No.

In the Supreme Court of the United States

FRED MARTIN MOTOR COMPANY, PETITIONER

v.

SPITZER AUTOWORLD AKRON, LLC, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

As part of its approval of Chrysler's bankruptcy plan, the United States Bankruptcy Court for the Southern District of New York granted Chrysler's motion to reject its franchise agreements with more than seven hundred dealers. In response to the bankruptcy court's order, Congress enacted Section 747 of the Consolidated Appropriations Act of 2010, which provided the terminated dealers with the right to seek reinstatement through binding arbitration. The question presented is as follows:

Whether, by reopening the final order of a federal bankruptcy court and permitting a private arbitrator to reverse it, Section 747 of the Consolidated Appropriations Act of 2010 is unconstitutional.

PARTIES TO THE PROCEEDING AND CORPORATE DISCLOSURE STATEMENT

Petitioner is Fred Martin Motor Company (Fred Martin). Fred Martin has no parent corporation, and no publicly held company owns 10% or more of Fred Martin's stock.

Respondents are Spitzer Autoworld Akron, LLC (Spitzer); the United States of America; Dick Scott, Inc.; FCA US LLC, formerly known as Chrysler Group LLC; Fox Hills Motor Sales, Inc.; Jim Marsh American Corp.; Livonia Chrysler Jeep, Inc.; Prestige Chrysler Jeep Dodge, LLC; Southfield Jeep, Inc.; Suburban Garden City, LLC; Suburban Troy, LLC; and Village Chrysler Jeep Inc. Spitzer and the United States filed briefs adverse to Fred Martin in the court below on the question presented; the other respondents were parties below and are listed pursuant to Rule 12.6.

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Fred Martin Motor Company respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-41a) is reported at 776 F.3d 411. The order of the district court denying petitioner's motion for partial summary judgment (App., *infra*, 44a-87a) is reported at 862 F. Supp. 2d 661. The order of the district court denying petitioner's motion for a separate trial (App., *infra*, 88a-92a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on January 16, 2015. Petitioner's petition for rehearing was denied on March 13, 2015 (App., *infra*, 42a-43a). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISION INVOLVED

Section 747 of the Consolidated Appropriations Act of 2010, Pub. L. No. 111-117, 123 Stat. 3219-3221 (2009), is reproduced in the appendix to this petition (App., *infra*, 95a-99a).

STATEMENT

This petition presents a discrete and vitally important constitutional question implicating the separation of powers and the uniform application of the bankruptcy laws. It arises out of one of the largest bankruptcy proceedings in American history, involving the automaker Chrysler. In 2009, a federal bankruptcy court granted Chrysler's motion to reject its franchise agreements with more than seven hundred dealers. In response to the bankruptcy court's order, and as a result of overwhelming political pressure from the terminated dealers, Congress enacted Section 747 of the Consolidated Appropriations Act of 2010, which provided the terminated dealers with the right to seek reinstatement through binding arbitration. The question presented is whether Congress acted constitutionally when it reopened the final order of the bankruptcy court and permitted a private arbitrator to reverse it. The correct answer to that question is no. Because the court of appeals erred in upholding Section 747, and because this case presents a constitutional question of exceptional im-

portance, the petition for a writ of certiorari should be granted.

1. a. Chrysler is one of the Nation's "Big Three" automakers. In the wake of the financial crisis of 2008, Chrysler was in deteriorating health. Pursuant to the Troubled Asset Relief Program (TARP), Chrysler received a $4 billion loan from the federal government, and the government's Auto Task Force thereafter assumed a central role in negotiating a comprehensive restructuring of the company. App., *infra*, 3a-4a.

b. On April 30, 2009, Chrysler filed a voluntary bankruptcy petition under Chapter 11 in the Southern District of New York. Chrysler negotiated a restructuring plan with Fiat, the Italian automaker, under which Chrysler would transfer its assets to a new entity, Chrysler Group LLC, pursuant to 11 U.S.C. 363(f), and Fiat would hold a stake in the new entity. A vital part of the plan involved streamlining what had become a bloated and inefficient network of dealers. At the time of the bankruptcy, Chrysler had some 3,200 dealers in the United States alone. Chrysler consequently filed a motion in the bankruptcy court pursuant to 11 U.S.C. 365, seeking authorization to reject its franchise agreements with 789 of its domestic dealers. App., *infra*, 4a-7a.

On June 9, 2009, after an evidentiary hearing at which it heard testimony from 15 witnesses and received written testimony from more than 60 others, the bankruptcy court granted the motion. *In re Old Carco LLC*, 406 B.R. 180, 212-213 (Bankr. S.D.N.Y. 2009). In a lengthy written opinion, the court explained that rejection of the contracts was appropriate because it "continued and accelerated [Chrysler's] efforts to rationalize [its] dealership network." *Id.* at 193. In the court's view, Chrysler had appropriately concluded that, "to consummate the Fiat Transaction * * *, [it] needed to trans-

fer a strong, well-positioned dealership network" to the new entity. *Id.* at 194.

On the following day, with the bankruptcy court having otherwise approved the restructuring plan, Chrysler made the Section 363(f) transfer and completed the sale. App., *infra*, 50a-51a.

c. None of the rejected dealers pursued an appeal from the bankruptcy court's order granting Chrysler's motion.[1] Long after the sale was consummated, a group of dealers did file a motion in the bankruptcy court for reconsideration. But the bankruptcy court denied that motion, *In re Old Carco LLC*, 423 B.R. 40, 58 (Bankr. S.D.N.Y. 2010), and its ruling was affirmed both by the district court, Civ. No. 10-2493, 2010 WL 3566908, at *4 (S.D.N.Y. Sept. 14, 2010), and by the Second Circuit, 420 Fed. Appx. 89, 89 (2011). Another group of dealers brought various actions against Chrysler in state court. But the bankruptcy court enjoined those actions, *In re Old Carco LLC*, No. 09-50002, Dkt. No. 5372, at 10 (Bankr. S.D.N.Y. Aug. 31, 2009), and its ruling was likewise affirmed both by the district court, Civ. Nos. 09-8875 & 09-8887, 2010 WL 9461648, at *8 (S.D.N.Y. July 2, 2010), and by the Second Circuit, 438 Fed. Appx. 30, 30 (2011).

2. Rather than pursuing an appeal through the courts, the terminated dealers turned to Congress for an "immediate legislative fix." *Ramifications of Auto Industry Bankruptcies (Part I): Hearing Before the H.*

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[1] On an appeal by other parties, the Second Circuit affirmed the bankruptcy court's sale order, *In re Chrysler LLC*, 576 F.3d 108 (2009), but this Court subsequently vacated and remanded with instructions to dismiss the appeal as moot, *Indiana State Police Pension Trust* v. *Chrysler LLC*, 558 U.S. 1087 (2009).

Comm. on the Judiciary, 111th Cong. 7 (2009) (statement of Rep. Jackson Lee). Because of their influence and sheer numbers, the terminated dealers placed enormous political pressure on Congress: as one representative put it, "I think we have 435 Members of Congress, [and] I think 430 contacted me and all wanted their dealer to testify today." *GM and Chrysler Dealership Closures and Restructuring: Hearing Before the H. Subcomm. on Oversight and Investigations of the Comm. on Energy and Commerce*, 111th Cong. 11 (2009) (statement of Rep. Barton).

Members of Congress introduced numerous bills to provide for restoration of the terminated dealers. See H.R. 2743, 111th Cong. (2009); H.R. 2750, 111th Cong. (2009); H.R. 2796, 111th Cong. (2009); H.R. 3450, 111th Cong. (2009); S. 1253, 111th Cong. (2009); S. 1304, 111th Cong. (2009). Those bills were explicitly and specifically targeted at the termination of dealers in the Chrysler bankruptcy (and the similar termination of dealers in the contemporaneous General Motors bankruptcy). For example, H.R. 2743 was entitled the "Automobile Dealer Economic Rights Restoration Act of 2009," and it would have required Chrysler and General Motors to "restore the franchise agreement between [terminated] automobile dealer[s] and Chrysler LLC or General Motors Corp. that was in effect prior to the commencement of their respective bankruptcy cases." H.R. 2743, 111th Cong. (2009).

Congress eventually afforded the dealers relief by slipping a provision "at the eleventh hour into an omnibus appropriations bill." App., *infra*, 8a. That provision—which came to be Section 747 of the Consolidated Appropriations Act of 2010—gave a "covered dealership" "the right to seek, through binding arbitration, continuation, or reinstatement of a franchise agreement, or to be

added as a franchisee to the dealer network of [a] covered manufacturer." Consolidated Appropriations Act of 2010, § 747(b), Pub. L. No. 111-117, 123 Stat. 3220 (2009) (CAA). Each arbitrator was to be selected from a list maintained by the American Arbitration Association (AAA), or, if the parties could not agree, by the AAA itself. CAA § 747(e), 123 Stat. 3221. Section 747 contained no provision for judicial review of the arbitrator's decision.

Although Section 747 did not specifically refer to Chrysler or General Motors, its provisions were tailored to apply to those bankruptcies—and those bankruptcies alone. Section 747 defined a "covered manufacturer" as "an automobile manufacturer in which the United States Government has an ownership interest, or to which the Government has provided financial assistance under title I of the Emergency Economic Stabilization Act of 2008," CAA § 747(a)(1)(A), 123 Stat. 3219-3220; the only two manufacturers that qualified were Chrysler and General Motors. What is more, Section 747 defined a "covered dealership" as "an automobile dealership that had a franchise agreement" that was "in effect as of October 3, 2008" and "terminated, not assigned * * *, not renewed, or not continued during the period beginning on October 3, 2008, and ending on December 31, 2010," CAA § 747(a)(2), 123 Stat. 3220; that was the time period during which the Chrysler and General Motors bankruptcies took place. A dealer was entitled to seek a franchise agreement in the same area, and involving the same brands, as it had before its termination. CAA § 747(b), 123 Stat. 3220. And a dealer was required to elect to pursue arbitration within 40 days of the statute's enactment. CAA § 747(d), 123 Stat. 3220-3221.

Members of Congress could not have been clearer in stating that their intention was to reopen, and to provide

a mechanism for reversing, the bankruptcy court's approval of the terminations. As one member colorfully put it at a hearing on the issue, "[s]houldn't we * * * find a solution for those dealers who essentially have been screwed by the bankruptcy system?" *Ramifications of Auto Industry Bankruptcies (Part III): Hearing Before the H. Subcomm. on Commercial and Administrative Law of the Comm. on the Judiciary*, 111th Cong. 56 (2009) (statement of Rep. Issa). Other members described the provision as "[s]ubmitting to arbitration * * * decisions already approved in bankruptcy court," 155 Cong. Rec. 31,625 (2009) (statement of Sen. Levin); "revers[ing]" the "short-sighted decisions" to terminate dealers, 155 Cong. Rec. 31,036 (2009) (statement of Rep. Van Hollen); and "ensur[ing] that covered dealerships have a fair and impartial review of the termination decision[s]," 155 Cong. Rec. 31,625 (2009) (statement of Sen. Durbin).

Congress adopted Section 747 in the face of warnings that it could be, "rather frankly, unconstitutional." 155 Cong. Rec. 31,041 (2009) (statement of Rep. Dingell). A member of the administration's Auto Task Force advised Congress that "intervention into a closed judicial proceeding on behalf of [the terminated dealers]" would "rais[e] substantial legal concerns" and "set a dangerous precedent." *Ramifications of Auto Industry Bankruptcies (Part II): Hearing Before the H. Subcomm. on Commercial and Administrative Law of the Comm. on the Judiciary*, 111th Cong. 18 (2009) (statement of Ron Bloom, senior adviser at the Department of the Treasury). And the Congressional Research Service produced a lengthy analysis of the potential constitutional objections to predecessor bills. See Carol Petit et al., Congressional Research Service, *Memorandum: Mandating*

Dealership Agreements for Automakers Receiving Federal Funds: Constitutional Analysis (July 15, 2009).

Congress nevertheless included Section 747 in the Consolidated Appropriations Act of 2010, and, on December 16, 2009, the President signed the Act into law. Over 400 terminated dealers subsequently elected to pursue arbitrations pursuant to Section 747; Chrysler prevailed in 76 arbitrations, dealers prevailed in 32, and the remaining claims were settled. App., *infra*, 11a.

3. This petition arises out of litigation brought in the United States District Court for the Eastern District of Michigan by Chrysler against various dealers that had prevailed in their respective arbitrations, including respondent Spitzer Autoworld Akron, LLC (Spitzer). Petitioner Fred Martin Motor Company (Fred Martin) is a Chrysler dealer in Akron, Ohio, that was not terminated in the bankruptcy proceedings and whose market area would overlap with respondent Spitzer's if Spitzer were reinstated. Because of petitioner's interest in the resolution of Spitzer's status, Chrysler named petitioner as a defendant. As is relevant here, petitioner filed a cross-claim seeking a declaration that Section 747 is unconstitutional; the United States intervened to defend its constitutionality. App., *infra*, 13a-14a.

Petitioner filed a motion for partial summary judgment. In an order addressing numerous dispositive motions, the district court denied petitioner's motion without separately analyzing the constitutionality of Section 747. App., *infra*, 44a-87a. The court suggested that, in light of its interpretation of the provision, it was unnecessary to reach the question of its constitutionality. *Id.* at 69a n.5. When petitioner filed a motion seeking a separate trial, taking the position that the constitutionality of Section 747 remained a live issue, the district court denied the motion and additionally expressed doubt that

petitioner possessed standing. *Id.* at 88a-92a. The district court subsequently entered final judgment. *Id.* at 93a-94a.

4. The court of appeals affirmed in relevant part. App., *infra*, 41a. As a preliminary matter, the court concluded that petitioner possessed standing to challenge the constitutionality of Section 747 because "[t]he increase in direct competition caused by the possible entrance of [respondent Spitzer], as mandated by the § 747 arbitration, causes [petitioner] a cognizable economic injury." *Id.* at 34a.

On the merits, however, the court of appeals summarily rejected petitioner's constitutional claim, even though it acknowledged that the purpose of Section 747 was "retroactively [to] revers[e]" the effects of the dealers' termination. App., *infra*, 32a. The court of appeals reasoned that "Section 747 neither nullifies nor reopens a prior court order; rather, it simply reverses the effects of a court order through prospective relief." *Id.* at 35a. Although the court of appeals recognized the general principle that the Constitution "forbids congressional or executive interference with the final judgments of courts," *ibid.* (citing *Plaut* v. *Spendthrift Farm, Inc.*, 514 U.S. 211, 223-224 (1995)), it reasoned that the Constitution "does not forbid the granting of prospective relief intended to mitigate the perceived negative effects of a court order," *ibid.* The court of appeals asserted that its conclusion was supported by this Court's decision in *Miller* v. *French*, 530 U.S. 327 (2000), which in its view distinguished between "legislation that attempted to reopen the dismissal of a suit seeking money damages," on the one hand, and "legislation that altered the prospective effect of injunctions entered by Article III courts," on the other. App., *infra*, 35a (quoting *Miller*, 530 U.S. at 344) (internal quotation marks and citation omitted).

5. The court of appeals subsequently denied petitioner's petition for rehearing. App., *infra*, 42a-43a.[2]

REASONS FOR GRANTING THE PETITION

In enacting Section 747 of the Consolidated Appropriations Act of 2010, Congress acted with blatant disregard for fundamental constitutional principles. That provision reopened, and provided a mechanism for reversing, a specific final order of a bankruptcy court. In enacting that provision, Congress exercised judicial power, in violation of the separation of powers, and disrupted the uniform application of the bankruptcy laws. If the Sixth Circuit's decision upholding Section 747 is left undisturbed, it will provide a template for future incursions on the finality of bankruptcy-court judgments. As the primary guardian of separation-of-powers principles, this Court should grant review and reverse the Sixth Circuit's gravely erroneous reasoning.

A. By Reopening The Final Order Of A Federal Bankruptcy Court And Permitting A Private Arbitrator To Reverse It, Section 747 Is Unconstitutional

By reopening the final order of a federal bankruptcy court, Section 747 contravened the "fundamental principle," rooted in the separation of powers, that Congress may not "depriv[e] judicial judgments of the conclusive effect that they had when they were announced." *Plaut* v. *Spendthrift Farms, Inc.*, 514 U.S. 211, 219, 228 (1995). And it also contravened another fundamental constitutional principle by vesting review of the bankruptcy court's order in a private arbitrator. See *id.* at 218. In

[2] Chrysler has filed a petition for a writ of certiorari challenging aspects of the court of appeals' decision not at issue here. See 14-1190 Pet. (filed Mar. 27, 2015).

short, if the boundaries between the branches of government are like "fences," see *id.* at 240, Congress jumped the fence both coming and going when it enacted Section 747. This Court should grant review to rectify Congress's obvious constitutional intrusion.

1. There can be no doubt that Section 747 did exactly what members of Congress said they wanted to do: *viz.*, to reopen, and provide a mechanism for reversing, the bankruptcy court's final order terminating Chrysler's franchise agreements with its dealers (and the similar order in the General Motors bankruptcy). Indeed, Section 747 could not have been more precisely tailored to achieve that objective. It captured only Chrysler and General Motors as "covered manufacturer[s]" because they were the only manufacturers to have accepted financial assistance under the Troubled Asset Relief Program (TARP); it defined "covered dealership[s]" as those dealers whose franchise agreements with "covered manufacturer[s]" had been terminated during the relevant time period; it gave the dealers the right to seek franchise agreements in the same areas, and involving the same brands, as they had before their terminations; and it required the dealers to elect to pursue arbitration within 40 days of the statute's enactment. See p. 6, *supra*.

In short, Section 747 was a bespoke statute, which applied only to discrete, readily identifiable parties and operated within a short and targeted time frame. Under those circumstances, there is "no reasonable construction" of Section 747 under which it does not require the reopening of the final order of the bankruptcy court. *Plaut*, 514 U.S. at 217. Even the Sixth Circuit recognized as much when it described Section 747 as "retroactively reversing" the effects of the dealers' termination. App., *infra*, 32a.

2. By reopening the final order of a federal bankruptcy court, Section 747 violates the separation of powers: specifically, the principle that, because federal courts have "the power, not merely to rule on cases, but to *decide* them," legislation "is unconstitutional to the extent that it requires" the "reopen[ing]" of "final judgments entered before its enactment." *Plaut*, 514 U.S. at 218-219, 240.

