chrysler would have had no right to back away from the deal, including the deal to sign a dealer agreement once IHS Automotive performed. Thus, IHS Automotive had an enforceable right to add the vehicle line that depended on its own performance, and that would have obligated Chrysler to sign its customary dealer agreement with IHS Automotive for the sale and service of the new vehicle line. If post-2010 law is applied, LaFontaine is entitled to challenge the addition of a new vehicle line, and Chrysler has a right to get out of the contract. The 2010 amendment would create an enormous substantive change in both Chrysler and IHS Automotive's contractual rights under two pre-existing contracts, Chrysler's contract with LaFontaine and IHS Automotive's contract with Chrysler. Thus, the presumption against the retroactive application of a change in the law applies doubly here.

B. MCL 445.1561 *et seq.* reflects the Legislature's effort to carefully balance the rights and obligations of manufacturers, distributors, wholesalers, dealers, and consumers, not merely protection for existing dealerships against everyone else.

MCL 445.1561 *et seq.* does not simply protect the rights of dealerships and existing dealers. It regulates the "dealings between manufacturers and distributors or wholesalers and their dealers" and regulates "the dealings between manufacturers, distributors, wholesalers, dealers, and consumers." Act 118 of 1981, Preamble. The law governs establishment, termination, discontinuance, and nonrenewal of dealerships, compensation for dealers, and various conditions related to the relationships of dealers, distributors, manufacturers, and consumers. The Dealers Act, like that of many jurisdictions, includes an encroachment provision that requires an automobile franchisor to first notify existing franchisees within a given area if it plans to appoint a new franchisee or introduce a new vehicle line within the relevant market area. MCL 445.1561 *et seq.* See generally, Jefferson I. Rust, Regulating Franchise Encroachment: An Analysis of Current and Proposed Legislative Solutions, 19 Okla City U L Rev 489, 503 (Fall 1994). But neither the statute as a whole nor MCL 445.1567(3), which is at issue here, is intended to safeguard the rights and interests of existing dealerships over those of manufacturers, new market entrants, and consumers. To be sure, the history of auto dealer statutes reflects a concern that manufacturers were unfairly terminating dealers after they invested time and capital in their dealerships. See e.g., 1939 FTC Annual Report 22, 25-26 ("motor-vehicle manufacturers … have been, and still are, imposing on their respective dealers unfair and inequitable conditions of trade…"). As a result of these problems, which were recognized as early as the 1930s, "[v]irtually every aspect of the manufacturer-dealer relationship – from the purchase of a dealership to termination – is now regulated…." 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, 85 (2010).

But neither the language nor the purpose of the statute reflects a legislative intent to empower existing dealers to create monopoly markets at the expense of market entrants, consumers, and manufacturers. Indeed, LaFontaine's reading of the statute's purpose and effect, that it exists solely to protect existing dealers, raises serious problems under the Sherman Act. See e.g., *American Motor Inns, Inc v Holiday Inns, Inc*, 521 F2d 1230, 1244-1255 (CA 3 1975) (recognizing that acts of a franchisor are not insulated from liability under antitrust laws by the fact that the company is functioning as a franchisor). Instead, the statute's "good cause" standard "permits courts to balance the interests of the parties with the effect on competition" and arguably allows prohibition of an "additional dealer only where the appointment appears to be a bad faith effort to harm an existing dealer." Rust, 19 Okla. City U. L. Rev. at 505-506 (discussing *McDonald Ford Sales, Inc v Ford Motor Co*, 165 Mich App 321; 418 NW2d 716 (1987)).