This Court's analysis in *Plaut* is instructive. There, the Court was considering the constitutionality of a statute reopening cases that had been dismissed as a result of the Court's interpretation, in an earlier case, of the governing limitations period. See 514 U.S. at 215-217. The Court began by discussing at length the origins of the separation of the legislative and judicial functions. *Id.* at 219-225. The Court noted that, before the ratification of the Constitution, "legislative interference with the courts at the behest of private interests and factions" was common. *Id.* at 220-221. That interference convinced the Framers that it was "necess[ary] to separate the legislative from the judicial power," giving to the legislature the "power to make general law" and to the judiciary the "power to apply that law in particular cases." *Id.* at 221, 224. Turning to the statute at issue, the Court explained that, "[h]aving achieved finality * * * a judicial decision becomes the last word of the judicial department with regard to a particular case or controversy, and Congress may not declare by retroactive legislation that the law applicable *to that very case* was something other than what the courts said it was." *Id.* at 227.[3]

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[3] Similarly, this Court has stated that "acts reversing judgments, * * * legislative judgments and decrees, and other similar special, partial and arbitrary exertions of power under the forms of legisla-

Section 747 violates the same principle that was at issue in *Plaut*: *viz.*, that Congress may not require the reopening of final orders previously entered by the judiciary. After providing interested parties with a full and fair opportunity to be heard, the federal bankruptcy court decided that Chrysler could reject its franchise agreements with 789 of its domestic dealers as part of its bankruptcy plan. None of the rejected dealers appealed the bankruptcy court's order, and it therefore became final. Then, by congressional design, Section 747 effectively vacated that order. Congress's enactment of Section 747 was unmistakably an exercise of judicial power.[4]

The fact that the order in question was entered by a bankruptcy court, rather than a district court, does not alter the analysis. To be sure, bankruptcy judges lack the tenure and salary protections afforded to district judges under Article III of the Constitution. But bankruptcy judges serve to "supplement[] the capacity of district courts." *Wellness Int'l Network, Ltd.* v. *Sharif*, No. 13-935, slip op. 14 (May 26, 2015). Bankruptcy judges are appointed, and subject to removal, by Article III judges. See 28 U.S.C. 152(a)(1), (e). In addition, bankruptcy courts constitute units of their respective district courts, see 28 U.S.C. 152(a)(1); they act only on matters

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tion," violate due process. *Hurtado* v. *California*, 110 U.S. 516, 536 (1884).

[4] In his opinion concurring in the judgment in *Plaut*, Justice Breyer cited an additional consideration: namely, whether a law "lacks generality" and "applies only to a few individual instances." 514 U.S. at 243. The statute at issue here would plainly satisfy any such requirement, because it targeted only two particular debtors—"[a] number * * * too small * * * to distinguish meaningfully the law before us from a similar law aimed at a single closed case." *Id.* at 244.

referred to them by their district courts, see 28 U.S.C. 157(a); and their judgments and orders are reviewable by those courts, see 28 U.S.C. 158(a).

Where, as here, a bankruptcy court indisputably has the authority to enter the judgment or order at issue, see *Stern* v. *Marshall*, 131 S. Ct. 2594, 2620 (2011), the principle that Congress may not require federal courts to reopen previously entered final orders is fully implicated. If anything, that principle applies with even greater force in the bankruptcy context, because the Bankruptcy Clause additionally requires that bankruptcy laws be "uniform * * * throughout the United States," U.S. Const. Art. I, § 8, cl. 4—with the result that private bankruptcy laws (or laws that "specifically apply to the affairs of only one named debtor") are invalid. *Railway Labor Executives' Ass'n* v. *Gibbons*, 455 U.S. 457, 471 (1982). Under the Bankruptcy Clause, as under the separation of powers more generally, Congress acted unconstitutionally when it enacted a law that reopened two specific final orders of bankruptcy courts and targeted two particular debtors.

3. In the decision under review, the Sixth Circuit did not dispute that the separation-of-powers principle articulated in *Plaut* applied with full force in the bankruptcy context. Instead, the Sixth Circuit concluded that the principle was inapplicable because Section 747 "simply reverses the effects of a court order through prospective relief." App., *infra*, 35a (citing *Miller* v. *French*, 530 U.S. 327 (2000)).

The Sixth Circuit's reasoning was simply incorrect. In *Miller*, this Court considered the constitutionality of a provision of the Prison Litigation Reform Act that required a district court to stay prospective relief in a civil action challenging prison conditions during the pendency of a motion to terminate that relief. The Court rejected

the argument that the provision was unconstitutional because it impermissibly interfered with a district court's power to enter an injunction. The Court noted that "[t]he provision of prospective relief is subject to the continuing supervisory jurisdiction of the court" and thus did not constitute the "last word of the judicial department." 530 U.S. at 347 (citation omitted). The Court reasoned that "[p]rospective relief under a continuing, executory decree remains subject to alteration due to changes in the underlying law." *Id.* at 344. Applying that principle, the Court concluded that, "[b]y establishing new standards for the enforcement of prospective relief in [the provision at issue], Congress has altered the relevant underlying law" in a way that did not contravene the separation of powers. *Id.* at 347.

Section 747 is different in kind from the provision at issue in *Miller*. The bankruptcy court's order here, unlike the order at issue in *Miller*, was not an injunctive order requiring "continuing supervisory jurisdiction"; instead, as a discrete order that terminated certain contracts, it did constitute the "last word of the judicial department." 530 U.S. at 347 (citation omitted). There is thus no sense in which Section 747 could be said to "alter[] the relevant underlying law," *ibid.*; the *only* effect of Section 747 was to reopen the bankruptcy court's approval of the dealers' termination.

The Sixth Circuit reasoned that Section 747 provided "prospective relief," and was thus analogous to the provision at issue in *Miller*, on the ground that it was "intended to mitigate the perceived negative effects of a court order." App., *infra*, 35a. If that were sufficient to constitute "prospective relief," however, the *Miller* exception would swallow the *Plaut* rule, because *any* relief granted by Congress that nullified the effects of a court order would qualify as "prospective." Under the correct

view of *Miller*, the relevant inquiry focuses on the nature of the underlying order. And because the underlying orders here were not even remotely comparable to the injunctions at issue in *Miller*, Congress acted unconstitutionally when it reopened them.

4. In one respect, Section 747 goes even further than the provision at issue in *Plaut* in breaching the separation of powers. Section 747 not only violates the principle that Congress may not require the reopening of final orders previously entered by the judiciary, but it further encroaches on the judicial power by enabling a private tribunal (here, an arbitrator) to reverse such orders. See, *e.g.*, *Plaut*, 514 U.S. at 218 (explaining that "Congress cannot vest the review of the decisions of Article III courts in * * * officials of other departments"); *Chicago & Southern Air Lines, Inc.* v. *Waterman S.S. Corp.*, 333 U.S. 103, 113 (1948) (noting that "[j]udgments, within the powers vested in courts by the Judiciary Article of the Constitution, may not lawfully be revised, overturned or refused faith and credit by another Department of Government"); *Hayburn's Case*, 2 U.S. (2 Dall.) 409, 413 (1792) (opinion of Iredell, J., and Sitgreaves, D.J.) (stating that "no decision of any court of the United States can, under any circumstances * * * agreeable to the Constitution, be liable to a revision, or even suspension, by the Legislature itself").

After effectively vacating the bankruptcy court's order, Section 747 forced Chrysler to undergo binding arbitration with the terminated dealers before arbitrators selected from a list maintained by the American Arbitration Association (AAA). See pp. 5-6, *supra*. Indeed, in a report to Congress, AAA characterized what it was doing as providing terminated dealers with "[an] avenue to * * * seek redress" and "appeal the manufacturers' decisions through * * * binding arbitration[] adminis-

tered by the Association," in light of the fact that the "bankruptcy process [had] provided" no such avenue. American Arbitration Association, *A Report to Congress on the Automobile Industry Special Binding Arbitration Program* 6 (Nov. 2010) <tinyurl.com/aaacongress-report>. But Congress can no more vest review of judicial orders in private arbitrators than it can compel the reopening of those orders in the first place. Because Section 747 cannot be reconciled with the constitutional separation of powers, the Sixth Circuit erred in upholding it. This Court should grant review and reverse the Sixth Circuit's judgment.

B. The Question Presented Is An Exceptionally Important One That Merits The Court's Review In This Case

If the Sixth Circuit's decision upholding Section 747 is left undisturbed, it will give Congress the green light to make similar incursions on the finality of bankruptcy-court judgments. Given the gravity of the separation-of-powers question presented in this case and the particular importance of finality and uniformity in the bankruptcy context, further review is warranted.

1. While there is no conflict in the courts of appeals concerning the constitutionality of Section 747, this Court has not hesitated to grant certiorari on separation-of-powers questions even where there was no conflict on the constitutional question (and even where the lower court upheld the constitutionality of the challenged practice). See, *e.g.*, *Stern*, 131 S. Ct. at 2603; *Free Enterprise Fund* v. *PCAOB*, 561 U.S. 477, 488 (2010); *Freytag* v. *Commissioner*, 501 U.S. 868, 873 (1991). In part, that practice reflects the reality that, for a conflict to exist on a separation-of-powers question involving a federal statute, at least one lower court would have to declare the statute unconstitutional—an act that, in and of itself,

would typically trigger this Court's review. See, *e.g.*, *United States* v. *Kebodeaux*, 133 S. Ct. 2496, 2501 (2013). But it also reflects this Court's role as the primary arbiter of separation-of-powers disputes—and its attendant vigilance in guarding against even seemingly "innocuous" encroachments by Congress on the coordinate branches of government. See *Metropolitan Washington Airport Authority* v. *Citizens for the Abatement of Aircraft Noise, Inc.*, 501 U.S. 252, 277 (1991). Indeed, in *Plaut*, the Court granted review even though the statute at issue affected only cases that were subject to reinstatement motions filed by a previous date, and thus would not affect future cases. See 514 U.S. at 215.

A conflict is particularly unlikely to arise in this context precisely because of the bespoke nature of Section 747—the very quality that makes the statute so egregiously unconstitutional. As discussed above, Section 747 is targeted at just two cases—the proceedings in the Chrysler and General Motors bankruptcies. See p. 6, *supra*. As a result, most of the litigation concerning the interpretation and application of Section 747 was concentrated *in this very case*—which was initially brought by Chrysler against various dealers nationwide that had prevailed in their respective arbitrations. See p. 8, *supra*.

2. Unless the Court grants certiorari in this case, the constitutionality of Section 747 will almost certainly evade the Court's review. And if the Sixth Circuit's decision is left undisturbed, it will provide a template for future Congresses that disagree with decisions by bankruptcy courts—with obvious implications for the finality and uniformity of those decisions. Finality is an especially important consideration in the context of bankruptcy proceedings, where parties structure their affairs in reliance on the bankruptcy court's decisions (as Fiat evi-

dently did here in deciding to invest in Chrysler and thereby save it from liquidation). See *In re Old Carco LLC*, 406 B.R. 180, 194 (Bankr. S.D.N.Y. 2009). Should a future Congress wish to override a bankruptcy court's decision, all it will need to do is to disguise the fact that its statute is targeted at that particular decision—and, indeed, it will not even need to do so all that artfully. As long as the statute can be said to provide "prospective relief," it will pass muster under the Sixth Circuit's reasoning. And as long as the statute is as narrowly targeted as Section 747, its constitutionality will likely also evade the Court's review.

* * * * *

In this case, a special-interest group used its considerable political power in an effort to obtain relief from an adverse judicial decision. In the face of that political pressure, Congress simply buckled: it not only effectively nullified the decision at issue, but proceeded to take the dispute out of the judicial system altogether. Leaving aside the doctrinal niceties, what Congress did in enacting Section 747 was not only undignified, but deeply offensive to core constitutional values. This is the paradigmatic case in which Congress succumbed to "majoritarian pressures" that are antithetical to sound judicial administration. See *CFTC* v. *Schor*, 478 U.S. 833, 860 (1986) (Brennan, J., dissenting). It is therefore also the paradigmatic case in which the Court should perform "one of [its] most vital functions": "to police with care the separation of the governing powers." *Public Citizen* v. *Department of Justice*, 491 U.S. 440, 468 (1989) (Kennedy, J., concurring in the judgment). The Court should grant the petition for certiorari in this case and reject the Sixth Circuit's deeply flawed reasoning.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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JUNE 2015

APPENDIX

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Nos. 13-2117, 13-2118 & 13-2119

Chrysler Group LLC, Plaintiff-Appellee,
United States of America, Intervenor-Appellee,

v.

Fox Hills Motor Sales, Inc.; Village Chrysler Jeep
Incorporated; Jim Marsh American Corporation,
Defendants-Appellants

Livonia Chrysler Jeep, Inc., Plaintiff-Appellant,

v.

Chrysler Group, LLC, et al., Defendants-Appellees,
United States of America, Intervenor-Appellee.
Chrysler Group LLC, Plaintiff-Appellee,
United States of America, Intervenor-Appellee,

v.

Sowell Automotive, Incorporated, et al., Defendants,

Argued: August 8, 2014
Decided and Filed: January 16, 2015

Before: ROGERS and GRIFFIN, Circuit Judges; VAN TATENHOVE, District Judge.*

OPINION

ROGERS, Circuit Judge.

Congress—in Section 747 of the Consolidated Appropriations Act of 2010—created an arbitration procedure for automobile dealerships to seek continuation or reinstatement of franchise agreements that had been terminated by Chrysler during its bankruptcy proceedings, with the approval of the bankruptcy court. This case involves what happens when the dealerships prevail, as some did, in their statutorily-provided arbitrations.

The lawsuit below involved numerous claims, counterclaims, and cross-claims by Chrysler and various dealers. Among other things, the parties dispute the scope of relief provided for successful dealers under § 747, and whether such dealers are subject to state dealer protest laws that permit existing dealerships to protest the addition of a new dealer. The district court correctly held that § 747 does not constitute an unconstitutional legislative reversal of a federal court judgment, and that the only relief provided to successful dealers under § 747 is the issuance of a "customary and usual" letter of intent. The district court also properly found that the letters of intent at issue in this case were "customary and usual," with the exception of one contractual provision that requires reversal. Contrary to the district court's conclusion, however, application of the state deal-

* The Honorable Gregory F. Van Tatenhove, United States District Judge for the Eastern District of Kentucky, sitting by designation.

er acts of the two states in question (Michigan and Nevada) is preempted by § 747, because the state acts provide for redetermination of factors directly addressed in federally-mandated arbitrations closely related to a major federal government bailout.

I.

This case involves the post-bankruptcy corporate identity of Chrysler, the American automobile manufacturer. The bankruptcy transferred almost all of the business from "Old Chrysler" to "New Chrysler," an entirely new corporate entity.[1] Facing declining sales and an overextended network of dealerships, Old Chrysler arrived at the brink of insolvency after the global financial crisis and filed for Chapter 11 bankruptcy in April 2009. *In re Chrysler LLC*, 405 B.R. 84, 87-88, 90 (Bankr. S.D.N.Y. 2009). Prior to the bankruptcy petition, Old Chrysler applied to and received from the federal government's Troubled Asset Relief Program ("TARP") a $4 billion loan, which was given in exchange for a security interest in all of Old Chrysler's assets, to be held by the U.S. Treasury. *Id.* at 89-90; *see also* Emergency Economic Stabilization Act of 2008, Pub. L. No. 110-343, 122 Stat. 3765 (codified at 12 U.S.C. § 5201 *et seq.*) (establishing TARP). After this loan, the federal government assumed a central role in Chrysler's restructuring. Beyond the Treasury's floating of considerable capital

[1] Previous courts have distinguished between an "Old Chrysler" (aka Chrysler LLC, the remains of which are now known as Old Carco LLC), which existed before its bankruptcy, and "New Chrysler" (aka Chrysler Group LLC), which was formed after Old Chrysler's insolvency and assumed nearly all of the prior company's ongoing business. We follow this convention when the distinction is important.

aid through TARP, the President of the United States instituted an Auto Task Force, whose goal was to negotiate a comprehensive restructuring among Chrysler and other affected parties. *In re Chrysler LLC*, 405 B.R. at 91. Eventually, the parties negotiated a plan with Fiat, the Italian automaker, which was willing and able to take up primary ownership of Chrysler's automobile empire. *See id.* at 91-92.

As part of the final sale order of the bankruptcy court, Old Chrysler sold, free and clear of all liens and encumbrances, nearly all of its assets to New Chrysler, which was owned predominantly by a voluntary employees' beneficiary association and partially by Fiat and various entities of the federal government, with Fiat maintaining the possibility of acquiring a majority ownership in the future. *Id.* at 92, 113. This asset transfer was conducted pursuant to 11 U.S.C. § 363(f), which creates a mechanism for a bankruptcy trustee to sell certain property of the debtor "free and clear of any interest in such property of an entity other than the estate."

In addition to transferring substantially all of Old Chrysler's assets to the new entity, the restructuring plan included some procedures designed to consolidate and streamline Old Chrysler's business operations. At the time of the bankruptcy petition, Old Chrysler had 32 manufacturing and assembly facilities and a network of 3,200 independent dealerships in the United States. *In re Chrysler LLC*, 405 B.R. at 88. Early in the bankruptcy proceedings, Old Chrysler filed a motion seeking to "reject executory contracts and unexpired leases affecting 789 domestic car dealerships," that is, requesting permission to terminate its sales and service agreements with 789 dealers. *See id.* That request represented the

elimination of nearly a quarter of Chrysler's dealerships in the United States.

In response to the upheaval in the American automobile industry—which was said to threaten almost 2,000 dealerships nationwide and put nearly 100,000 jobs at risk—the United States Senate held a special hearing on June 3, 2009, to address the issue of dealership closures. *GM and Chrysler Dealership Closures: Protecting Dealers and Consumers: Hearing Before the S. Comm. on Commerce, Sci. & Transp.*, 111th. Cong. (2009) ("Senate Hearing"). One senator at the hearing expressed concern that "[w]e committed an awful lot of taxpayer money to try to save all those jobs that are now being cut," while the cause of the problem was that the automobile manufacturers were stubbornly refusing to innovate in the marketplace. *See id.* at 85 (statement of Sen. Bill Nelson). One senator stated that "because of this financial investment, we have an obligation to ensure Federal resources are being used wisely and fairly and in the best interests of the taxpayers." *Id.* at 20 (statement of Sen. John Thune).[2]

During the hearing, James Press, the Vice Chairman and President of Old Chrysler, responded that the deal-

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[2] As of July 2010, the U.S. Treasury had committed $80.7 billion to GM and Chrysler under TARP's Automotive Industry Financing Program. Office of the Special Inspector General for TARP, *Factors Affecting the Decisions of General Motors and Chrysler to Reduce Their Dealership Networks*, SIGTARP-10-008, at 2 (July 19, 2010) ("SIGTARP Report"). This SIGTARP Report on the dealership closures was initiated after "Senator Jay Rockefeller sent a letter to SIGTARP noting that the hearing demonstrated substantial confusion, even amongst dealers, as to how GM and Chrysler selected dealerships for termination and what benefit, if any, the companies gained from terminating the dealerships." *Id.* at 1.

ership terminations were necessary for the survival of New Chrysler. He pointed out that the average Chrysler dealer lost over $3,000 annually and that the existence of "a legacy of dealers that sell only one or two of the company's three brands—Chrysler, Jeep and Dodge— . . . led to redundancies and inefficiencies in product development and marketing costs." *Id.* at 28-29. Press outlined Chrysler's plan to streamline their dealership network:

> Chrysler has consistently communicated the need for a consolidation of dealers to our network. Our most recent restructuring effort, Project Genesis, is aimed at bringing all three brands under one roof to go along with our plan to produce fewer products that overlap. Genesis was launched in 2008 with an extensive communication plan including a series of meetings across the United States with our dealers and presentations at the National Auto Dealers Association annual conference. In each market, we identified the optimal number of dealers and locations and we began working collaboratively to build a healthy and profitable network.

Id. at 30; *see also In re Old Carco LLC*, 406 B.R. 180, 193-95 (Bankr. S.D.N.Y. 2009) (describing Project Genesis). Chrysler determined which dealerships would be targeted for termination based on an analysis of certain factors, including: total sales potential for the market, each dealer's record of meeting sales and operational targets, the modernity of the dealer's physical facilities, the location of the dealership with respect to "optimum retail growth area," and "[e]xclusive representation within larger markets." Senate Hearing at 31. As part of Project Genesis, 84 percent of the remaining dealers

would carry all three of Chrysler's brands, compared to 62 percent prior to consolidation. *Id.* Congress did not take any action at that time.

The bankruptcy court overseeing the Chrysler restructuring eventually authorized the dealership rejections. *In re Old Carco LLC*, 406 B.R. at 186-87. The authorization of the rejections was made under the authority of § 365 of the Bankruptcy Code, which provides that, with limited exceptions, "the trustee, subject to the court's approval, may assume or reject any executory contract . . . of the debtor." 11 U.S.C. § 365(a). When authorizing the rejection of the rejected dealers' sales and service agreements, the bankruptcy court applied the business judgment standard, opting not to employ a higher standard despite the presence of state and federal statutes that protected auto dealerships from being terminated without good cause. *See In re Old Carco LLC*, 406 B.R. at 187-93; *see also In re Penn Traffic Co.*, 524 F.3d 373, 382-83 (2d Cir. 2008) (discussing § 365's business judgment standard). Applying the business judgment standard, the bankruptcy court ratified Chrysler's decision to reject its executory contracts with the dealers it desired to eliminate, reasoning that "rejection . . . was necessary and appropriate" for the new company's business plans to the extent that it "enable[d] the Debtors to consummate the Fiat Transaction and transfer to New Chrysler a smaller, more effective, and more profitable dealer network without disruption." *In re Old Carco LLC*, 406 B.R. at 195. The bankruptcy court also held that § 365 of the Bankruptcy Code, as applied in this instance, preempted state laws that provided rights and remedies related to the termination of dealership agreements. *Id.* at 199-201.

Although earlier legislative attempts to protect the interests of the rejected auto dealers did not go anywhere,[3] § 747, out of which this entire dispute arises, was inserted at the eleventh hour into an omnibus appropriations bill. Consolidated Appropriations Act of 2010, § 747, Pub. L. No. 111-117, 123 Stat. 3034, 3219-21. Section 747 was intended to "establish[] a disclosure and arbitration process to determine whether dealers that had their franchise agreements terminated or not assumed by a successor company should be added to dealer networks of automobile manufacturers partially owned by the Federal Government." H.R. Rep. No. 111-366, at 942 (2009) (Conf. Rep.). This provision defines a "covered manufacturer" in two separate ways, one of which was

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[3] Some members of Congress acted in response to the dealership terminations. In early June 2009, two bills were proposed, in the Senate and the House separately, that were intended to protect the dealerships targeted for termination, and provide them with a right of restoration. In particular, the Senate version of the bill would have provided:

> [A]t the request of an automobile dealer, an automobile manufacturer covered under this section shall restore the franchise agreement between that automobile dealer and Chrysler LLC . . . that was in effect prior to the commencement of [its] . . . bankruptcy case[] and take assignment of such agreements.

S. 1304, 111th Cong. § 2(b)(2) (2009). The House bill was substantively identical. *See* H.R. 2743, 111th Cong. § 3(b) (2009).

These bills did not pass either chamber. In July, another measure, which would have allowed dealerships terminated during the bankruptcy "to enter into a new dealer agreement . . . on the same terms as existed immediately before" the termination, passed in the House of Representatives, attached to an appropriations act. H.R. 3170, 111th Cong. § 745(b) (2009). The Senate never passed that version of the bill.

intended to cover New Chrysler: "an automobile manufacturer which acquired more than half of the assets of an automobile manufacturer in which the United States Government has an ownership interest, or to which the Government has provided financial assistance under title I of the Emergency Economic Stabilization Act of 2008." § 747(a)(1)(B), 123 Stat. at 3220. Subsection (b) of the provision creates an arbitration right for dealerships terminated during the bankruptcy:

> A covered dealership that was not lawfully terminated under applicable State law on or before April 29, 2009, shall have the right to seek, through binding arbitration, continuation, or reinstatement of a franchise agreement, or to be added as a franchisee to the dealer network of the covered manufacturer in the geographical area where the covered dealership was located when its franchise agreement was terminated, not assigned, not renewed, or not continued. Such continuation, reinstatement, or addition shall be limited to each brand owned and manufactured by the covered manufacturer at the time the arbitration commences, to the extent that the covered dealership had been a dealer for such brand at the time such dealer's franchise agreement was terminated, not assigned, not renewed, or not continued.

§ 747(b), 123 Stat. at 3220. Subsection (d) establishes the procedure to be followed during the arbitration. In particular, it commands the arbitrator to

> balance the economic interest of the covered dealership, the economic interest of the covered manufacturer, and the economic interest of the public at large and . . . decide, based on that bal-

> ancing, whether or not the covered dealership should be added to the dealer network of the covered manufacturer.

§ 747(d), 123 Stat. at 3220.[4] The arbitrator must then submit a written determination that includes an "explanation of how the balance of economic interests supports the arbitrator's determination" and "a clear statement indicating whether the franchise agreement at issue is to be renewed, continued, assigned or assumed by the covered manufacturer." *Id.*, 123 Stat. at 3221. Subsection (e) lays out a method for the selection of the arbitrator, establishes discovery techniques, and provides for other administrative details. Most importantly for this case, subsection (e) provides for the following relief when the arbitrator finds in favor of one of the rejected dealerships:

> [T]he covered manufacturer shall as soon as practicable, but not later than 7 business days

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[4] Section 747(d) also provides that:

> The factors considered by the arbitrator shall include (1) the covered dealership's profitability in 2006, 2007, 2008, and 2009, (2) the covered manufacturer's overall business plan, (3) the covered dealership's current economic viability, (4) the covered dealership's satisfaction of the performance objectives established pursuant to the applicable franchise agreement, (5) the demographic and geographic characteristics of the covered dealership's market territory, (6) the covered dealership's performance in relation to the criteria used by the covered manufacturer to terminate, not renew, not assume or not assign the covered dealership's franchise agreement, and (7) the length of experience of the covered dealership.

§ 747(d), 123 Stat. at 3220-21.

> after receipt of the arbitrator's determination, provide the dealer a customary and usual letter of intent to enter into a sales and service agreement. After executing the sales and service agreement and successfully completing the operational prerequisites set forth therein, a covered dealership shall return to the covered manufacturer any financial compensation provided by the covered manufacturer in consideration of the covered manufacturer's initial determination to terminate, not renew, not assign or not assume the covered dealership's applicable franchise agreement.

§ 747(e), 123 Stat. at 3221. A letter of intent is a contract that precedes a full sales and service agreement, the final contractual arrangement between a manufacturer and a dealer that provides the dealership with the right to sell certain makes of automobiles produced by the manufacturer.

A number of the terminated dealers sought arbitration against New Chrysler under § 747. Out of over 400 former dealers who elected to arbitrate, Chrysler prevailed in 76 arbitrations, the dealer prevailed in 32 arbitrations, and the remaining disputes were settled through other means. *Chrysler Grp. LLC v. S. Holland Dodge, Inc.*, 862 F. Supp. 2d 661, 670 n.3 (E.D. Mich. 2012). Of the hundreds of dealerships that were rejected pursuant to the bankruptcy court's order, five are currently parties to this appeal: Fox Hills Motor Sales, Inc., d/b/a Fox Hills Chrysler Jeep, which had been authorized to sell Chrysler and Jeep vehicles in Plymouth, Michigan; Village Chrysler Jeep, Inc., d/b/a Village Automotive Center, which had been authorized to sell Chrysler and Jeep vehicles in Royal Oak, Michigan; Jim

Marsh American Corporation, d/b/a Jim Marsh Chrysler-Jeep, which had been authorized to sell Chrysler and Jeep vehicles in Las Vegas, Nevada; Livonia Chrysler Jeep, Inc., which had been authorized to sell Chryslers and Jeeps in Livonia, Michigan; and Spitzer Autoworld Akron, LLC, which had been authorized to sell Chrysler, Jeep, and Dodge vehicles in Akron, Ohio. Fox Hills, Village, Jim Marsh, Livonia, and Spitzer were among those dealers that prevailed, and each of the written arbitration determinations ordered Chrysler to offer a letter of intent or to renew and assume the dealership "in the manner provided for by the Act and in accordance with the terms and conditions of the Act." *Id.* at 670-71 (quoting the determinations). Chrysler issued letters of intent to the prevailing dealers. Many of the dealers who received these letters feared that they would be unable to meet the conditions imposed by Chrysler or that their reentry would be prevented by existing dealers' protests brought under state dealer laws. *See id.*

During the pendency of the arbitration, New Chrysler allegedly installed "like-line" dealers in the same vicinities as some of the rejected dealers that were pursuing reinstatement through § 747 arbitration. For example, the arbitrator in the Village arbitration noted: "Since terminating Village in June 2009, Chrysler has extended its Genesis plan to a dealer ("Suburban") at the Troy Motor Mall within a very close sales radius of Village. Suburban now sells all three brands . . . ." Chrysler similarly issued to an existing dealer near Fox Hills a letter of intent to become a "3 in 1" dealer.

Disagreement about what the § 747 arbitration orders entailed led almost immediately to the present litigation. This appeal arises out of three separate actions that were consolidated in the district court. In two sepa-

rate complaints against various prevailing dealers, Chrysler sought declaratory relief, requesting that the court declare that "1) Section 747 does not preempt state dealer acts; 2) the [letters of intent] provided by New Chrysler are customary and usual within the meaning of Section 747; and 3) a [letter of intent] is the sole and exclusive remedy under Section 747." *Id.* at 672. An independent complaint filed by Livonia and counter-complaints filed by other prevailing dealers named in Chrysler's complaint all asserted various claims for declaratory, injunctive, and monetary relief. *Id.* at 672-73. Essentially, the rejected dealers that prevailed at arbitration claimed, with some variation, that § 747 preempted state dealer laws to the extent that existing dealers could prevent their reintroduction to the dealership networks, that Chrysler's letters of intent were not customary and usual, and that Chrysler owed the dealers monetary compensation for violating § 747. Some existing like-line dealerships, those who could potentially compete with the rejected dealerships were they to be reinstated, were named in Chrysler's original complaints. Some of them, including Fred Martin, filed cross-claims seeking a declaration that § 747 is invalid and unconstitutional, or in the alternative, that § 747 does not preempt the state dealer protest laws that grant such existing dealerships certain rights to protest the installation of competing dealerships in the same vicinity. *Id.* at 672.

A flurry of dispositive motions ensued, requesting declaratory relief along the lines of the claims outlined above. *Id.* at 673-75 (listing fifteen). When two of the parties raised constitutional challenges—Chrysler argued that the constitutional avoidance doctrine warranted a narrow construction, and Fred Martin argued that the act was unconstitutional under any construction—the

United States Government intervened to defend the constitutionality of § 747.

In a lengthy opinion, the district court construed § 747 and addressed the constitutional issues raised by the parties. First, the court rejected the claims for any monetary damages by holding that "under the plain language of the Act, the sole and exclusive remedy for a dealer rejected by Old Chrysler who prevails in a Section 747 arbitration with New Chrysler is a customary and usual letter of intent to enter into a sales and service agreement with New Chrysler." *Id.* at 676, 678. Next, the court construed the remedy provided under § 747, holding that § 747 does not provide for unconditional "reinstatement," as argued by some of the prevailing dealers. *Id.* at 678. The court reasoned that subsection (e) explicitly required only that Chrysler issue a "customary and usual letter of intent"; and that subsection (b)'s reference to "reinstatement" and "continuation" applied only to General Motors, which terminated dealers not through rejection of the contracts during the asset sale, as had New Chrysler, but rather through deferred termination agreements that were assumed by the new post-bankruptcy entity. *Id.* at 676-77. The court also declined to "confirm and/or enforce the[] arbitration awards," reasoning that § 747 did not authorize such a remedy and that the Federal Arbitration Act, which permits judicial confirmation, does not apply to a statutorily mandated, as opposed to voluntary, arbitration. *Id.* at 678-80. Considering the more explicit reinstatement remedies in the proposed bills that were rejected in the House and Senate and emphasizing the sparseness of the remedy that was actually passed by Congress, the district court also concluded that § 747 does not preempt state dealer laws. *Id.* at 682. Finally, the court noted that its rulings did not entirely dispose of all of the ac-

tions and that the next appropriate step would be to hold a status conference in order to determine the most efficient method of adjudicating the remaining claims, including the issue of whether Chrysler provided the prevailing dealers with "the statutory customary and usual letter of intent to enter into franchise agreements." *Id.* at 683 (citing *Eagle Auto Mall Corp. v. Chrysler Grp., LLC*, No. CV 10-3876, 2011 WL 6754087 (E.D.N.Y. Dec. 23, 2011) (proceeding to trial on same issue)).

Some of the parties appealed, but we remanded because the district court's preliminary rulings did not amount to a final judgment, and the appeal was therefore premature. *See* Order, *Chrysler Grp., LLC v. Jim Marsh Am. Corp.*, No. 12-1468 (6th Cir. June 27, 2012); Order, *Chrysler Grp., LLC v. Fred Martin Motor Co.*, No. 12-1507 (6th Cir. June 27, 2012).

At the bench trial, the district court denied Fred Martin's motion for a separate trial, which Fred Martin argued was justified because it was seeking a declaratory judgment that § 747 is unconstitutional regardless of the court's earlier narrow construction of the remedy. *Chrysler Grp. LLC v. S. Holland Dodge, Inc.*, Nos. 10-12984, 10-13290, 10-13908, 2013 WL 1499138, at *3 (E.D. Mich. Apr. 11, 2013). The court adopted the Government's reasoning that any constitutional issue had already been resolved by the court's interpretation of § 747 and that Fred Martin lacked standing to bring the claim. *Id.* at *2. On the same day, the district court issued a pre-trial order clarifying that the "customary and usual" standard would be determined by comparing the prevailing dealers' letters of intent to a "relevant universe" of letters of intent. The court adopted the reasoning of the *Eastern District of New York in Eagle Auto Mall Corp.*, 2011 WL 6754087, and the *Central District*

of California in Los Feliz Ford, Inc. v. Chrysler Group, LLC, No. 10-6077 (C.D. Cal. Apr. 9, 2012), and defined the "relevant universe" as the letters of intent issued by New Chrysler (not Old Chrysler) to new dealer candidates through July 2010, when the last of the disputed letters of intent was issued.

The district court held a bench trial on July 9, 2013, to determine whether Chrysler supplied each dealer that had prevailed at arbitration with a "customary and usual letter of intent," as required by the statute. *Chrysler Grp. LLC v. S. Holland Dodge, Inc.*, Nos. 10-12984, 10-13290, 10-13908, 2013 WL 3817408 (E.D. Mich. July 23, 2013). By this time, most of the rejected dealers involved in the case had reached settlements with New Chrysler, and the only rejected dealers whose letters of intent were in dispute were Fox Hill, Village, Jim Marsh, and Livonia. *Id.* at *5 & n.1. The evidence at the bench trial consisted of: 122 letters of intent that New Chrysler had issued to new dealer candidates between June 9, 2009 (the effective date of New Chrysler assuming Old Chrysler's business) and July 31, 2010; a joint exhibit spreadsheet tracking various provisions in each of the 122 letters of intent; and the testimony of one witness, Chrysler's National Dealer Placement Manager from before the bankruptcy through the relevant periods after the § 747 arbitrations. *Id.* at *5-6.

The district court determined that all of the remaining rejected dealers had received "customary and usual" letters of intent. *Id.* at *8. First, the court used English language dictionaries, *Black's Law Dictionary*, and the federal Medicare regulations to define "customary" and "usual" in this context as "substantially the same [as] found in a majority" of the relevant universe of comparison letters of intent. *Id.* at *7. Applying this definition,

the court found that "[t]he Rejected Dealers have failed to present evidence that any of the terms in their [letters of intent] were not included in at least the majority" of the relevant universe of issued letters of intent, and the court accordingly entered judgment in Chrysler's favor. *Id.* at *8.

This appeal followed. Three separate appeals were consolidated.

Four of the terminated dealers appeal in two separate appeals. In appeal number 13-2117, three of them—Fox Hills, Village, and Jim Marsh—filed a consolidated appellants' brief arguing that § 747 preempts state dealer laws and that, in any event, the district court erred in defining the "relevant universe" of letters of intent when determining whether their letters of intent were "customary and usual." In appeal number 13-2118, another terminated dealer, Livonia, appealed, arguing that § 747's remedy is unconditional reinstatement, that state dealer protest laws are preempted, and that, in any event, Chrysler's letter of intent to Livonia was not "customary and usual."

In appeal number 13-2119, one of the existing like-line dealers, Fred Martin, argues that the district court erred by not considering its constitutional challenge. Fred Martin contends that (1) it has standing to raise the issue, and (2) § 747 runs afoul of separation-of-powers principles by reopening the bankruptcy court's final judgment. In response, Spitzer Autoworld, a prevailing dealer in Fred Martin's relevant market area, defended § 747's constitutionality and claimed that Fred Martin lacked standing to raise a constitutional challenge to the act. Unlike the other prevailing dealers, Spitzer does not challenge the state dealer protest laws.

The Government intervened to defend the constitutionality of § 747.

II.

The district court properly concluded that § 747 does not entitle prevailing dealers to unconditional "reinstatement,"[5] but requires only that Chrysler issue the typical letter of intent, legally enforceable as a contract entered into in good faith. The plain language of the act compels this conclusion. Such a remedy is, moreover, far from illusory. In accordance with Congress's aim to reintroduce prevailing dealers back into the manufacturers' dealership networks, prevailing dealers obtain something substantial that they otherwise would lack—contractual entitlement—to the extent that they meet the operational prerequisites of a customary and usual letter of intent.

A customary and usual letter of intent is the sole remedy provided for a prevailing dealer under § 747. A close examination of the statutory language of § 747 shows that the statute contemplates that Chrysler's only immediate obligation after a positive arbitration is to issue a letter of intent. Subsection (e) provides that within seven days of an arbitration decision in favor of the rejected dealer, Chrysler "shall . . . provide the dealer a *customary and usual letter of intent* to enter into a sales and service agreement." § 747(e) (emphasis added). In

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[5] Only Livonia contends that prevailing dealerships are entitled to unconditional "reinstatement." The other prevailing dealerships appear to concede that a "customary and usual letter of intent" is the only available remedy, although they argue that state dealer protest laws are preempted insofar as they may prevent a letter of intent from ripening into a full sales and service agreement.

matters of statutory interpretation, where this court must discern Congress's intended meaning, we must start with the language itself. *E.g.*, *Brilliance Audio, Inc. v. Haights Cross Commc'ns, Inc.*, 474 F.3d 365, 371 (6th Cir. 2007). Our interpretation of § 747 accords with those of other circuits, as no circuit has held that § 747 requires unconditional reinstatement. *See Eagle Auto Mall Corp. v. Chrysler Grp., LLC*, 550 F. App'x 69, 69-70 (2d Cir. 2014); *Los Feliz Ford, Inc. v. Chrysler Grp., LLC*, 571 F. App'x 546, 547 (9th Cir. 2014).