Under a proper reading, it is clear that the statute balances protections for existing dealerships against the potentially negative impact of barriers to new market entrants on consumers, who are likely to suffer increased prices and reduced services if dealerships are decreased by virtue of these laws. Roger D. Lair & Francine LaFontaine, Understanding the Economics of Franchising and the Laws that Regulate It, 26 Franchise L J 55, 55 (2006). The statute also encompasses provisions that take into account that anti-encroachment provisions mean that manufacturers "make less profit and lose a way to incentivize existing dealers to perform better." McMillian, 45 Gonz L Rev at 93. The statute's careful equilibrium takes into account the potential for anti-encroachment provisions to hurt dealer applicants by making it more difficult and expensive to enter the market or shutting them out of a market entirely. The Legislature's balance was not intended to merely decrease competition and increase costs for consumers. It sought to find the right balance between and among these competing interests, all in the public

interest and for the public health, safety, and welfare. Thus, LaFontaine is wrong to suggest that only "new motor vehicle dealers" are within the zone of protection of the statute.

C. If LaFontaine's statutory rights are enlarged to permit a challenge to a new dealer or vehicle line more than six but less than nine miles away, the effect will be to allow LaFontaine to interfere with the vested contractual rights of IHS Automotive and Chrysler.

LaFontaine argues that the case is about statutory rights, not contractual interference, and insists that the Legislature intended the 2010 amendment to apply to all "new motor vehicle dealers." (LaFontaine's Brief, p 9). LaFontaine then insists that IHS Automotive is not a "new motor vehicle dealer" within the meaning of the statute. This is both factually and legally untrue. First, IHS Automotive is a "new motor vehicle dealer" under the statute; the issue here does not involve a new dealership but a new vehicle line at an existing dealership. Second, and more importantly, LaFontaine ignores the fact that, under its approach, the enlarged radius of 2010 PA 139 would permit it to challenge and potentially invalidate the future dealer agreement between Chrysler and IHS Automotive if applied here.

LaFontaine's claimed right to protest a new vehicle line or dealership within a nine-mile radius of the existing LaFontaine dealership in Saline, Michigan depends entirely on the retroactive application of the statute. Before the statute was amended, it had no right to file suit to protest Chrysler's decision to add a vehicle line to another existing facility that was more than six miles away. In fact, Chrysler and LaFontaine's agreement expressly made LaFontaine's right to sell in its "sales locality" a "non-exclusive right" and expressly provided that the "Sales Locality may be shared with other CC dealers of the same line-make as CC determines to be appropriate." (App 49a, 53A, 57A, Chrysler Sales and Service Agreements). Thus, before the amendment Chrysler had an absolute right to enter into agreements to establish other facilities or vehicle lines

within the sales locality, subject only to the statutory provisions as they existed before the 2010 amendments.

IHS Automotive's agreement with Chrysler provided that "CG will give notice to the state and/or dealers as may be required by state law." (App 61a, Letter of Intent). The state law in effect at the time was MCL 445.1561 *et seq.*, which provided for notice to any existing dealers located within a radius of six miles. MCL 445.1566(a); MCL 445.1576. In other words, when IHS Automotive and Chrysler entered into their contract on February 2, 2010, state law did not require Chrysler to give notice to any existing dealers because none were located within a six-mile radius. Only after they entered into a legally valid contract, which bound IHS Automotive to take many specific and expensive steps to establish a facility in compliance with Chrysler's requirements, did the Legislature enact 2010 PA 141. The letter of intent is a valid enforceable contract under Michigan law. *Opdyke*, 413 Mich at 359. Thus, once the contract between IHS Automotive and Chrysler was made, and IHS Automotive began performance under the contract, IHS Automotive had, and has, vested rights. IHS Automotive was entitled to build a facility in accordance with Chrysler's requirements, and once it did, it would be entitled to display, sell, and service Dodge vehicles in addition to Chrysler and Jeep vehicles. (App 61a-631).

The 2010 amendment altered the definition of "relevant market area," a definition that controls when notice must be provided. Thus, the amendment expressly altered MCL 445.1566(a) by changing the radius from six to nine miles and effectively altered the reach of MCL 445.1576 by requiring notice to the "relevant market area" which, under the statute as amended, will require notice based on a nine-mile radius. LaFontaine argues that the amended radius of nine miles should be applied to potentially block Chrysler and IHS Automotive's agreement because "at the time that Chrysler's obligation to provide notice arose (before entering into a dealer agreement),

the relevant market applicable to LaFontaine was 9 miles." (LaFontaine's Brief on Appeal, pg. 10-12). But LaFontaine's rights only exist if the Court applies the amendment retroactively to permit a challenge to the potentially new vehicle line contemplated in IHS Automotive and Chrysler's contract.