Livonia points to two phrases from § 747 that could be read to suggest that prevailing dealers are entitled to unconditional, no-strings-attached "reinstatement": subsection (b)'s statement that the rejected dealers "have the right to seek, through binding arbitration, *continuation, or reinstatement of a franchise agreement, or to be added as a franchisee*," and subsection (d)'s statement that the arbitrator "shall decide . . . whether or not the covered dealership *should be added to the dealer network* of the covered manufacturer." § 747(b), (d) (emphases added). Far from mandating unconditional reinstatement, however, these provisions simply imply that the remedy should meaningfully facilitate incorporation of prevailing dealerships back into the network. Congress's chosen remedy—the letter of intent—does just that. A letter of intent is a binding contract to enter into a sales and service agreement, that is, a contract to be added to the dealer network, or "reinstated." As New Chrysler's National Dealer Placement Manager testified at the bench trial, after receiving a letter of intent, "the dealer candidate ha[s] contractual certainty that if they

meet the requirements they will, in fact, get a sales and service agreement . . . [a]bsolutely."[6]

III.

Section 747 also preempts the state dealer protest laws in Nevada and Michigan. Although Congress stopped short of mandating unconditional reinstatement, Congress did intend to provide a substantial and meaningful remedy, one that would grant prevailing dealers "contractual certainty" that a sales and service agreement would be forthcoming, so long as customary and usual operational requirements were met. To that end, Congress intended for the arbitrator's decision to be the final and preclusive determination of whether there exists good cause for the terminated dealers to resume dealing in Chrysler vehicles. State dealer protest laws—like those in Nevada and Michigan[7]—that would permit state officials to enjoin the reintroduction of a prevailing dealership based on a second, parallel determination regarding good cause are thus preempted by § 747.

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[6] We do not rely on Chrysler's argument, accepted by the district court, that reinstatement is not required because the use of the specific term "reinstatement" in § 747(b) was intended to cover only GM dealerships that had been a part of deferred termination agreements. *See Chrysler Grp.*, 862 F. Supp. 2d at 677.

[7] Fox Hills, Village, Jim Marsh and Livonia all argue in favor of preemption. Because these dealerships are located in Nevada and Michigan, we consider their preemption arguments under the laws of those states. Spitzer, on the other hand, does not challenge the state dealer protest laws in its home state of Ohio, a point conceded by its attorney at oral argument. Accordingly, we do not consider the preemption argument with respect to Ohio state dealer protest laws.

Section 747 preempts such state dealer protest laws because they stand as an obstacle to Congress's aim to provide a substantial and meaningful remedy to prevailing dealers. Conflict preemption occurs when a state law "'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 373 (2000) (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)); *see also Fulgenzi v. PLIVA, Inc.*, 711 F.3d 578, 583-84 (6th Cir. 2013). In other words, "[i]f the purpose of the act cannot otherwise be accomplished—if its operation within its chosen field . . . must be frustrated and its provisions be refused their natural effect—the state law must yield to the regulation of Congress." *Savage v. Jones*, 225 U.S. 501, 533 (1912).

Michigan's and Nevada's state dealer protest laws, in particular, frustrate Congress's purpose in enacting § 747 because they permit state officials to delay and possibly nullify the effect of federal arbitration. Congress intended the federal arbitration to determine whether there is good cause for a terminated dealer to be added to New Chrysler's dealer networks. To that end, Congress placed within the discretion of the arbitrator the decision of "whether the franchise agreement at issue is to be renewed, continued, assigned or assumed by the covered manufacturer." § 747(d). State dealer protest laws create a process by which a state official subsequently and independently determines whether there is good cause for the new dealerships to have a sales and service agreement. This second, parallel determination of good cause impermissibly grants state officials the power to review the federal arbitral decisions. In an analogous case, involving whether a nonlawyer could practice before the United States Patent Office, the Supreme Court reasoned that

> [a] State may not enforce licensing requirements which, though valid in the absence of federal regulation, give "the State's licensing board a virtual power of review over the federal determination" that a person or agency is qualified and entitled to perform certain functions, or which impose upon the performance of activity sanctioned by federal license additional conditions not contemplated by Congress. "No State law can hinder or obstruct the free use of a license granted under an act of Congress."

Sperry v. Florida, 373 U.S. 379, 385 (1963) (relying in part on *Leslie Miller, Inc. v. Arkansas*, 352 U.S. 187 (1956) (internal citations omitted)).

Regardless of the intent of an auto manufacturer in tendering a letter of intent to a prospective dealer, state dealer protest laws give existing auto dealerships certain rights to prevent the entry of dealerships that could compete with them. The Michigan and Nevada dealer protest laws[8] protect existing dealers from competition by providing a process by which the auto manufacturers must demonstrate "good cause" in order to create a new dealership within a certain proximity of an existing dealership. Under both systems, whenever a proposed new

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[8] These are only one aspect of a whole range of regulations designed to protect the interests of auto dealerships and regulate the relationship between dealerships and manufacturers, as well as the sale of motor vehicles generally. *See* Mich. Comp. Laws § 445.1561 *et seq.*; Nev. Rev. Stat. § 482.318 *et seq.*; *see generally New Motor Vehicle Bd. of Cal. v. Orrin W. Fox Co.*, 439 U.S. 96, 100-03 (describing state dealer laws generally and California's in particular). The prevailing dealerships do not challenge any other part of these comprehensive state regulatory schemes.

likeline dealership[9] enters into the "relevant market area" of an existing dealership,[10] the existing dealership may lodge a protest with the relevant state official.[11] The state official—a court in Michigan, an administrative official in Nevada—determines whether "good cause" exists for establishing the new dealership. Mich. Comp. Laws § 445.1576(5); Nev. Rev. Stat. § 482.36357(1)(b)(2). The Michigan statute instructs the court, in its determination of "good cause," to consider a non-exclusive list of seven factors, including "[w]hether it is injurious or beneficial to the public welfare" and the "[e]ffect on the retail new motor vehicle business and the consuming public in the relevant market area." Mich. Comp. Laws § 445.1576(5), (5)(b), (c). The Nevada statute does not provide much guidance on what constitutes "good cause," but it includes "the economic effect of the pro-

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[9] Both statutes only give protest rights to those existing dealerships that sell vehicles of the same "line make" (the "brand") as the proposed dealership. Mich. Comp. Laws § 445.1576(2); Nev. Rev. Stat. § 482.36357(1). They also apply equally to new dealerships and dealerships that are relocating to a new location. Mich. Comp. Laws § 445.1576(2); Nev. Rev. Stat. § 482.36357(1).

[10] In Michigan, this is the area within a 9-mile or 15-mile radius of the existing dealership, depending on the population of the county in which the new dealership will be located. Mich. Comp. Laws § 445.1566(1). In Nevada, it is an area within a 10-mile radius of an existing dealer that sells vehicles of the same line and make. Nev. Rev. Stat. § 482.3634.

[11] In Michigan, the existing dealership must bring an action for a declaratory judgment in circuit court within 30 days of receiving written notice of the manufacturer's intention to establish the new dealership. Mich. Comp. Laws § 445.1576(3). In Nevada, an existing dealer has 15 days after notice to file a protest with the Director of the Department of Motor Vehicles. Nev. Rev. Stat. § 482 36357(1)(b).

posed action upon the protesting dealer." Nev. Rev. Stat. § 482.36363(2). Upon a finding of no good cause, the new dealership is prohibited from operating.

A side-by-side comparison of the Michigan statute's "good cause" factors and § 747(d)'s factors demonstrates that the determinations are substantially similar. The similarity starts with the characterization of the determination: "whether or not the covered dealership *should be added* to the dealer network," § 747(d) (emphasis added), is not meaningfully different from "whether *good cause exists for establishing* . . . an additional new motor vehicle dealer," Mich. Comp. Laws § 445.1576(5). On the most general level, both analyses weigh the effect of the new dealership on "the public welfare," Mich. Comp. Laws § 445.1576(5)(c), or "the public at large," § 747(d). Similarly, they both consider the effect of the decision on the dealer, although Michigan does this only for relocating dealers—which face a situation more akin to the terminated dealers in this case that are attempting to reopen operations. *See* Mich. Comp. Laws § 445.1576(5)(g). Next, both inquiries consider how longstanding is the proposed franchisee's commitment: Michigan law has the decisionmaker look at the "[p]ermanency of the investment," *id.* § 445.1576(5)(a),[12]

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[12] Chrysler suggests that this factor considers "the *existing dealership's* investments." However, this interpretation of the permanency-of-investment factor is neither required by the statutory language—which does not specify whose investment is considered—nor supported by Michigan case law. A search of the case law revealed only one published Michigan case that discussed the factor. In that case, the appellate court held that the trial court's finding that a relocation represented a permanent investment was clearly supported by the evidence, where the relocating dealer was relocating to a modern facility, was transferring equity to the new facility, and was

while the federal arbitrator must similarly consider "the length of experience of the covered dealership," § 747(d). Both inquiries analyze the competitive qualifications of the petitioning dealership in relation to the existing consumer market. The Michigan court does this by weighing the "[e]ffect on the retail new motor vehicle business and the consuming public in the relevant market area," "[w]hether the [existing dealers] are providing adequate competition and convenient consumer care," and "[w]hether the establishment or relocation of the new motor vehicle dealer would promote competition," Mich. Comp. Laws § 445.1576(5)(b), (d), (e). The federal arbitrator does it by weighing such factors as the covered dealership's historic profitability, its overall business plan, and its current economic viability, as well as its satisfaction of the prior franchise agreement's performance objectives. § 747(d). Finally, both analyses consider relevant demographic and geographic characteristics of the relevant market area. *Compare* Mich. Comp. Laws § 445.1576(5)(f) ("Growth or decline of the population and the number of new motor vehicle registrations in the relevant market area.") *with* § 747(d) ("[T]he demographic and geographic characteristics of the covered dealership's market territory.").

That leaves only a few factors that are unique to § 747, and each of those factors is easily explained by the different contexts of a run-of-the-mill franchise encroachment and the unprecedented and unique circumstances of a § 747 proceeding. First, § 747 explicitly considers the economic interest of the covered manufactur-

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obtaining more capital from the manufacturer to refinance the relocation. *See McDonald Ford Sales, Inc. v. Ford Motor Co.*, 418 N.W.2d 716, 718 (Mich. Ct. App. 1987).

er, a consideration that would be unnecessary in the normal state protest proceeding, during which the court may presume that the manufacturer is acting in its best economic interest. Second, § 747 considers "the covered dealership's performance in relation to the criteria used . . . to terminate, not renew, not assume or not assign" the prior dealership agreement. § 747(d). This factor is unique to the terminated dealers covered under § 747 and totally irrelevant to any other prospective dealer. These slight differences do not make the inquiries so substantially different that the Michigan "good cause" determination is not effectively the same determination as a § 747 determination that a terminated dealer "should be added to the dealer network."

The analysis for the Nevada "good cause" inquiry is similar. Even though the Nevada statute is much sparser than Michigan's or the federal statute, it still covers many of the same general categories of factors and is on the whole similar in scope. That is, the statute requires the state official to consider the effect on "the business of selling new vehicles at retail in the relevant market area," the effect on the "welfare of the public," the present adequacy of services from other dealers, and whether the new franchise would "increase constructive competition and therefore be in the public interest." Nev. Rev. Stat. § 482.36358. The nature of the inquiry is essentially the same as the inquiry under § 747, arriving at the same normative judgment by analyzing various demographic, geographic, and economic factors related to the relevant market area, the petitioning dealer, and the existing dealers. The only meaningful difference is that the Nevada statutes explicitly require the state official to "consider the economic effect of the proposed action upon the protesting dealer." *Id.* § 482.36363(2). However, this represents only one additional factor that slightly shifts

the emphasis of the inquiry; it does not change the essence of the inquiry, which is whether there is good cause to allow a substantial investment into the regional retail vehicle market.

The analyses are thus largely the same. The subtle differences, in both substance and phrasing, are explained predominantly by differences in emphasis and framing: (1) whereas the state dealer protest laws look at the future effect of the new (or relocating) dealer, the federal law looks at the historic characteristics of the old dealer; (2) the state statutes encompass two slightly different types of cases—the establishment of entirely new dealerships and the relocation of existing dealerships; and (3) the state statutes contemplate that the manufacturer will be making the case in favor of the new dealer location, while the federal statute presupposes (as it must) that the dealer and manufacturer are adversaries. Especially considering these contextual differences, the determination is at heart the same: whether the new dealership should be allowed to operate, or good cause exists for allowing it to do so.

One of Chrysler's primary arguments is that the state dealer protest laws and § 747 "serve entirely different purposes." But the underlying inquiry is the same. Even if the state dealer protest laws are designed to protect the interests of existing dealers, while § 747 is meant to remedy the negative effects of unwarranted dealership terminations, the general concerns are the same: should this new dealer be allowed to enter the market? Congress, consistent with the retrospective intent of the act, deliberately chose not to weigh very heavily the interests of existing dealers, who would have had no state-created rights at the time of termination anyway. Given the context, namely the petitioning of a new

dealership for entry into a specified geographic region to sell certain specified line-makes, and the similarity of factors, as discussed above, the state and federal determinations are of the same kind. Accordingly, the differences that Chrysler points out are not so great that the state laws are not an obstacle to the federal arbitration's effect.

This conclusion is compelled by the Supreme Court's decision in *Leslie Miller, Inc. v. Arkansas*, in which the Supreme Court held that an Arkansas regulation that operated in parallel to a federal regulation was preempted as it applied to contractors working for the United States Armed Forces. 352 U.S. 187 (1956). Both the state and federal regulations required contractors to be "responsible" as defined by statute, and the regulatory factors were substantially similar, albeit not identical, in their details. *See id.* at 188-89. The Court held that the Arkansas regulation was preempted as applied, because "[s]ubjecting a federal contractor to the Arkansas contractor license requirements would give the State's licensing board a virtual power of review over the federal determination of 'responsibility' and would thus frustrate the expressed federal policy of selecting the lowest responsible bidder." *Id.* at 190. The Court has reaffirmed the general holding that "[a] State may not enforce licensing requirements which . . . give the State's licensing board a virtual power of review over the federal determination." *Sperry*, 373 U.S. at 385 (internal quotation marks omitted). *Accord North Dakota v. United States*, 495 U.S. 423, 435-36 n.7 (1990) (plurality opinion) (Stevens, J.); *United States v. Virginia*, 139 F.3d 984, 988 (4th Cir. 1998).

It could be argued that the Court's decision in *Leslie Miller* relied on the rationale of "immunity of the in-

struments of the United States from state control." *See Leslie Miller*, 352 U.S. at 190 (quoting *Johnson v. Maryland*, 254 U.S. 51, 57 (1920)). In *North Dakota v. United States*, Justice Brennan criticized the majority's exclusive reliance on preclusionary principles: "The plurality's assertion that *Leslie Miller, Inc.*, was not decided on immunity grounds is inconsistent with that opinion's own analysis." 495 U.S. at 453 (Brennan, J., dissenting) (citation omitted).

In any event, the instant case, like intergovernmental immunity cases, involves how the federal government spends its funds. Indeed, our conclusion that the state protest law provisions are preempted is bolstered because Chrysler was categorized as a § 747 "covered manufacturer" due to the fact that "the United States Government ha[d] an ownership interest in it" and "the Government ha[d] provided financial assistance" to it under TARP. § 747(a)(1)(B). We need not address today what our holding would be if this were not the case.

Our holding above that § 747 provides only the limited relief of a "customary and usual letter of intent" is fully consistent with congressional intent to preempt state law in this respect.[13] Preemption is not an addi-

[13] Indeed, Chrysler's own actions imply that the protest laws, or at least the interests of existing dealers in monopolizing their area, were not consistent with Congress's intent in passing § 747. The original letters of intent that Chrysler provided following the arbitration provided Chrysler with the right to terminate the letter of intent whenever a protest was filed in response to the letter of intent. However, after further consideration, Chrysler stated that "the spirit of the statute was if they prevailed in arbitration they had the opportunity of coming back into the network," and Chrysler eliminated this protest-triggered unilateral right of termination.

tional remedy; rather, it ensures that the remedy is meaningful. Thus, the idea that the letter of intent is a "limited remedy . . . carefully crafted . . . not [to] conflict with the State Dealer Acts," 862 F. Supp. 2d at 682, misconstrues how the remedy and preemption issues are related. Even if the letter-of-intent remedy does not explicitly conflict with state law, the state laws stand as an obstacle to the intended end goal of the remedy and thereby make the remedy less effective at providing meaningful relief to the dealers. Chrysler's argument that "Section 747 and state establishment laws speak to wholly distinct phases of the establishment process," similarly misses the mark. The end goal is establishment, and letters of intent may not, therefore, amount to an effective nullity. To the extent the whole purpose of a letter of intent is to initiate and eventually arrive at establishment, state dealer laws diminish the effectiveness of letters of intent.

The preemption in this case moreover does not substantially interfere with state policies, since § 747 is generally consistent in purpose with the whole scheme of state dealer laws. For instance, another aspect of the dealer laws, intended to supplement and reinforce the protest laws' protections for existing dealers, is that manufacturers cannot terminate existing dealers without "good cause." *See* Mich. Comp. Laws § 445.1567 (requiring "good cause"); Nev. Rev. Stat. §§ 482.36352, .36355. Section 747 was intended to ensure that these protections from no-good-cause termination had not been unduly circumvented by the bankruptcy court's rejection authorization. For example, the § 747 arbitration can only be sought by "[a] covered dealership that was not lawfully terminated under applicable State law." § 747(b). The factors that the arbitrator must take into consideration parallel the factors relevant for the state-

law determination of whether good cause exists to terminate a dealership, especially those related to the performance of the dealership prior to termination. *Compare* § 747(d), *with* Mich. Comp. Laws § 445.1567(2)-(3) *and* Nev. Rev. Stat. § 482.36355.

Not only can the purpose of § 747 be reconciled with the overall scheme of state dealer laws, but preemption at most marginally encroaches on state regulatory turf in this case. It is true that there is a stronger presumption against preemption when the area of regulation is "'in a field which the States have traditionally occupied.'" *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996) (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)). However, § 747 does not to any great extent interfere even with the state dealer protest scheme. The act here has an extremely limited effect, as it applies only to a limited class of dealers and is limited in temporal scope. Nor is this "a field which the States have traditionally occupied." Many states do not have protest laws like the ones at issue in this case, as Chrysler's witness conceded at trial. And this is not an area of exclusive state regulation; federal law has protected automobile dealers from termination by manufacturers without "good cause" since 1956, before many of the states passed their state dealer protest laws. *See* Automobile Dealers' Day in Court Act, 15 U.S.C. §§ 1221-25 (1956).

At oral argument, Chrysler suggested that a Michigan constituency—although it was not clear whether it was the terminated dealers or some representative body of all dealerships—could have lobbied for a Michigan-specific protest-law abrogation in the final version of the bill. Chrysler's logic is that the absence of such a provision implies that there was no preemptive intent. This argument, first, relies on overly speculative counterfac-

tuals about the possibility of assembling a strong and cohesive constituency that could lobby effectively on a state-by-state basis. But more importantly, the argument undermines itself with its own implicit assumption about the variety of state dealer protest laws. Rather, the variety of state dealer protest laws—ranging from no such law to Iowa's expansive encroachment laws[14]—weighs in favor of the law creating a general national policy, regardless of any one state's law. Were Michigan an odd outlier, then the absence of a Michigan-specific exception would be more meaningful. The general policy applicable to all states is, however, to preempt state processes that serve to second-guess the federal determination, as explained above.

The legislative history of § 747 supports the operation of conflict preemption, because it shows that Congress intended to respond to dealership closings by retroactively reversing the effects of closing dealerships that were profitable and did not deserve to be closed. Thus, the failure to pass a law that perfectly parallels state dealer protest laws—which naturally emphasize the interests of existing dealers—is more reasonably understood as a deliberate choice. For example, by emphasizing that the bill targets "high-performing, historically profitable, and experienced automobile dealers with longstanding relationships with their customers," the conference report suggests that a return to the status quo or previous success is the desired goal for the prevailing dealers. *See* H.R. Rep. No. 111-366, at 942 (2009)

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[14] Iowa law creates a cause of action for monetary damages whenever a new franchisee "has an adverse effect on the gross sales of the existing franchisee's outlet or location," with some exceptions. Iowa Code Ann. § 523H.6.

(Conf. Rep.). The conference report makes no mention of the letter of intent, but does discuss a "dealer's request to be added to the . . . dealer network." *Id.* at 942-43. Statements of members of Congress also support the retroactive intent of the act. During consideration of the Consolidated Appropriations Act, one senator said that § 747 would give dealers "a fair shot at *getting back into business*." 155 Cong. Rec. S13,128 (2009) (statement of Sen. Barbara Mikulski). During debate and questioning, the chairman of the committee that reviewed the bill characterized "the primary intent of th[e] provision [as] to ensure that covered dealerships have a fair and impartial *review of the termination decision*." *Id.* at S13,130 (statement of Sen. Dick Durbin).

The history of the legislation, namely the related bills that were introduced but never passed through both houses of Congress, *see* n.3, *supra*, does not suggest a limitation on § 747's scope, as suggested by Chrysler. Chrysler reasons that "legislators had considered, but declined to enact, more sweeping legislation" and that the legislative history demonstrates a "legislative compromise" that "provides rejected dealers the right to enter the network on the same terms as ordinary course dealer candidates." In turn, Chrysler argues that because the statutory "framework requires Chrysler Group to treat prevailing rejected dealerships just like any other dealer candidate," those prevailing dealers must "engage in the same [state] process as must any other Dealer Candidate." The specific conclusion does not appear to follow from the given premise, and in any event, we would be on treacherous ground to derive congressional intent from the contrasting content of unenacted bills because they "are not reliable indicators of congressional intent." *Mead Corp. v. Tilley*, 490 U.S. 714, 723 (1989).

Accordingly, § 747 preempts the operation of Michigan and Nevada dealer protest laws, which would authorize state officials to review the federal arbitral decisions.

IV.

Third, contrary to Fred Martin's argument,[15] § 747 does not violate the separation of powers doctrine and is, therefore, constitutionally sound.

As an initial matter, Fred Martin has standing to raise the constitutional issue. The increase in direct competition caused by the possible entrance of Spitzer Autoworld, as mandated by the § 747 arbitration, causes Fred Martin a cognizable economic injury. "The Court routinely recognizes probable economic injury resulting from [governmental actions] that alter competitive conditions as sufficient to satisfy the [Article III 'injury-in-fact' requirement]." *Clinton v. City of New York*, 524 U.S. 417, 433 (1998) (internal quotation marks and citation omitted). Once that injury is established, it is clear that the arbitration causes the injury. Finally, holding § 747 to be unconstitutional would redress the injury by nullifying the arbitration decision. Therefore, Fred Martin asserts all three requirements for constitutional standing—injury in fact, causation and redressability—

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[15] Because we accept Chrysler's interpretation of the remedy, namely that the statute's sole and exclusive remedy is a letter of intent, we need not address Chrysler's constitutional avoidance argument, which solely focused on the scope of the remedy. We therefore do not address the Bankruptcy Uniformity Clause, which is addressed on this appeal only with respect to constitutional avoidance.

set forth in *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992).

The act does not violate the separation of powers doctrine because § 747 does not interfere with a final court judgment. Section 747 neither nullifies nor reopens a prior court order; rather, it simply reverses the effects of a court order through prospective relief. Though the integrity of the "Judicial Power of the United States" established in Article III of the Constitution forbids congressional or executive interference with the final judgments of courts, *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 223-24 (1995), it does not forbid the granting of prospective relief intended to mitigate the perceived negative effects of a court order. That distinction follows logically from the Supreme Court's exposition of *Plaut*'s scope with respect to injunctions: "*Plaut* . . . was careful to distinguish the situation before the Court in that case—legislation that attempted to reopen the dismissal of a suit seeking money damages—from legislation that 'altered the prospective effect of injunctions entered by Article III courts.'" *Miller v. French*, 530 U.S. 327, 344 (2000) (quoting *Plaut*, 514 U.S. at 232).

V.

Finally, four of the prevailing dealers challenge the district court's determination that they received a "customary and usual letter of intent." For the most part, the district court correctly rejected these claims. However, we do not apply the extraordinarily restrictive standard employed by the district court, which defined "customary and usual" provisions as those that are "substantially the same [a]s found in a majority" of the letters offered "to dealers who were given the opportunity to be added as new franchisees to the dealer network

. . . , both in the ordinary course of New Chrysler's dealer network activities and to arbitrating dealers" from June 9, 2009 to July 31, 2010. *Chrysler Grp.*, 2013 WL 3817408, at *7. Including in the "relevant universe" the letters of intent issued to prevailing dealers under § 747 without considering whether certain terms render the promise of a sales and service agreement illusory, would distort the statutory meaning of "customary and usual letter of intent" and undermine the effectiveness of the remedy that Congress provided to prevailing dealers.

First, because there is very little that is "usual" about the letters of intent issued by Chrysler in accordance with a § 747 arbitration, the proper set of letters of intent used to ascertain what is "customary and usual" should not include those required by a § 747 arbitration. A typical letter of intent follows a lengthy process of strategizing, negotiating, and vetting, after which Chrysler has almost no reservations committing to a sales and service agreement. An ordinary, run-of-the mill dealership installation does not occur at the behest of the federal government after a politically contentious government buyout of the industry following a global financial calamity. In short, Chrysler would not usually or customarily issue a letter of intent to a dealership that it did not want to enter its dealer network.

This approach finds some support from the Ninth Circuit, which limited the "relevant universe" to "the terms of [letters of intent] that new Chrysler dealers actually agreed to," in order to preclude the hypothetical possibility that a covered manufacturer could "nullify an arbitrator's order by offering onerous terms in initial [letters of intent] and then selectively negotiating more advantageous terms only with dealers it chooses." *Los Feliz Ford*, 571 F. App'x at 548. The Second Circuit sim-

ilarly suggested that the proper set of letters of intent for comparison purposes are those "issued by Chrysler in the ordinary and voluntary course of business." *Eagle Auto Mall*, 550 F. App'x at 70.

Further, the letters of intent must constitute a meaningful intention to enter into a full sales and service agreement, rather than a merely illusory promise that may not materialize for arbitrary reasons. To this end, a genuine letter of intent may not contain provisions that are unreasonably onerous or that grant Chrysler broad discretion to back out. This is consistent with decisions of other courts that have considered the issue, which have held that "Chrysler cannot frustrate the purpose of Section 747 by offering dealers who prevailed in arbitration 'unusual and onerous' terms." *Eagle Auto Mall Corp. v. Chrysler Grp., LLC*, 2012 WL 4579375, at *2 (E.D.N.Y. Sept. 28, 2012), *aff'd* 550 F. App'x 69 (2d Cir. 2014) (quoting *Los Feliz Ford, Inc. v. Chrysler Grp., LLC*, 10-cv-6077 (C.D. Cal. Apr. 9, 2012) (slip op. at 14)); *see also Los Feliz Ford*, 571 F. App'x at 548.

However, notwithstanding how the district court defined the "relevant universe" of letters of intent, there is reversible error only with respect to one provision in one of the letters of intent that are challenged on this appeal.

A.

Fox Hill, Village, and Jim Marsh argue that there should be a new trial solely because the "relevant universe" was not defined correctly. Because they make no effort to show how changing the "relevant universe" would affect the application of the customary and usual standard to their letters of intent, their argument fails.

The customary and usual standard serves to ensure that each letter of intent affords the prevailing dealership a substantial and meaningful remedy, a remedy not rendered illusory by the inclusion of onerous provisions or conditions that a voluntarily entered into contract would not contain. Fox Hill, Village, and Jim Marsh argue that, by limiting the "relevant universe," the district court effectively guaranteed a finding that their letters of intent were customary and usual. Yet Fox Hill, Village, and Jim Marsh have failed to identify—before the district court or on appeal—a single burdensome provision in their respective letters of intent that, if reviewed against a different "relevant universe," would not be considered "customary and usual." Even after Chrysler highlighted their failure to identify how an alternative universe would have changed the trial outcome, Fox Hill, Village, and Jim Marsh did not address the deficiency in their reply brief. Absent such a showing, there is no basis for overturning the district court's finding that their letters were customary and usual.

B.

Livonia's challenge to the site-approval provision in its letter of intent, however, has merit because the site-approval provision, as applied to Livonia, may not be customary and usual. Because Livonia already had a successful dealership at its intended location, that location may be effectively pre-approved. To grant Chrysler a veto could render the promise of a dealership merely illusory and undermine Congress's intent to provide prevailing dealers with meaningful relief. Because Livonia's site-approval provision may not be permissible under § 747's "customary and usual letter of intent" standard, the district court's judgment with respect to that provi-

sion in Livonia's letter of intent must be reversed for further proceedings.

The provision in dispute requires Livonia to submit a site proposal to Chrysler for approval; should Chrysler reject the proposal, the letter of intent is nullified. However, it was clear throughout the arbitration that Livonia would be operating in the same location at the same facility it had operated before termination. The arbitrator considered Livonia's location at 30777 Plymouth Road in Livonia, Michigan, and the letter of intent was sent to Livonia at 30777 Plymouth Road. The arbitrator noted that Livonia intends to operate in the same location and out of the same facility it was running profitably before. Furthermore, the arbitrator reasoned that "[t]he difference to the consumer of the location of [a nearby existing dealer] versus [Livonia] likely lacks meaningful significance to the public." Under these circumstances, it appears unreasonable to expect a terminated dealer that was operating profitably before and still maintains control of the original premises of the dealership to obtain approval to operate a dealership at the same site. Even if, as alleged by Chrysler, a majority of letters of intent contain a site-approval requirement, Chrysler has not provided any reason why a dealership in Livonia's peculiar situation would not be pre-approved. By possibly granting Chrysler an effective veto, the site-approval provision may render the letter of intent merely illusory.

Livonia further challenges the site-control and exclusivity provisions in the letter of intent, arguing that because such provisions are not provided for a majority of dealerships, they are not customary and usual. However, because such provisions are customary and usual for dealerships in Livonia's position, namely a dealership

located in a suburban or metropolitan market, they do not require reversal.

The site-control option, paragraph 8(H) of Livonia's letter of intent, requires Livonia to provide Chrysler Group Realty Company LLC an option to lease or purchase the dealership facility. This option would only be triggered by particular events, presumably the termination of the sales and service agreement. Chrysler justifies waiving this provision for rural dealerships, because "rural markets have an abundance of land and locations" at which Chrysler could operate another dealership, at least as compared to "metropolitan and secondary markets." This appears to be a reasonable justification because, as Chrysler's witness explained at trial, suburban auto malls tend to be very crowded, with little vacant space available in which to construct a new facility in an optimally competitive location. Because Chrysler has provided a reasonable justification for discriminating between rural markets on one hand and suburban markets on the other, and 85 percent of letters of intent that were issued to dealerships in metropolitan and suburban markets required a site-control option, the provision was customary and usual as applied to Livonia.

Similarly, the exclusivity requirement is customary and usual as applied to Livonia because it is in a suburban market area. Livonia's letter of intent requires Livonia to "provide a facility . . . for the *exclusive* display, sales and service of the Chrysler and Jeep vehicle lines." (emphasis added). Chrysler's witness explained at trial that dealers in rural markets may not maintain sufficient sales volumes to sustain a facility that sells vehicles of only one manufacturer. Thus, Chrysler waived the exclusivity requirement for many of its rural dealerships. However, even including the rural dealerships, most of

the letters of intent contained an exclusivity requirement, and every single one of the non-rural dealerships were required to be exclusive. This provision is also customary and usual as applied to Livonia, and therefore does not require reversal.

VI.

For the foregoing reasons, we REVERSE and REMAND in Nos. 13-2117 and 13-2118 so that the district court may enter a declaratory judgment consistent with this opinion to the effect that the state dealer protest laws in Michigan and Nevada are preempted. With respect to No. 13-2117, we AFFIRM the district court's judgment dismissing the counter-claims of Fox Hills, Village, and Jim Marsh that alleged that they did not receive customary and usual letters of intent. With respect to appeal No. 13-2118, however, we VACATE the judgment of the district court dismissing Livonia's claim and REMAND for reconsideration of whether Livonia's letter of intent is customary and usual, in proceedings consistent with this opinion. With respect to appeal No. 13-2119, we AFFIRM the district court's judgment.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Nos. 13-2117, 13-2118 & 13-2119

Chrysler Group LLC, Plaintiff-Appellee,
Chrysler Group, LLC, et al., Defendants-Appellees,
United States of America, Intervenor-Appellee,

v.

Fox Hills Motor Sales, Inc.; et al., Defendants-Appellants,
Livonia Chrysler Jeep, Inc., Plaintiff-Appellant,
Sowell Automotive, Incorporated, et al., Defendants,
Spitzer Autoworld Akron, LLC, Defendant-Appellee,
Fred Martin Motor Company, Defendant-Appellant.

Filed: March 13, 2015

Before: ROGERS and GRIFFIN, Circuit Judges; and VAN TATENHOVE, District Judge.*

The court received three petitions for rehearing en banc. The original panel has reviewed the petitions for rehearing and concludes that the issues raised in the pe-

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* The Honorable Gregrory F. Van Tatenhove, United States District Judge for the Eastern District of Kentucky, sitting by designation.

titions were fully considered upon the original submission and decision of the cases. The petitions then were circulated to the full court. No judge has requested a vote on the suggestion for rehearing en banc.

Therefore, the petitions are denied.

ENTERED BY ORDER OF THE COURT

s/

Deborah S. Hunt, Clerk

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DISTRICT

Nos. 10-12984, 10-13290 & 10-13908

Chrysler Group LLC, Plaintiff,
v.
South Holland Dodge, Inc., et al., Defendants;

Consolidated with
Livonia Chrysler Jeep, Inc., a Michigan for profit corporation, Plaintiff,
v.
Chrysler Group, LLC, et al., Defendants;

Consolidated with
Chrysler Group LLC, Plaintiff,
v.
Sowell Automotive, Inc., et al., Defendants.

Decided: March 27, 2012

OPINION & ORDER

COX, District Judge.

Following the 2009 bankruptcies of Chrysler LLC ("Old Chrysler") and General Motors Corporation ("Old GM"), and actions taken to consolidate their respective dealer networks, Congress enacted Section 747 of the Consolidated Appropriations Act of 2010, Pub. L. No. 111-117 ("Section 747"). That Act was passed to grant certain arbitration rights to dealerships that were rejected or terminated in connection with the those bankruptcies. Several dealers who had been rejected by Old Chrysler initiated, and prevailed in, Section 747 arbitrations with Chrysler Group LLC (New Chrysler"). Those arbitration determinations have given rise to this litigation because the parties disagree as to what happens next following those Section 747 arbitration determinations.

In addition to New Chrysler, there are two different groups of dealers who are parties to this action. First, there are 8 dealers whose franchise agreements were rejected by Old Chrysler and who prevailed in Section 747 arbitrations with New Chrysler that are currently[1] parties in these consolidated actions: 1) Livonia Chrysler Group LLC ("Livonia"); 2) Village Chrysler Jeep, Inc. d/b/a Village Automotive Center ("Village"); 3) Fox Hills Motor Sales, Inc. d/b/a Fox Hills Chrysler Jeep ("Fox Hills"); 4) Boucher Imports, Inc. d/b/a Frank Boucher Chrysler ("Boucher"); 5) Jim Marsh American Corp. ("Jim Marsh"); 6) Spitzer Autoworld Akron, LLC ("Spitzer"); 7) BGR, LLC d/b/a Deland Dodge ("BGR"); and 8) Sowell Automotive, Inc., d/b/a Dodge City Chrysler Jeep ("Sowell") (collectively, the "Rejected Dealers"). Second, there are a number of existing dealers who are

[1] New Chrysler and a number of other dealers resolved their respective claims against each other.

parties to this action because they oppose New Chrysler establishing or relocating a dealer who prevailed in a Section 747 arbitration into their area without following the provisions of state-law dealer acts ("Interested Dealers"). These Interested Dealers include: 1) Crestwood Dodge, Inc. ("Crestwood") (who opposes Livonia); 2) Fred Martin Motor Co. ("Fred Martin") (who opposes Spitzer); 3) Falls Motor City, Inc. ("Falls Motor City") (who opposes Spitzer); and 4) Hurley Chrysler Jeep, Inc. ("Hurley") (who opposes BGR).

This matter is currently before the Court on 15 dispositive motions filed by these parties. In these motions, the parties raise the common issue of what relief is provided by Section 747 to a dealer rejected by Old Chrysler who prevails in a Section 747 arbitration with New Chrysler. The motions also raise the common issue of whether Section 747 preempts state-law dealer acts. The parties have extensively briefed the issues and the Court finds that oral argument would not aid the decisional process. *See* Local Rule 7.1(f)(2), U.S. District Court, Eastern District of Michigan. The Court therefore orders that the motions will be decided upon the briefs.[2]

For the reasons that follow, the Court shall declare that: 1) The sole and exclusive remedy for a dealer rejected by Old Chrysler who prevails in a Section 747 arbitration with New Chrysler is a customary and usual letter of intent to enter into a sales and service agreement with New Chrysler; 2) Section 747 does not provide for reinstatement of a dealer rejected by Old Chrysler who prevails in a Section 747 arbitration with New

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[2] Accordingly, the Court shall deny all motions requesting oral argument. (D.E. Nos. 355 & 360).