IHS Automotive and Chrysler were entitled to rely on the long-established provision governing the radius when they agreed to establish a new facility. The six-mile radius in the statute had prevailed for nearly thirty years, from 1981 when the anti-encroachment provision was first enacted, until 2010 when the Michigan Legislature amended the statute to enlarge the zone. 2010 PA 139. IHS Automotive was entitled to rely on the existing law, which did not entitle LaFontaine to challenge and delay its proposed new vehicle line until "the circuit court has rendered a decision on the matter." (*Id.*). LaFontaine seeks to get around this problem by pointing to language in the letter of intent that authorizes the parties to be relieved of contractual obligations "in the event that the contemplated transaction was successfully challenged...." (LaFonatine Brief on Appeal, quoting Letter of Intent App 61a). But this provision would never have come into play or have any effect on the plans to add a vehicle line absent the amendment.

This is exactly the circumstance in which a retroactive application should be disfavored. Statutes are presumed to apply prospectively, unless the Legislature clearly manifests the intent for retroactive application. *Johnson v Pastoriza*, 491 Mich 417, 429; 818 NW2d 279 (2012). This is "especially true when giving a statute retroactive application will ... create a new liability in connection with a past transaction, or invalidate a defense which was good when the statute was passed." (*Id.* at 429-430, quoting *Hansen-Snyder Co v General Motors Corp,* 371 Mich 480, 484; 124 NW 286 (1963)).

On the date that the amendment was enacted, Chrysler and IHS Automotive had already entered into an agreement, a letter of intent, which established specific terms for the establishment of a dealership to sell Dodge vehicles in Ann Arbor, Michigan. (App 61a-64a, Letter of Intent). Nearly, six months after the execution of the Chrysler and IHS Automotive agreement and nearly three years after the Chrysler-LaFontaine Dodge sales and service agreement was executed, an agreement which was predicated on then-existing law defining the relevant market area as a six-mile radius, the Legislature adopted the 2010 amendment to MCL 445.1561 *et seq.*, and changed the definition of "relevant market area" from a six-mile radius to a nine-mile radius. MCL 445.1566(1)(a). In other words, before the amendment, LaFontaine would not have gotten notice of any new dealership because IHS Automotive would be building the market entrant dealership more than six miles away. But, if the statute is to be applied to past transactions (agreements already in existence when the amendment was enacted), it would require a notice to LaFontaine and would entitle LaFontaine to challenge the new market entrant.[4] The presumption under Michigan law is strong because retrospective legislation is "commonly objectionable in principle, and apt to result in injustice...." Thomas M. Cooley, A Treatise on Constitutional Limitations Which Rest upon the Legislative Power of the States of the American Union 62-63 (1868). When figuring out whether a statute is being applied retroactively, it should be "judged with regard to the act or event that the statute is meant to regulate." Antonin Scalia and Bryan A. Garner, Reading

[4] LaFontaine also suggests in passing that Chrysler somehow waived its argument that the change in definition of the relevant market area ought not be applied because it gave the requisite notice. LaFontaine has not developed this argument with briefing nor was it presented to the lower court for decision. Thus, it is not properly before the Court. And in any event, Chrysler's sending a letter of notice does not waive IHS Automotive's right to argue that the amendments should not be applied retroactively to this transaction.

Law, pg 263 (2012). Here, the act or event that the statute is meant to regulate is the agreement to establish a new facility.

LaFontaine also spends a lot of time discussing the notice required for a "new motor vehicle dealer" of the same line/make in the same relevant market area. (LaFontaine's Brief on Appeal, pp 10-11). In LaFontaine's view, because it was a "new motor vehicle dealer" before the 2010 amendment, it was entitled to notice and therefore there is no question of retroactivity. But LaFontaine has it backwards. The question is whether the amendment alters LaFontaine and Chrysler's agreement, which predated the 2010 amendment by years. LaFontaine already enjoys an essentially infinite franchise, so retroactively enlarging the anti-encroachment territory would seriously interfere with Chrysler's ability to plan for and respond to changes in its business needs. Pre-2010, LaFontaine would not have been entitled to notice before the amendment because Chrysler was only obligated to give notice to dealers if the proposed market entrant would be established within six miles and the location of IHS Automotive's facility was more than six miles from LaFontaine's Saline dealership. Only if the amended definition is also applied does LaFontaine have a right to notice or any right to challenge the market entrant. The relevant date is the date of LaFontaine and Chrysler's dealer agreement. And applying the amendment also seriously interferes with IHS Automotive's rights under a second contract, its future dealer agreement, which was also entered into before the 2010 amendment was enacted.

D. Contrary to LaFontaine's argument, the strong presumption against retroactivity, the absence of language in the text giving the amendment retroactive effect, and the history of other amendments to the Dealers Act making clear that they applied to existing contracts all demonstrate that the Legislature intended pre-2010 law to apply here.

Michigan law recognizes a strong presumption against the retroactive application of new legislation absent a clear indication of a contrary legislative intent. *Frank W Lynch & Co v Flex*

Tech, Inc, 463 Mich 578, 583; 624 NW2d 180, 182 (2001). See also *Hughes v Judges' Retirement Bd*, 407 Mich 75, 85; 282 NW2d 160 (1979). This Court has traced this longstanding and strong presumption to United States Supreme Court cases recognizing that it is strongly rooted in our jurisprudence and dates back centuries. See *Landsgraf v USI Film Products*, 511 US 244, 265 (1994); *Dash v Van Kleeck*, 7 Johns 477, 503 (NY 1811) (Kent, CJ) ("It is s principle of the English common law, as ancient as law itself, that a statute, even of its omnipotent parliament, is not to be given a retrospective effect.) This presumption is founded on elementary notions of fairness, and "thus accords with what legislators almost always intend." *Kaiser Aluminum & Chem Corp v Bonjorno*, 494 US 827, 856 (1990) (Scalia, J, concurring).

This strong presumption controls the outcome of this case because no clear signal suggests that the 2010 amendment should apply retroactively. Nothing in the statutory text or history of the MCL 445.1561 *et seq.* indicates such an intention. The amendment is silent on retroactivity and includes a specific time—"immediate effect"—for 2010 PA 139 to take effect. This Court has taught that the "use of the phrase 'immediate' effect does not at all suggest that a public act applies retroactively." *Johnson,* 491 Mich at 430. "[P]roviding a specific, future effective date and omitting any reference to retroactivity support a conclusion that a statute should be applied prospectively only." (*Id.* at 432, quoting *Brewer v AD Transp Exp, Inc,* 486 Mich 50, 56; 782 NW2d 475 (2010)). This is "especially true when giving a statute retroactive application will ... create a new liability in connection with a past transaction, or invalidate a defense which was good when the statute was passed." (*Id.* at 429-430, quoting *Hansen-Snyder*, 371 Mich at 484).

Moreover, the Legislature "knows how to make clear its intention that a statute apply retroactively." *Johnson*, 491 Mich at 430, quoting *Frank W Lynch & Co*, 463 Mich at 584. And it has done so when enacting past amendments to this very statute. In 1998, the Legislature included

a specific provision to accomplish what LaFontaine insists it intended here though this same language is missing. In 1998, the Legislature included Act 456 the following language:

> The 1998 amendments to this act that added this section apply to agreements in existence on the effective date of this section and to agreements entered into or renewed after the effective date of this section. 1998, Act 456, Imd. Eff. Dec. 30, 1998. Now codified as MCL 445.1582a.

In other words, in 1998, when the Legislature sought to ensure that 1998 amendments to the Dealers Act would apply to agreements already in existence "on the effective date of this section and to agreements entered into or renewed after the effective date of this section," it included a specific provision to make that intention clear.