Chrysler; 3) Section 747 does not authorize an award of monetary damages; 4) Section 747 does not provide for judicial confirmation or enforcement and neither the FAA nor the AAA's Commercial Rules govern these statutorily-mandated arbitrations or authorize a party to move to confirm an arbitrator's determination in a Section 747 arbitration; and 5) Section 747 does not preempt the state-law dealer acts that govern the relationships between automobile manufacturers and dealers in California (Cal. Vehicle Code § 3060 *et seq.*), Florida (Fla. Stat. § 320.01 *et seq.*), Michigan (Mich. Comp. Laws § 445.1561 *et seq.*), Nevada (Nev. Rev. Stat. § 482.36311 *et seq.*), Ohio (Ohio Rev. Code. § 4517.43), or Wisconsin (Wis. Stat § 218.0101 *et seq.*).

The Court shall also hold a Status / Scheduling Conference, to discuss the most efficient method of adjudicating the remaining claims in this action.

BACKGROUND

This case has a fairly lengthy background, which is relevant to the issues presented in the pending motions.

A. For Decades, State-Law Dealer Acts Have Provided Certain Protections For Existing Dealers And Allow Them To Challenge A Manufacturer's Decision To Establish Or Relocate Another Dealer Into A Given Area.

For decades, various state-law dealer acts provide certain protections for existing dealers and allow them to challenge a manufacturer's decision to establish or relocate another dealer into a given area.

For example, in 1981, Michigan enacted Mich. Comp. Laws § 445.1561 *et seq*. ("the Michigan Dealer Act"). Among other things, the Michigan Dealer Act provides

protections for existing dealers. It regulates a manufacturer's establishment or relocation of a dealership within a relevant market area where the same line make is already represented. *See* Mich. Comp. Laws § 445.1566 & § 445.1576. Before a manufacturer can establish or relocate a dealer into a relevant market area ("RMA"), the manufacturer must do certain things – such as give written notice to existing dealers within the RMA of its intention to establish or relocate another dealer to the RMA. Those existing dealers can then challenge that action by filing a declaratory action in circuit court, to determine if good cause exists for the establishment or relocation of the dealer.

State-law dealer acts also exist in California, Florida, Nevada, Ohio, and Wisconsin. While the dealer acts in each of these states differ in various respects, they provide similar protections to existing dealers. Automotive manufacturers and dealers have been operating under these state-law dealer acts for decades.

B. Livonia, Village, Fox Hills, Boucher, Jim Marsh, Spitzer, BGR, And Sowell Each Operated Under Dealer Agreements With Old Chrysler.

Livonia is a Michigan corporation that operated a dealership in Livonia, Michigan, pursuant to Sales and Service Agreements with Old Chrysler. Livonia operated its dealership under those agreements for more than 25 years.

Village is a Michigan corporation that operated a dealership in Royal Oak, Michigan, pursuant to Sales and Service Agreements with Old Chrysler. Village operated its dealership under those agreements for more than 30 years.

Fox Hills is a Michigan corporation that operated a dealership in Plymouth, Michigan, pursuant to Sales and Service Agreements with Old Chrysler.

Boucher is a Wisconsin corporation that operated a dealership in Wisconsin, pursuant to Sales and Service Agreements with Old Chrysler. Boucher operated as a Chrysler, Jeep, and Dodge dealer under those agreements for 17 years.

Jim Marsh is a Nevada corporation that operated a dealership in Nevada, pursuant to Sales and Service Agreements with Old Chrysler. Jim Marsh operated as a Chrysler, Jeep, and Dodge dealer under those agreements for 9 years.

Spitzer is an Ohio corporation that operated a dealership in Ohio, pursuant to Sales and Service Agreements with Old Chrysler.

BGR is a Florida limited liability company that operated a dealership in Florida, pursuant to Sales and Service Agreements with Old Chrysler. BGR operated as a Chrysler, Jeep, and Dodge dealer under those agreements for 4 years.

Sowell is a California Corporation that operated a dealership in California, pursuant to Sales and Service Agreements with Old Chrysler. Sowell operated as a Chrysler, Jeep, and Dodge dealer under those agreements for more than 14 years.

C. In 2009, Both Old Chrysler And Old GM Filed For Bankruptcy And Consolidated Their Dealer Networks.

During the recent economic decline, the automotive industry was hit hard. In the fall of 2008, a global credit crisis affecting the liquidity markets impacted the avail-

ability of loans both to dealers and consumers, resulting in the erosion of consumer confidence and a sharp drop in vehicle sales. By the end of 2008, Old Chrysler and Old GM were both insolvent. This resulted in unprecedented bankruptcy filings by Old Chrysler and certain of its subsidiaries in April 2009, and by Old GM in June 2009. While both manufacturers consolidated their nationwide dealer networks in connection with these bankruptcy proceedings, they did so in different ways.

1. Old Chrysler's Bankruptcy Filing And Sale Of Assets To New Chrysler

On April 30, 2009, Old Chrysler filed a voluntary petition for relief in the Bankruptcy Court under Chapter 11 of the Bankruptcy Code. Rather than liquidate, Old Chrysler agreed, subject to bankruptcy court approval, to sell substantially all of its assets to a new entity formed by Fiat S.p.A. ("Fiat") under Section 363 of the Bankruptcy Code.

Section 363 of the Bankruptcy Code permits a debtor-in-possession or trustee, after notice and a hearing, to sell property of the estate outside the ordinary course of business, if the bankruptcy court determines that there is a "good business reason" to do so. *See* 11 U.S.C. § 363(b); *In re Chrysler LLC*, 405 B.R. 84, 94 (S.D. N.Y. 2009) (citing *In re Lionel Corp.*, 722 F.2d 1063, 1071 (2d Cir. 1983)). Section 363 also provides that, if certain requirements are met, estate property may be sold "free and clear of any interest in such property of an entity other than the estate." 11 U.S.C. § 363(f).

Here, the sale agreement provided that Old Chrysler would transfer substantially all of its operating assets to Chrysler Group, LCC ("New Chrysler"), a new entity that would be partially owned by Fiat. (*See* Sale Op. 9-

10, attached as Ex. B to D.E. No. 210). The terms of this transaction were memorialized in a Master Transaction Agreement among Old Chrysler, Fiat and New Chrysler. It provided, among other things, that Old Chrysler would transfer substantially all of its operating assets to New Chrysler, including the assignment of approximately 2,400 dealer agreements. It expressly excluded from the assets transferred to New Chrysler the remaining 789 dealer agreements that Old Chrysler intended to seek approval to reject.

On May 31, 2009, the bankruptcy court authorized the proposed sale. (*See In Re Chrysler*, 405 B.R. 84 (S.D. N.Y. May 31, 2009), attached as Ex. B to D.E. No. 210). On June 2009, the bankruptcy court entered orders approving the sale and authorizing the rejection of the 789 dealer agreements. (*See* Exs. E and F to D.E. No. 210). The bankruptcy court ordered that New Chrysler would purchase the assets free and clear of any third-party claims, including any claims by Old Chrysler dealers arising from the rejection of their dealership agreements. (*See* Ex. B to D.E. No. 210 at 24-30; Ex. E to D.E. No. 210 at 17-20). On June 10, 2009, the sale closed and became final.

The dealer agreements that Livonia, Village, Fox Hills, Boucher, Jim Marsh, Spitzer, BGR, and Sowell had with Old Chrysler were all rejected during the bankruptcy proceedings.

2. Old GM's Bankruptcy And How It Consolidated Its Dealer Network

Like Old Chrysler, Old GM also filed for bankruptcy and took actions to consolidate its dealer network. Old GM did so, however, in an entirely different manner.

In connection with its bankruptcy proceedings, Old GM sought to consolidate its dealer network from approximately 6,000 dealers to approximately 4,100 dealers. *See In re General Motors Corp.*, 407 B.R. 463, 513 (Bankr. S.D. N.Y. 2009).

Unlike Old Chrysler, Old GM did not reject dealer agreements under Section 363 of the Bankruptcy Code. Rather, Old GM assigned substantially all of its dealer agreements to a new legal entity, General Motors LLC ("New GM"), with specified dealer agreements subject to deferred termination ("wind down") provisions. *In re General Motors Corp.*, 407 B.R. at 513-15.

D. Various Alternatives Were Considered Before Congress Enacted Section 747.

Chrysler and GM dealers responded to these events by turning to Congress and asking for relief.

As explained in *Eagle Auto Mall Corp.*, various bills were introduced in the House of Representatives discussing the issues raised by terminated dealers that were ultimately addressed by Section 747:

> House Bill 2743 refers to itself as a bill to "restore the economic rights of automobile dealers." The language used in House Bill 2743, but ultimately rejected in the Act, states that "at the request of an automobile dealer," Chrysler and/or GM "shall *restore* the franchise agreement . . . that was in effect prior to the commencement of their respective bankruptcy cases." House Bill 2743 § 3(b) (emphasis added). Similarly, House Bill 3170 requires post-bankruptcy automobile dealership agreements with terminated dealers "on the same terms and

> onditions as existed immediately before [the date of the commencement of bankruptcy proceedings]." House Bill 3170 § 745(b).

Eagle Auto Mall Corp. v. Chrysler Group, LLC, 2011 WL 6754087, at *2 (E.D.N.Y. Dec. 23, 2011). House Bill 3170 included the following language:

> (b) Any automobile manufacturer with respect to which the Federal Government has a financial or ownership interest (or right to acquire such an interest) shall, to the extent that a valid dealer agreement existing immediately before the date of the commencement of a case under title 11 of the United States Code by such automobile manufacturer is not assumed by or assigned to another automobile manufacturer, *require any new entity created in such case to enter into a new dealer agreement with the dealer whose agreement was not so assumed or assigned, and on the same terms as existed immediately before such date.*

House Bill 3170 § 745(b) (emphasis added).

E. Section 747 Was Enacted And Gives Rejected Or Terminated Dealers The Right to Seek Continuation, Reinstatement, Or To Be Added To A Dealer Network Through A Statutorily-Created Arbitration Procedure.

On December 16, 2009, Congress enacted Section 747. Section 747 provides that a "covered dealership that was not lawfully terminated under applicable State law on or before April 29, 2009, [the day before Old Chrysler filed its bankruptcy petition], shall have the right to seek, through binding arbitration, continuation, or rein-

statement of a franchise agreement, or to be added as a franchisee to the dealer network of the covered manufacturer in the geographical area where the covered dealership was located when its franchise agreement was terminated, not assigned, not renewed, or not continued." § 747(b).

Section 747 provides that "[t]he arbitrator shall balance the economic interest of the covered dealership, the economic interest of the covered manufacturer, and the economic interest of the public at large and shall decide, based on that balancing, whether or not the covered dealership should be added to the dealer network of the covered manufacturer." Section 747 lists various factors that the arbitrator should consider. It further provides that "[t]he arbitrator shall issue a written determination no later than 7 business days after the arbitrator determines that the case has been fully submitted."

Section 747 states that the "arbitrator shall not award compensatory, punitive, or exemplary damages to any party. If the arbitrator finds in favor of a covered dealership, the covered manufacturer shall as soon as practicable, but not later than 7 days after receipt of the arbitrator's determination, provide the dealer a customary and ususal letter of intent to enter into a sales and service agreement." § 747(e).

F. Several Dealers Rejected By Old Chrysler Prevailed In Section 747 Arbitrations With New Chrysler And Those Arbitration Determinations Gave Rise To This Litigation.

Because they had each operated under franchise agreements with Old Chrysler, each of the Rejected Dealers in this action was permitted to seek arbitration under Section 747 with New Chrysler and did so.

Livonia, Village, Fox Hills, Boucher, Jim Marsh, Spitzer, BGR, and Sowell were among the 32 dealers across the nation that prevailed in Section 747 arbitrations with New Chrysler.[3]

In the arbitration proceeding between Livonia and New Chrysler, the arbitrator issued a "Written Determination of Arbitrator" on July 16, 2010, that states that Livonia "shall be offered a Letter of Intent to enter into a Sales and Service Agreement for a Chrysler-Jeep franchise with the covered manufacturer, in the manner provided for by the Act and in accordance with the terms and conditions of the Act." (Ex. I to D.E. No. 210).

In the arbitration proceeding between Village and New Chrysler, the arbitrator issued a "Written Determination of Arbitrator" on June 15, 2010, that states that New Chrysler "shall issue Village a customary and usual letter of intent to enter into a sales and service agreement, in the manner provided for by the Act and in accordance with the terms and conditions of the Act." (Ex. I to D.E. No. 264).

In the arbitration proceeding between Fox Hills and New Chrysler, the arbitrator issued a "Written Determination of Arbitrator" on July 18, 2010, that states that New Chrysler "shall offer Claimant, as the covered dealership described in Section I, Respondent's Letter of Intent to enter into Respondent's dealer network, in the

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[3] New Chrysler states that over 400 of Old Chrysler's former dealers, whose dealer agreements were rejected by order of the Bankruptcy Court, elected to arbitrate under Section 747. (D.E. No. 25 at 3). New Chrysler further states that it prevailed in 76 of those arbitrations, that it did not prevail in 32 of those arbitrations, and that the remaining arbitrations were otherwise resolved.

manner provided for by the Act and in accordance with the terms and conditions of the Act." (Ex. J to D.E. No. 244).

In the arbitration proceeding between Boucher and New Chrysler, the arbitrator issued a "Written Determination of Arbitrator" on July 9, 2010, that states that Boucher "shall be added to the dealer network and therefore shall be provided the customary and usual Letter of Intent by Chrysler, in the manner provided for by the Act and in accordance with the terms and conditions of the Act." (Ex. I to D.E. No. 229).

In the arbitration proceeding between Jim Marsh and New Chrysler, the arbitrator issued a "Written Determination of Arbitrator" on July 13, 2010, that states that Jim Marsh "shall be renewed and therefore shall be assumed by the Manufacturer, in the manner provided for by the Act and in accordance with the terms and conditions of the Act." (Ex. I to D.E. No. 266).

In the arbitration proceeding between Spitzer and New Chrysler, the arbitrator issued a "Written Determination of Arbitrator" on June 23, 2010, that states that Spitzer "**shall** be **renewed** and therefore **shall** be **assumed** by the covered manufacturer, in the manner provided for by the Act and in accordance with the terms and conditions of the Act." (Ex. I to D.E. No. 228) (bolding in original).

In the arbitration proceeding between BGR and New Chrysler, the arbitrator issued a "Written Determination of Arbitrator" on May 3, 2010, that states that BGR "**shall** be added to the roster of dealerships of Chrysler Group, LLC., the newly created and covered manufacturer. Such addition shall be limited to the Dodge brand owned and manufactured by the Chrysler Group, LLC at

the time this arbitration commenced, to the extent that the Dealership described above in Section I had been a dealer for such brand at the time the franchise agreement was rejected in the bankruptcy court." (Ex. H to D.E. No. 270) (bolding in original).

In the arbitration proceeding between Sowell and New Chrysler, the arbitrator issued a "Written Determination of Arbitrator" on June 1, 2010, that states that Sowell "**shall** be renewed and therefore **shall** be assumed by and added to the dealership network of the covered manufacturer, in the manner provided for by the Act and in accordance with the terms and conditions of the Act." (Ex. K to D.E. No. 241) (bolding in original).

The instances in which Rejected Dealers prevailed in Section 747 arbitrations with New Chrysler have given rise to this litigation because New Chrysler, the Rejected Dealers, and other interested existing dealers, disagree as to what happens next following those arbitration rulings.

In sum, New Chrysler asserts that Section 747's sole and exclusive remedy is that the prevailing dealer receives a customary and usual letter of intent ("LOI") from New Chrysler. New Chrysler contends that it has provided prevailing dealers with the required LOI's and that Section 747 does not preempt state dealer acts or allow New Chrysler to ignore the provisions of those acts. New Chrysler further contends that Section 747 does not authorize a dealer to be "reinstated" and that any "reinstatement" could not result here in any event because these dealers never had a dealer agreement with New Chrysler.

The Rejected Dealers disagree. Some Rejected Dealers contend that Section 747 preempts state dealer

acts or that the dealer acts do not apply to them. Some contend that the LOI's they received from New Chrysler are deficient and/or insufficient under Section 747. Some contend that, under Section 747, they are entitled to be "reinstated" and are entitled to be placed in the same position they were in before their franchise terminated.

Other interested existing dealers have threatened to sue New Chrysler if New Chrysler establishes or relocates a dealer who prevailed in a Section 747 arbitration into their area without following applicable state dealer act provisions.

G. Procedural History Of This Consolidated Action

There were three separate actions pending before this Court (Case No. 10-12984, Case No. 10-13290, and Case No. 10-13908), which this Court consolidated. New Chrysler and several dealers have settled their respective claims against each other.

1. Remaining Claims

Claims asserted by certain parties to the following complaints, counter-complaints and cross-complaints remain in this action.

a. Claims Between New Chrysler, Sowell, Spitzer, BGR, Boucher, Fred Martin, And Falls Motor City

In a Complaint seeking declaratory relief filed on July 14, 2011 (D.E. No. 290), New Chrysler seeks declaratory relief as to two groups of Defendants: 1) several Rejected Dealers who prevailed in Section 747 arbitrations with New Chrysler; and 2) some existing like-line dealers who had threatened to sue New Chrysler to prevent

the establishment of dealerships (for the rejected dealers) in their areas. New Chrysler asks the Court to declare that: 1) Section 747 does not preempt state dealer acts; 2) the LOIs provided by New Chrysler are customary and usual within the meaning of Section 747; and 3) a LOI is the sole and exclusive remedy under Section 747. The rejected dealers named in New Chrysler's July 14, 2011 Complaint who are still parties to this action are Sowell, Spitzer, BGR, and Boucher.

Sowell filed a Counter-Complaint against New Chrysler, seeking declarative relief consistent with its position as to Section 747 (Count One) and asserting the following additional counter-claims: "Violation of 15 U.S.C. Section 1221-1225 for Lack of Good Faith in Terminating, Cancelling or Not Renewing Sowell's Franchise" (Count Two); "Injunctive Relief" (Count Three); "Statutory Violation California Vehicle Code Section 11713.3(l) and (g) and Section 747" (Count Four); "Statutory Violation of California Vehicle Code Section 11713.13" (Count Five); and "Unfair Business Practices Business and Professions Code Section 17200" (Count Six). (D.E. No. 338).