In 2010, the Legislature chose not to enact language making clear that the new enlarged area was intended to apply to agreements already in existence. This omission was not accidental; it confirms the longstanding presumption recognized under Michigan law, which is that statutory enactments operate prospectively only. The Michigan Legislature intended this change to apply prospectively so as to avoid interfering with existing reliance interests. And that intention should be given effect here.[5]

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[5] Amici, Detroit Auto Dealers Association and Michigan Auto Dealers Association, rely on *Chrysler Corp v Kolosso Auto Sales, Inc*, 148 F3d 892 (CA 7 1998) for the proposition that all dealers should have the benefit of the 2010 amendment regardless of when they entered into their dealer agreements. (Joint Amicus Brief, p 4). Although *Kolosso* held that it is not a violation of the contracts clause to change a provision in the Wisconsin auto dealer statute (not specifically a relevant market area provision), the parties in that case did not raise any retroactivity argument. Further, the provision was explicitly made retroactive because of a legislative policy. Previous changes in Wisconsin's dealership law without such language had been made prospective only. *Kolosso,* 148 F3d at 896.

E. LaFontaine's criticism of the Sixth Circuit's decision in *Kia v Glassman* is flawed.[6]

LaFontaine argued that Kia was wrongly decided because the Sixth Circuit looked to the wrong date to determine whether the application of the 2010 amendment to Chrysler and IHS Automotive's proposed transaction was a prospective or retroactive application of the law. (LaFontaine's Brief on the Merits, pp 12-13). To the contrary, *Kia* was well-reasoned decision recognizing that in comparable circumstances "the 2010 Amendment would alter a key aspect of the parties' bargain – the nonexclusive nature of Glassman's distribution rights and Kia's right to establish new dealers." *Kia Motors America, Inc v Glassman Oldsmobile Saab Hyundai, Inc,* 706 F3d at 733, 738 (CA 6, 2013). In addition, after recognizing Michigan's strong presumption against retroactivity, the Sixth Circuit concluded that the 2010 amendment was not intended to apply retroactively. In reaching this conclusion, the Sixth Circuit considered but rejected several arguments that LaFontaine raises here.

First, the court distinguished the 2010 amendment from the mechanic's lien statute dealt with in *Hanson-Snyder*, 371 Mich 480, because unlike in that case involving a procedural amendment extending the time for filing a lien, the amendment here was substantive. The Sixth Circuit pointed out that, "[b]efore the Amendment, the statute allowed Kia to establish a new dealership 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 a new dealer." *Kia*, 706 F3d at 740. The Sixth Circuit explained that this did not amount to a change in the "mechanics or time frame for objecting to a new dealer," it substantively entitled Glassman to object. As a result, the court applied the presumption against

[6] IHS Automotive responds to LaFontaine's discussion under IV, V, and VI together here because they are so closely intertwined.

retroactivity. Similarly, in this case, the 2010 amendment is substantive, giving LaFontaine a right to challenge Chrysler and IHS Automotive's plans that it did not have before the amendment was enacted.

Second, the court disagreed with Glassman's assertion that a retroactivity issue did not exist, an assertion that LaFontaine has made in this case. According to the Sixth Circuit, Glassman's argument that Kia sought to establish the new dealership after the 2010 amendment was enacted did not mean that the application was prospective. The court reasoned that "this argument ignores the fact that the Amendment affects Kia's rights under a contract that predates the Amendment...." (*Id.*). Relying on *Bob Tatone Ford, Inc v Ford Motor Co*, 197 F3d 787, 792 (6th Cir 1999) (applying Ohio law), the Sixth Circuit held that requiring "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 six miles from Glassman." (*Id.*, citing *Dale Baker Oldsmobile v Fiat Motors of North America, Inc*, 794 F2d 213, 219-20 (CA 61986) (indicating that a statute would operate retroactively if it impacted a pre-existing contract, even though the conduct it regulated post-dated the statute)). Similarly, here, if the 2010 Amendment is applied to here, it will deprive Chrysler of its previously unrestricted right to establish a new vehicle line more than six miles from LaFontaine and will impede and potentially prevent IHS Automotive's right to proceed to establish a new vehicle line at its facility.

Third, the court disagreed with Glassman's contention that Kia lacked a contractual right that would have been affected because its rights were statutory, an argument that LaFontaine repeats here. The Sixth Circuit pointed out that the argument "ignores the Agreement." The Sixth Circuit correctly emphasized that the same argument had also been made and rejected in *Dale*

Baker Oldsmobile. Contrary to Glassman's argument, and that of LaFontaine, "[c]learly the 2010 Amendment would affect that contractual right [Kia's unrestricted right to establish new dealers outside a six mile radius of Glassman's location] because it would require Kia to give Glassman notice." 706 F2d at 741. See also *Dale Baker,* 794 F2d at 220 (Michigan law); *Ace Cycle World, Inc v American Honda Motor Co*, 788 F2d 1225, 1226 (CA 7 1986) (Illinois law); *Men-Guer Chrysler-Plymouth v Chrysler Corp*, 16 F3d 1220, 1994 WL 7609, at *4 (CA 6 Jan 12, 1994) (unpublished table decision) (Ohio law); *Chrysler Motors Corp v Thomas Auto Co*, 939 F2d 538, 541-43 (CA 8 1991)(Arkansas law); *Scuncio Motors Inc v Subaru of New England, Inc*, 715 F2d 10, 13 (CA 1 1983) (Rhode Island law); *Buggs v Ford Motor Co*, 113 F2d 618, 621 (CA 7 1940) (Wisconsin law); *Hein-Werner Corp v Jackson Indus, Inc*, 306 NE2d 440, 443 (Mass 1974) (Massachusetts law); *Nissan N Am, Inc v Royal Nissan, Inc*, 794 So2d 45, 48 (La Ct App 2001) (Louisiana law); *Stamps v Ford Motor Co*, 650 F Supp 390, 399 (ND Ga 1986) (Georgia law); *Miller Auto Corp v Jaguar Land Rover N Am, LLC*, No 09-1921, 2010 Wis 3417975, at *7 (D Conn Aug 25, 2010) (Connecticut law); *H-D Michigan, LLC v Sovie's Cycle Shop, Inc*, 626 F Supp 2d 274, 278 & n 5(ND NY 2009) (New York law); *Northwood AMC Corp v American Motors Corp*, 423 A2d 846, 849 (Vt 1980) (Vermont law).

Finally, while it did not reach the constitutional question whether applying the amendment retroactively would violate the Contracts Clauses of the United States and Michigan Constitutions, the Sixth Circuit explicitly acknowledged "that retroactive application would raise a significant question" and reasoned that this provided "an additional reason for applying the 2010 Amendment prospectively only." (*Id.*). That same reasoning applies here and supports a ruling declining to apply the 2010 amendment retroactively.

F. Contrary to LaFontaine's argument, the 2010 amendment is not procedural or remedial and falls outside of any exception to the normal rule limiting retroactive application of a statute.

LaFontaine argues that the 2010 amendment does not affect IHS Automotive's vested rights, and thus can be applied without raising the question of retroactivity or implicating the Contracts Clauses of the United States and Michigan Constitutions. But this argument was properly rejected by the Sixth Circuit in *Kia*, and cannot be squared with the circumstances at issue here. Contrary to LaFontaine's argument, Chrysler had an unrestricted right to locate new dealers anywhere outside of a six mile radius. If the 2010 amendment is applied, then despite a contractual provision in its agreement with LaFontaine giving it this unrestricted right (App 49a), Chrysler was obligated to give notice to LaFontaine and defend a challenge based on the standard of "good cause" set forth in MCL 445.1576(3). Clearly, Chrysler's substantive rights were affected by this. Likewise, before 2010 PA 139 was enacted, IHS Automotive had a contractual right to establish a new facility, which if it performed, would result in a right to a sales and service agreement to sell Dodge products. If the 2010 amendment is applied, IHS Automotive no longer has a firm right to proceed because a dealer, LaFontaine, may challenge the proposed new vehicle lines on the basis of the statute. And these statutory rights interfere with IHS Automotive and Chrysler's contractual right to proceed, causing at a minimum, significant delay due to the legal challenge, and potentially scuttling the deal on statutory grounds. In these circumstances, the application of the statute to this conduct is retroactive, interferes substantively with rights of Chrysler and IHS Automotive and gives significant new substantive rights to LaFontaine, all to the detriment of vested contractual rights already in existence.