The existing like-line dealers named in New Chrysler's July 14, 2011 Complaint who are still parties to this action include Fred Martin, Falls Motor City, and Hurley. Falls Motor City and Fred Martin each filed cross claims against Spitzer, seeking a declaration that Section 747 is invalid and unconstitutional or, alternatively, that Section 747 does not preempt the Ohio Dealer Act. (D.E. Nos. 95 & 114).

b. Claims Between Livonia, New Chrysler, And Crestwood

Livonia's August 19, 2010 Complaint against New Chrysler and one existing like-line dealer, Crestwood, includes four counts: 1) "Count I – Declaratory Relief 28 USCA Sec. 2201," which seeks declaratory relief relating to Section 747; 2) "Count II – Violation of the Act and Confirmation / Enforcement of the Arbitration Award"; 3) "Count III – Injunction," which asks the Court to enjoin the expiration of the LOI issued to Livonia by New Chrysler; and 4) "Count IV – Punitive Damages" which asks the Court to award Livonia punitive damages for New Chrysler's alleged violation of Section 747. (D.E. No. 1 in Case No. 10-13290). New Chrysler filed a counterclaim seeking declaratory relief consistent with its position as to Section 747. (D.E. No. 104).

c. Claims Between New Chrysler, Fox Hills, Village, and Jim Marsh

In a Complaint seeking declaratory relief filed on February 9, 2011 (D.E. No. 136), New Chrysler seeks declaratory relief as to several additional Rejected Dealers who prevailed in Section 747 arbitrations with New Chrysler and some additional existing like-line dealers who had threatened to sue New Chrysler to prevent the establishment of dealerships (for the rejected dealers) in their areas. New Chrysler asks the Court to declare that: 1) Section 747 does not preempt state dealer acts; 2) the LOIs provided by New Chrysler are customary and usual within the meaning of Section 747; and 3) a LOI is the sole and exclusive remedy under Section 747. The Rejected Dealers named in New Chrysler's February 9, 2011 Complaint who are still parties to this action are Fox Hills, Village, and Jim Marsh.

Fox Hills and Village's September 9, 2010 Counter-Complaint against New Chrysler asserts the following claims: "Declaratory Relief" (Count I), wherein they seek a declaration that Section 747 preempts the Michigan Dealer Act; "Confirmation of Fox Hills' Arbitration Award" (Count II); "Confirmation of Village's Arbitration Award" (Count III); "Enforcement of Fox Hills' Arbitration Award" (Count IV); "Enforcement of Village's Arbitration Award" (Count V); and "Violation of Section 747 [ ] and Request for Monetary Damages" (Count VI). (D.E. No. 38).

Jim Marsh filed a Counter-Complaint asserting two counts: "Declaratory Relief" (Count I); and "Confirmation of Marsh's Arbitration Award" (Count II). (D.E. No. 200-2).

2. Rulings Regarding Motion Practice

The above actions were consolidated in this Court's Order dated December 17, 2010. (D.E. 92). Upon consolidating the cases, the Court made several rulings regarding early motion practice and discovery.

This Court ordered that the parties may file motions to dismiss based on personal jurisdiction, subject matter jurisdiction, improper venue, insufficient process, insufficient service of process, or failure to join a party under Rule 19 at any time. Several parties filed such motions, which the Court ruled upon on May 10, 2011. (*See* D.E. No. 195).

Because the same threshold legal issues impact all parties, the Court ordered that it would hear and determine all motions to dismiss based on failure to state a claim upon which relief can be granted (and any summary judgment motions filed prior to discovery) at the

same time. The Court further ordered that it would hear and determine all motions to dismiss before any discovery commences.

New Chrysler and several Interested Dealers contend that if the Court were to interpret Section 747 as the Rejected Dealers urge it to do, Section 747 would be unconstitutional. The United States of America ("the Government") intervened in this action to defend the constitutionality of Section 747.

3. Pending Dispositive Motions

The remaining parties in this action have filed the following 15 dispositive motions, which raise several common issues:

1) Livonia's Motion for Partial Summary Judgment (D.E. No. 193): wherein Livonia asks the Court to declare that: a) having prevailed in a Section 747 arbitration with New Chrysler, it is entitled to be "reinstated" as a dealer in its former location; and b) Section 747 preempts the Michigan Dealer Act;

2) New Chrysler's Cross-Motion for Summary Judgment as to Livonia (D.E. No. 210): wherein New Chrysler asks the Court to: a) grant summary judgment in favor of New Chrysler as to Count I of its counterclaim and declare that Section 747's sole and exclusive remedy is the issuance of a LOI, Section 747 does not provide for judicial "confirmation," judicial enforcement, or an award of punitive damages, and Section 747 does not preempt the Michigan Dealer Act;

and b) dismiss counts I, II, III, and IV of Livonia's Complaint with prejudice;

3) Spitzer's Motion for Summary Judgment (D.E. No. 231): wherein Spitzer asks this Court to declare that Section 747 preempts the Ohio Dealer Act, and rule that New Chrysler and other dealers waived their right to challenge Spitzer's "reinstatement";

4) New Chrysler's Cross-Motion For Summary Judgment As To Spitzer (D.E. No. 228): wherein New Chrysler asks the Court to grant summary judgment in its favor and against Spitzer on Count One of its Second Amended Complaint and declare that Section 747 does not preempt the Ohio Dealer Act or permit New Chrysler to ignore its obligations under state law;

5) Fred Martin's Motion for Partial Summary Judgment as to Spitzer (D.E. No. 215); wherein it asks the Court to declare that Section 747 is unconstitutional or, alternatively, that Section 747 does not preempt the Ohio Dealer Act;

6) Falls City's Motion for Partial Summary Judgment as to Spitzer (D.E. No. 247): wherein it asks the Court to declare that Section 747 is unconstitutional or, alternatively, that Section 747 does not preempt the Ohio Dealer Act;

7) Fox Hills and Village's Motion for Partial Summary Judgment (D.E. No. 219): wherein they ask the Court to declare that Section

747 is Constitutional and preempts the Michigan Dealer Act;

8) New Chrysler's Cross-Motion for Summary Judgment as to Fox Hills and Village (D.E. No. 244): wherein it asks the Court to declare that Section 747's sole and exclusive remedy is the issuance of a LOI, Section 747 does not provide for judicial "confirmation" or enforcement, and Section 747 does not preempt the Michigan Dealer Act;

9) Boucher's Motion for Summary Judgment (D.E. No. 220): wherein it asks the Court to declare that Section 747 preempts the Wisconsin Dealer Act;

10) New Chrysler's Cross-Motion for Summary Judgment as to Boucher (D.E. No. 229): wherein it asks the Court to declare that Section 747 does not preempt the Wisconsin Dealer Act;

11) Jim Marsh's Motion for Summary Judgment (D.E. No. 225): wherein it asks the Court to declare that Section 747 is Constitutional and that it preempts the Nevada Dealer Act, and rule that the Nevada Dealer Act's protest provision does not apply where a terminated dealer is "reinstated" under Section 747;

12) New Chrysler's Cross-Motion for Summary Judgment as to Jim Marsh (D.E. No. 242): wherein it asks the Court to declare that Section 747's sole and exclusive remedy is the issuance of a LOI, Section 747 does not provide for judicial "confirmation," and Sec-

tion 747 does not preempt the Nevada Dealer Act;

13) New Chrysler's Motion for Summary Judgment as to Sowell (D.E. No. 241): wherein it asks the Court to declare that Section 747's sole and exclusive remedy is the issuance of a LOI, Section 747 does not provide for "reinstatement," and Section 747 does not preempt the California Dealer Act;

14) BGR's Motion to Dismiss and/or for Summary Judgment (D.E. No. 234): wherein BGR asks the Court to dismiss New Chrysler's complaint against it, declare that Section 747 preempts the Florida Dealer Act, and rule that New Chrysler is not entitled to the declarations that it seeks;[4] and

15) New Chrysler's Cross-Motion for Summary Judgment as to BGR (D.E. No. 243): wherein it asks the Court to declare that Section 747's sole and exclusive remedy is the issuance of a LOI, Section 747 does not provide for "reinstatement" or judicial "confirmation," and Section 747 does not preempt the Florida Dealer Act.

Standard of Decision

The above pending motions are brought pursuant to Fed. R. Civ. P. 12(b)(6) and/or Fed. R. Civ. P. 56(c).

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[4] BGR's motion also asked the Court to dismiss the action under Fed. R. Civ. P. 19 for failure to join a required party, Hurley. After BGR filed its motion, however, Hurley was added as a party to this action.

When ruling on a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6), the court must construe the complaint in a light most favorable to the plaintiff and accept all the well-pleaded factual allegations as true. *Evans-Marshall v. Board of Educ.*, 428 F.3d 223, 228 (6th Cir. 2005). However, "the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions." *Ashcroft v. Iqbal*, __ U.S. __, 129 S.Ct. 1937, 1948 (2009). Although a heightened fact pleading of specifics is not required, the plaintiff must bring forth "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). In practice, a complaint must contain either direct or inferential allegations respecting all the material elements to sustain a recovery under some viable legal theory. *Lillard v. Shelby County Bd. of Educ.*, 76 F.3d 716, 726 (6th Cir. 1996).

Summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c).

ANALYSIS

I. What Relief Does Section 747 Provide For Dealers Rejected By Old Chrysler Who Prevail In A Section 747 Arbitration With New Chrysler?

The pending motions raise the common issue of what relief Section 747 provides to a dealer rejected by Old Chrysler who prevails in a Section 747 arbitration with New Chrysler.

Thus, the first issue is one of statutory interpretation. "[S]tatutory-interpretation analysis begins by examining 'the language of the statute itself to determine if its meaning is plain.'" *Nat'l Air Traffic Controllers Ass'n v. Sec'y of Dep't of Transp.*, 654 F.3d 654, 657 (6th Cir. 2011) (quoting *Menuskin v. Williams*, 145 F.3d 755, 768 (6th Cir. 1998)). Plain meaning is examined by looking at the language and design of the statute as a whole. *Id.*

In doing so, the Court must give effect to each word and make "every effort not to interpret a provision in a manner that renders other provisions of the same statute inconsistent, meaningless or superfluous." *Menuskin*, 145 F.3d at 768.

"Unless they are otherwise defined, the words in a statute 'will be interpreted as taking their ordinary, contemporary, common meaning.'" *Deutsche Bank National Trust Co. v. Tucker*, 621 F.3d 460, 462 (6th Cir. 2010) (citing *United States v. Plavcak*, 411 F.3d 655, 660 (6th Cir. 2005)). "When 'construing a federal statute, it is appropriate to assume that the ordinary meaning of the language that Congress employed accurately expresses it legislative purpose.'" *Id.*

"If the statutory language is unambiguous, 'the judicial inquiry is at an end, and the plain meaning of the text must be enforced.'" *Deutsche Bank*, 621 F.3d at 463. Conversely, if the statutory language is not clear, the Court may examine the relevant legislative history. *United States v. Parrett*, 530 F.3d 422, 429 (6th Cir. 2008).

A. The Sole And Exclusive Remedy For A Dealer Rejected By Old Chrysler Who Prevails In A Section 747 Arbitration With New Chrysler Is A Customary And Usual Letter Of Intent To Enter Into A Sales And Service Agreement With New Chrysler.

Section 747 states that the "arbitrator shall not award compensatory, punitive, or exemplary damages to any party. *If the arbitrator finds in favor of a covered dealership, the covered manufacturer shall* as soon as practicable, but not later than 7 days after receipt of the arbitrator's determination, *provide the dealer a customary and ususal letter of intent to enter into a sales and service agreement*." § 747(e) (emphasis added). The Act does not provide any other remedies to a covered dealer who prevails in a Section 747 arbitration. This Court concludes and declares that, under the plain language of the Act, the sole and exclusive remedy for a dealer rejected by Old Chrysler who prevails in a Section 747 arbitration with New Chrysler is a customary and usual letter of intent to enter into a sales and service agreement with New Chrysler.

B. Section 747 Does Not Provide For "Reinstatement" Of A Dealer Rejected By Old Chrysler Who Prevails In A Section 747 Arbitration With New Chrysler.

Several Rejected Dealers contend that, because they prevailed in a Section 747 arbitration, the Act automatically entitles them to be "reinstated" to the same position they were in when Old Chrysler rejected their franchise agreements (i.e., that it unconditionally requires New Chrysler to enter into Sales and Service Agreements with them, allowing them to operate dealerships

at their previous locations). The Court rejects this proposed interpretation of the Act.[5]

Subsection (b) of Section 747 provides that a "covered dealership that was not lawfully terminated under applicable State law on or before April 29, 2009, shall have the right to seek, through binding arbitration, continuation, or reinstatement of a franchise agreement, *or* to be added as a franchisee to the dealer network of the covered manufacturer in the geographical area where the covered dealership was located when its franchise agreement was terminated, not assigned, not renewed, or not continued." § 747(b) (emphasis added). Thus, the Act provides that a covered dealer may seek, through a Section 747 arbitration, either: 1) continuation of a franchise agreement; 2) reinstatement of a franchise agreement; or 3) if the covered dealer's franchise agreement was terminated, to be added as a franchisee to the dealer network of the covered manufacturer.

The Court finds no ambiguity in the language of the Act. The above language simply reflects the different legal positions of dealers terminated or rejected by Old Chrysler and Old GM.

The Rejected Dealers' interpretation of the Act ignores the critical fact that *New Chrysler is a legally distinct entity from Old Chrysler*. Because the Rejected Dealers have never had franchise agreements with New Chrysler, they cannot seek either "continuation" or "re-

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[5] The Court notes that New Chrysler and several Interested Dealers assert that Section 747 would violate the Constitution, if the Court were to interpret Section 747 as the Rejected Dealers urge it to do. Given that the Court rejects the Rejected Dealers' interpretation of the Act, the Court need not reach the Constitutional issue.

instatement" of a franchise agreement with New Chrysler. The only option under Section 747 for dealers rejected by Old Chrysler is to seek to be added as a franchisee to New Chrysler's dealer network.

The Act's reference to "reinstatement" and "continuation" is not superfluous because that language applies to the other covered manufacturer, New GM. Although Old GM and New GM are legally distinct entities, Old GM assigned substantially all of its dealer agreements to New GM. A significant number of those assigned dealer agreements included deferred termination ("wind down") provisions. *In re General Motors Corp.*, 407 B.R. at 513-15. That is, those assigned dealer agreements were assigned to New GM, but included provisions under which the franchise agreement would terminate at a future date. This is significant because *GM dealers had post-bankruptcy contractual relationships with New GM*. Therefore, a dealer whose franchise agreement with Old GM was assigned to New GM, but had a wind down provision, could seek: 1) "reinstatement" of its franchise agreement with New GM, if its agreement was terminated by New GM after assumption of the contract; or 2) "continuation" of its franchise agreement with New GM, if the dealer filed for arbitration before the wind down provision at issue took effect (i.e., if it was subject to winding down under the agreement assigned to New GM, but had not yet been terminated).

If, as the Rejected Dealers argue, the Court were to interpret the Act as requiring New Chrysler to reinstate a rejected dealer who prevailed in a Section 747 arbitration with New Chrysler to the position that dealer held when Old Chrysler terminated its franchise agreement, that would render the sole remedy provided for in the Act – a customary and usual letter of intent to enter into

a sales and service agreement with New Chrysler – meaningless and superfluous. A letter of intent precedes a sales and service agreement and spells out conditions that the dealer candidates must satisfy to become a dealer. If Congress intended that New Chrysler was unconditionally required to enter into a sales and service agreement with a prevailing dealer, there would be no reason to provide a customary and usual letter of intent to enter into a sales and service agreement.

As the Court finds no ambiguity in the Act, it is unnecessary to examine the legislative history of Section 747. Nevertheless, even if this Court were to consider the legislative history, it supports this Court's interpretation of Section 747. Bills introduced in the House of Representatives included language stating that: 1) covered manufacturers "shall restore the franchise agreement . . . that was in effect prior to the commencement of their respective bankruptcy cases," H.R. 2743, 111th Cong. § 3(b) (2009); and 2) required covered manufacturers to enter into dealership agreements with terminated dealers "on the same terms and conditions as existed immediately before" the date the bankruptcy proceeding was commenced. H.R. 3170, 111th Cong. § 745(b) (2009). Significantly, Section 747 as ultimately enacted does not include such language. Ostensibly, Congress considered such language but decided against it. *Pak v. Reno*, 196 F.3d 666, 676 (6th Cir. 1999). "Few principles of statutory construction are more compelling than the proposition that Congress does not intend *sub silentio* to enact statutory language that it has earlier discarded in favor of other language." *INS v. Cardoza-Fonseca*, 480 U.S. 421, 442-43 (1987) (quoting *Nachman Corp. v. Pension Benefit Guar. Corp.*, 446 U.S. 359, 392-93 (1980)).

Accordingly, the Court concludes and declares that Section 747 does not provide for "reinstatement" of a dealer rejected by Old Chrysler who prevails in a Section 747 arbitration with New Chrysler.

C. Section 747 Does Not Authorize An Award of Monetary Damages.

Section 747 expressly states that the "arbitrator *shall not* award compensatory, punitive, or exemplary damages to any party." § 747(e) (emphasis added). In keeping with the express terms of the Act, none of the Rejected Dealers who prevailed in Section 747 arbitrations with New Chrysler were awarded[6] any kind of monetary damages in arbitration.

Nevertheless, several Rejected Dealers now seek monetary damages from New Chrysler under Section 747. (*See, e.g.*, Count IV of Livonia's Complaint, seeking punitive damages for New Chrysler's alleged violation of the Act; Count VI of Fox Hills and Village's Counter-Complaint, seeking monetary damages for New Chrysler's alleged violation of the Act).

The Court declares that Section 747 does not authorize an award of monetary damages. Accordingly, all claims seeking monetary damages for alleged violations of the Act shall be dismissed.

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[6] Indeed, none of them received an arbitration "award" at all. Rather, each of the arbitrations resulted in a "Written Determination of Arbitrator."

D. Section 747 Does Not Provide For Judicial Confirmation Or Enforcement And Neither The FAA Nor The AAA's Commercial Rules Govern These Statutorily-Mandated Arbitrations Or Authorize A Party To Move To Confirm An Arbitrator's Determination In A Section 747 Arbitration.

Several Rejected Dealers ask this Court to confirm and/or enforce their arbitration awards. (*See, e.g.*, Count II of Livonia's Complaint, "Violation of the Act and Confirmation / Enforcement of the Arbitration Award"; Counts II & III of Fox Hills and Village's Counter-Complaint, seeking confirmation of arbitration awards and asking the Court to "enter an Order confirming the Written Determination/Award[s] of the Arbitrator," "enter final Judgment in favor of" Fox Hills and Village, "adjudging, unconditionally, that, as long as [they] meet the contractual obligations of the[ir] franchise agreement[s] prior to Chrysler's bankruptcy rejection," they "shall be restored to Chrysler's dealer network" and that their "most recent Sales and Service Agreement(s) be reinstated/renewed."; Counts IV & V of Fox Hills and Village's Counter-Complaint, seeking an order "enforcing the Written Determination/Award[s]" of the arbitrators, and entering final judgment in favor of Fox Hills and Village, "adjudging, unconditionally, that, as long as [they meet] the contractual obligations of the franchise agreement[s] prior to Chrysler's bankruptcy rejection, [their] franchises shall be continued or reinstated" and their "most recent Sales and Service Agreement(s) be renewed."; Count II of Jim Marsh's Counter-Complaint, seeking substantially similar relief).

The pleadings setting forth requests for confirmation or enforcement do not specify the alleged authority for

seeking confirmation or enforcement of the arbitrators' determinations.