G. LaFontaine wrongly seeks to avoid the serious constitutional problems with its position by trying to characterize IHS Automotive and Chrysler's rights as statutory, not contractual.

Finally, retroactive application of the 2010 amendment would violate the Contracts Clauses of the Michigan Constitution and the United States Constitution. Mich Const 1963, art I, Section 10; US Const, art I, Section 10. These provisions bar a legislature from enacting any "law impairing the obligation of contracts. (*Id.*). The threshold inquiry to determine whether a change in state law violates the Contracts Clause is whether it substantially impairs a contractual relationship. *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). See also *Byjelich v John Hancock Mut Life Ins Co*, 324 Mich 54, 61; 36 NW2d 212 (1949) (statute would unconstitutionally impair obligations and rights under insurance contract if it gave courts power to compel an insured to assign a policy during a divorce action so as to enable spouse to recover cash surrender value).

LaFontaine insists that the application of the amendment would not impair contractual rights by asserting that the Chrysler/LaFontaine agreement contained language referencing applicable law. LaFontaine argues that Chrysler and IHS Automotive should have recognized that the Michigan Legislature could amend the laws affecting the placement of new dealers or vehicle lines. But even when a contract clause references applicable law, unless the contract speaks to future applicable laws, it incorporates the law existing at the time the contract was entered into. See *Dale Baker*, 794 F2d at 221 (giving the Dealers Act prospective effect to avoid serious Contract Clause concerns); *Rutherford Farmers Cooperative v MTD Consumer Group, Inc,* 124 F Appx 918 (CA 6 2005) (unpublished).

Here, the provision had been the same since the enactment of the statute, and Michigan law as well as that of the Sixth Circuit held that the existing Dealers Act would not be applied retroactively. See also *Joe Dwyer, Inc v Jaguar Cars, Inc*, 167 Mich App 672; 423 NW2d 311 (1988). Thus, Chrysler and IHS Automotive were entitled to rely on and did rely on existing law when negotiating their agreements. And the 2010 amendment ought not be applied to upset these settled and vested contract rights.[7]

LaFontaine is wrong to suggest that this will create chaos in the marketplace or result in a patchwork of inconsistent rules governing the relationships between auto dealers, distributors, and manufacturers. To the contrary, courts all across the country have repeatedly declined to give retroactive effect to changes in the protected radius around franchisees. Such provisions apply prospectively only to avoid unsettling the expectations of the parties, interfering with existing contract rights, and undermining the predictability associated with the rule of law, a predictability that is a vital component of economic and commercial activity. (See string cite on pg 15).

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.

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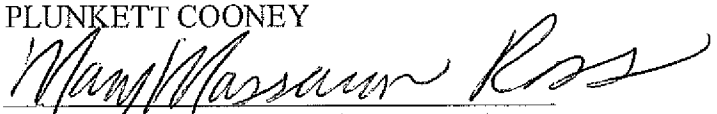
[7] Amici again rely on *Kolosso*, 148 F3d 892, a decision using Wisconsin law that is not controlling here, to support their position that applying the 2010 amendment to the agreements here does not violate the Contracts Clauses of the U.S. and Michigan constitutions. (Joint Amicus Brief, p 9). In that case, however, the legislative provision of Wisconsin's auto dealers act found not to violate the Contract Clause did not involve the definition of relevant market area that was part of a bilateral agreement between the parties, as here. To the contrary, it was a provision entitling a dealer to challenge a manufacturer's refusal to permit it to move its dealership.

Respectfully submitted,

PLUNKETT COONEY

BY: 

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