1. Section 747 Does Not Authorize A Party To Move To Confirm Or Vacate An Arbitrator's Determination.

It is undisputed that the arbitrations at issue took place pursuant to Section 747. Congress, however, did not provide in Section 747 any authority under which a party can appeal, or move to vacate, confirm, enjoin, or stay, an arbitrator's determination in a Section 747 arbitration, although it certainly could have done so. "Where Congress does not provide relief that it clearly knows how to provide, it is understood to have deliberately chosen not to provide that relief." *Tysinger Motor Co., Inc. v. Chrysler Group, LLC*, 2011 WL 63866 (E.D. Va. Jan. 7, 2011) (citing *Meghrig v. KFC Western, Inc.*, 516 U.S. 479, 485 (1996)).[7]

[7] Even if the Act did provide that this Court 7 could confirm an arbitrator's determination in a Section 747 arbitration, the "confirmation" requested by several Rejected Dealers goes far beyond confirming the arbitrators' actual determinations. Although couched in terms of "confirmation" or "enforcement," some of the requests, in substance, ask the Court to affirmatively grant relief not provided under the Act – "reinstatement" to the same position they were in when Old Chrysler rejected their franchise agreements.

2. The FAA Does Not Apply To These Statutorily-Mandated Arbitrations Or Authorize A Party To Move To Confirm An Arbitrator's Determination In A Section 747 Arbitration.

To the extent that any of the Rejected Dealers contend that they may seek confirmation under the Federal Arbitration Act, that argument also fails.

Section 747 makes no reference to the Federal Arbitration Act. Moreover, it is well established that "[a]rbitration under the Federal Arbitration Act is 'a matter of consent, not coercion." *Albert M. Higley Co. v. N/S Corp.*, 445 F.3d 861, 863 (6th Cir. 2006) (quoting *Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 479, 109 S.Ct. 1248, 103 L.Ed.2d 488 (1989)). The Federal Arbitration Act ("FAA") applies, and authorizes a party to seek judicial confirmation of an arbitration award, only where the parties have contractually agreed to submit their dispute to arbitration and agreed that a judgment should be entered upon the award. *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 219-220, 105 S.Ct. 1238 (1985) (The purpose of the FAA is to enforce privately negotiated agreements to arbitrate); *see also* 9 U.S.C. § 9, which governs confirmation of arbitration awards under the FAA, and provides that a party can apply to the court for an order confirming an arbitration award "[i]f the parties in their agreement have agreed that a judgment of the court shall be entered upon the award made pursuant to the arbitration.").

Here, New Chrysler and the Rejected Dealers did not enter into agreements to arbitrate and the arbitration was not a matter of consent. Rather, Section 747 required New Chrysler to arbitrate with the Rejected

Dealers. Because the parties did not contractually agree to arbitrate, the FAA does not apply to these statutorily-mandated arbitrations and it therefore does not authorize a party to move to confirm an arbitrator's determination in a Section 747 arbitration.

3. The Commercial Rules Of The AAA Do Not Govern Section 747 Arbitrations And Do Not Authorize A Party To Move To Confirm An Arbitrator's Determination.

In its motion, BGR asserts that it is entitled to seek confirmation pursuant to Rule 48 of the Commercial Rules of the American Arbitration Association ("AAA"). (D.E. No. 234 at 11). This argument also fails.

The only reference that Section 747 makes to the AAA is the provision governing how the arbitrator is to be selected:

> The arbitrator shall be selected from the list of qualified arbitrators maintained by the Regional Office of the American Arbitration Association (AAA), in the Region where the dealership is located, by mutual agreement of the covered dealership and covered manufacturer. If agreement cannot be reached on a suitable arbitrator, the parties shall request AAA to select the arbitrator.

§ 747(e).

Although Congress certainly could have drafted Section 747 to do so, Section does not provide that Section 747 arbitrations are governed by the Commercial Rules of the AAA.

Not only does Section 747 not reference or incorporate the Commercial Rules of the AAA, the Act express-

ly provides the procedures to be followed in a Section 747 arbitration – many of which are contrary to the Commercial Rules of the AAA. For example, Rule 43 of the Commercial Rules of the AAA authorizes the arbitrator to "grant any remedy or relief that the arbitrator deems just and equitable and within the scope of the agreement of the parties . . ." and to award and apportion fees and expenses, while Section 747 expressly provides that the arbitrator "shall not award compensative, punitive, or exemplary damages to any party" and that the "parties shall be responsible for their own expenses, fees, and costs." Rule 43 of Commercial Rules of AAA; § 747(e).

Moreover, the Commercial Rules of the AAA themselves provide that the rules govern an arbitration only if the parties have an agreement to arbitrate and that agreement provides for arbitration by the AAA. *See* Rule 1 of Commercial Rules of AAA ("The parties shall be deemed to have made these rules a part of their arbitration agreement whenever they have *provided for arbitration by the American Arbitration Association* (hereinafter AAA) under its Commercial Arbitration Rules").

New Chrysler and BGR did not enter into an agreement to arbitrate. Rather, Section 747 required New Chrysler to arbitrate with BGR. Because the parties did not contractually agree to arbitrate, and thus do not have an agreement to arbitrate that provides for arbitration by the AAA, the Commercial Rules of the AAA do not apply and the FAA does not authorize BGR to move to confirm the arbitrator's determination.

Accordingly, the Court concludes and declares that Section 747 does not provide for judicial confirmation or enforcement and neither the FAA nor the AAA's Commercial Rules govern these statutorily-mandated arbi-

tration or authorize a party to move to confirm an arbitrator's determination in a Section 747 arbitration.

II. Does Section 747 Preempt State Dealer Acts?

The Rejected Dealers contend that Section 747 preempts the state dealer acts that govern the relationships between automobile manufacturers and dealers in California (Cal. Vehicle Code § 3060 *et seq.*), Florida (Fla. Stat. § 320.01 *et seq.*), Michigan (Mich. Comp. Laws § 445.1561 *et seq.*), Nevada (Nev. Rev. Stat. § 482.36311 *et seq.*), Ohio (Ohio Rev. Code. § 4517.43), and Wisconsin (Wis. Stat § 218.0101 *et seq.*) (collectively, the "State Dealer Acts").

The Court's resolution of this issue must be guided by "two cornerstones" of preemption jurisprudence. *Wyeth v. Levine*, 555 U.S. 555, 565 (2009). First, the purpose of Congress is "the ultimate touchstone" in every preemption case. *Id.* (quoting *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996)). Second, in every preemption case, and particularly in those in which Congress has legislated in a field which the States have traditionally occupied, the Court starts with the "'assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.'" *Wyeth*, 555 U.S. at 565 (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)).

"Preemption can be express or implied. Express preemption occurs when Congress 'explicitly state[s]' that it intends a statute to have that effect. *Fednav, Ltd. v. Chester*, 547 F.3d 607, 618 (6th Cir. 2008) (quoting *Jones v. Rath Packing Co.*, 430 U.S. 519, 525, 97 S.Ct. 1305, 51 L.Ed.2d 604 (1977)). As explained by the Sixth

Circuit, implied preemption comes in two forms, field and conflict preemption:

> Field preemption occurs when "the scheme of federal regulation is sufficiently comprehensive to make reasonable the inference that Congress 'left no room' for supplementary state regulation." *Ohio Mfrs. Assoc. v. City of Akron*, 801 F.2d 824, 828 (6th Cir. 1986) (quoting *Hillsborough County, Fla. v. Automated Medical Labs., Inc.*, 471 U.S. 707, 713, 105 S.Ct. 2371, 85 L.Ed.2d 179 (1978)). Conflict preemption occurs when a provision of state law "actually conflicts with federal law." *City of Akron*, 801 F.2d at 828.

Fednav, 547 F.3d at 618-19.

There is no express preemption here because Congress did not expressly state in Section 747 that it is intended to preempt any State Dealer Acts. In addition, the Rejected Dealers do not argue that field preemption, which occurs when the scheme of federal regulation is sufficiently comprehensive such that it is reasonable to infer that Congress "left no room" for state regulation, is present.[8]

The Rejected Dealers contend that Section 747 preempts State Dealer Acts by virtue of conflict preemption.

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[8] And even if they did make that argument, this Court would reject it. Section 747, which consists of six pages and provides a limited remedy and a limited time-frame for arbitrations, is not the type of comprehensive regulation that leaves no room for state regulation.

Conflict preemption "arises when 'compliance with both federal and state regulations is a physical impossibility,' *Florida Line & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-43, 83 S.Ct. 1210, 1217-18, 10 L.Ed. 248 (1963), or when state law 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress,' *Hines v. Davidowitz*, 312 U.S. 52, 67, 61 S.Ct. 399, 404, 85 L.Ed. 581 (1941)." *Ohio Mfrs. Ass'n v. City of Akron*, 801 F.2d 824, 828 (6th Cir. 1986).

The Rejected Dealers assert that the purpose and objective of Section 747 is to "reinstate" any dealer rejected by Old Chrysler who prevails in a Section 747 arbitration with New Chrysler by requiring to New Chrysler to unconditionally enter into a sales and service agreement with that dealer. (*See e.g.*, D.E. No. 220 at 14) ("Congress clearly intended that a covered dealership which prevailed in its arbitration under the statute would be added to the covered manufacturer's dealer network by entering into a sales and service agreement with the covered manufacturer for the franchises formerly held by the covered dealerships."). They contends that any State Dealer Act provision they prevents or delays that from occurring is an obstacle to Section 747's purpose and objective and therefore conflict preemption arises.

The Rejected Dealers also contend that, because a dealer who prevails in a Section 747 arbitration is entitled to be unconditionally reinstated (i.e., New Chrysler must enter unconditionally enter into a sales and service agreement with that dealer), complying with both Section 747 and the relevant State Dealer Act is impossible. *(See e.g.*, D.E. No. 193 at 4 ("A State Court could rule that, although a covered dealership prevailed under the Arbitration under the Act and was entitled to Reinstatement, the dealership is not allowed under State

Law."). In essence, the Rejected Dealers assert that, under Section 747, they won the unconditional right to enter into sales and service agreements with New Chrysler and therefore compliance with both Section 747 and any state-law provision in a Dealer Act that may prevent or delay that result is impossible.

Both of these arguments are premised on the Rejected Dealers' proposed interpretation of the Act. As set forth *supra*, this Court rejects that interpretation of Section 747. "In light of the importance of congressional intent to preemption analysis," the Court again notes that the legislative history does not support the Rejected Dealer's interpretation of the Act. *Millsaps v. Thompson*, 259 F.3d 535, 547 (6th Cir. 2001). Bills introduced in the House of Representatives included reinstatement language or language requiring covered manufacturers to enter into dealership agreements with terminated dealers "on the same terms and conditions as existed immediately before" the date the bankruptcy proceeding was commenced, but Section 747 as enacted does not include such language. Congress's rejection of such language persuades this Court that the purpose and objective of Section 747 is not to "reinstate" or unconditionally require New Chrysler to enter into a sales and service agreement with any dealer who prevails in a Section 747 arbitration. "Congress does not intend *sub silentio* to enact statutory language that it has earlier discarded in favor of other language." *INS v. Cardoza-Fonseca*, 480 U.S. at 442-43 (quoting *Nachman Corp.*, 446 U.S. at 392-93).

This Court agrees with New Chrysler that Congress intended to provide dealers that had been rejected by Old Chrysler an opportunity to be added to New Chrysler's dealer network by means of a letter of intent to en-

ter into a sales and service agreement. A letter of intent precedes a sales and service agreement and spells out conditions that the dealer candidates must satisfy to become a dealer. Congress could have drafted Section 747 to require that New Chrysler enter into sales and service agreement with any dealer that prevailed in a Section 747 arbitration – but it chose not to do so. The Court agrees that Section 747's limited remedy was carefully crafted by Congress such that it would not conflict with the State Dealer Acts that have governed this area for decades.[9]

Accordingly, the Court concludes that Section 747 does not preempt the State Dealer Acts.

III. Remaining Claims

The above rulings do not dispose of all claims in this action. Like the situation in *Eagle Auto Mall Corp., supra*, several Rejected Dealers assert that New Chrysler has not provided them the statutory customary and usual letter of intent to enter into franchise agreements.

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[9] Some Rejected Dealers also assert that the 9 provisions of the State Dealer Acts in effect in their respective states simply do not apply to them because they are being "reinstated" rather than being added to the dealer network. For example, Mich. Comp. Laws § 445.1576 provides that before a manufacturer enters into a dealer agreement "establishing or relocating a new motor vehicle dealer within a relevant market area where the same line is represented," the manufacturer must provide written notice of its intent to do so to the existing dealers in that market area. Livonia argues that § 445.1576 does not apply to it because it is entitled to be "reinstated" and it therefore is not being "established" in the market area at issue. All such arguments fail because they are also based on a proposed interpretation of the Act that this Court rejects.

Count Two of New Chrysler's July 14, 2001 Complaint for Declaratory Relief New Chrysler asks the Court to declare that the LOIs provided by New Chrysler to Sowell is New Chrysler's customary and usual LOI and is in compliance with Section 747. Count One of Sowell's Counter-Complaint against New Chrysler seeks a declaration that the LOI New Chrysler provided to Sowell is not a customary and usual LOI in compliance with Section 747.[10]

Livonia's complaint seeking declaratory relief also includes a request that the Court declare that the LOI New Chrysler provided to Livonia is not a customary and usual LOI in compliance with Section 747. Among other things, Livonia's Complaint alleges that the LOI provided to it by New Chrysler contains a provision that, in violation of the Michigan Dealer Act, states that Livonia will not protest if a new dealer is added in its market.

In addition, Count II of New Chrysler's February 9, 2011 Complaint for Declaratory Judgment against Fox Hills, Village, and Jim Marsh asks the Court to declare that the LOIs New Chrysler issued to Fox Hills, Village, and Jim Marsh are New Chrysler's customary and usual LOIs and comply with the Act.

Given the Court's rulings above, these dealers are now foreclosed from arguing that the statutorily required LOI must express the terms of their pre-bankruptcy status. Nevertheless, as in *Eagle Auto Mall Corp.*, there remains an open question as to whether the

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[10] Sowell's Counter-Complaint also contains other claims that have not yet been challenged in a motion for summary judgment. (Counts Two through Six of Sowell's Counter-Complaint). These claim also remain pending in this action.

letters of intent provided to the Rejected Dealers constitute the customary and usual letters of intent required by the Act.[11] And as the Rejected Dealers stress, they have not yet had any discovery on the issue.

Accordingly, the Court shall hold a Status / Scheduling Conference, to discuss the status of the remaining claims and the most efficient method of adjudicating those claims.

CONCLUSION & ORDER

For the reasons set forth above, IT IS ORDERED that all motions requesting oral argument on the pending motions to dismiss and/or for summary judgment (D.E. Nos. 355 & 360) are DENIED.

IT IS FURTHER ORDERED that, for the reasons set forth above, this Court hereby DECLARES that:

1) The sole and exclusive remedy for a dealer rejected by Old Chrysler who prevails in a Section 747 arbitration with New Chrysler is a customary and usual letter of intent to enter into a sales and service agreement with New Chrysler.

2) Section 747 does not provide for reinstatement of a dealer rejected by Old Chrysler who prevails in a Section 747 arbitration with New Chrysler.

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[11] New Chrysler agrees that the rejected dealers who obtained a favorable decision in arbitration can seek, in this action, to enforce the remedy provided under Section 747. (*See, e.g.*, D.E. No. 242 at n.6).

3) Section 747 does not authorize an award of monetary damages.

4) Section 747 does not provide for judicial confirmation or enforcement and neither the FAA nor the AAA's Commercial Rules govern these statutorily-mandated arbitrations or authorize a party to move to confirm an arbitrator's determination in a Section 747 arbitration.

5) Section 747 does not preempt the state dealer acts that govern the relationships between automobile manufacturers and dealers in California (Cal. Vehicle Code § 3060 *et seq.*), Florida (Fla. Stat. § 320.01 *et seq.*), Michigan (Mich. Comp. Laws § 445.1561 *et seq.*), Nevada (Nev. Rev. Stat. § 482.36311 *et seq.*), Ohio (Ohio Rev. Code. § 4517.43), or Wisconsin (Wis. Stat § 218.0101 *et seq.*).

IT IS FURTHER ORDERED that New Chrysler's motions for summary judgment, seeking summary judgment as to its July 14, 2011 Complaint for Declaratory Judgment against Spitzer, BGR and Boucher (D.E. Nos. 228, 243 & 229) are GRANTED. The cross-motions for summary judgment filed by Spitzer, BGR, and Boucher (D.E. Nos. 231, 234, & 220) are DENIED.

IT IS FURTHER ORDERED that the motions for partial summary judgment filed by Fred Martin and Falls City (D.E. Nos. 215 & 247) are GRANTED as to Counts Two of their Cross-Complaints and are DENIED in all other respects.

IT IS FURTHER ORDERED that New Chrysler's motion for summary judgment, seeking summary judgment as to its July 14, 2011 Complaint for Declaratory

Judgment against Sowell is GRANTED with respect to Counts One and Three of New Chrysler's Complaint but is DENIED WITHOUT PREJUDICE as to Count Two.

IT IS FURTHER ORDERED that Livonia's Motion for Partial Summary Judgment (D.E. No. 193) is DENIED.

IT IS FURTHER ORDERED that New Chrysler's Cross-Motion for Summary Judgment as to Livonia is GRANTED IN PART AND DENIED IN PART. The motion is DENIED WITHOUT PREJUDICE to the extent that New Chrysler seeks a declaration that the LOI New Chrysler provided to Livonia is New Chrysler's customary and usual LOI and is in compliance with Section 747, and DENIED WITHOUT PREJUDICE with respect to New Chrysler's request to dismiss that portion of Count I of Livonia's complaint seeking a declaration that the LOI New Chrysler issued does not comply with the Act. The motion is GRANTED in all other respects.

Accordingly, Counts II, III, and IV of Livonia's complaint are DISMISSED. Count I is also DISMISSED, with exception of the portion of Count I that asserts a challenge to the LOI provided to Livonia by New Chrysler.

IT IS FURTHER ORDERED that New Chrysler's motions for summary judgment, seeking summary judgment as to its February 9, 2011 Complaint for Declaratory Judgment against Fox Hills, Village, and Jim Marsh (D.E. Nos. 244 & 242) are GRANTED to the extent that summary judgment is granted in favor of New Chrysler as to Count I. The motions are DENIED WITHOUT PREJUDICE as to Count II, which asks the Court to declare that the LOIs New Chrysler issued to

Fox Hills, Village, and Jim Marsh are New Chrysler's customary and usual LOIs and comply with the Act.

IT IS FURTHER ORDERED that the cross-motions for summary judgment filed by Village, Fox Hills, and Jim Marsh (D.E. Nos. 219 & 225) are DENIED and Village, Fox Hills, and Jim Marsh's counter-complaints are DISMISSED.

IT IS FURTHER ORDERED that the Court shall hold a Status / Scheduling Conference on **May 14, 2012 AT 3:00 p.m.,** to discuss the most efficient method of adjudicating the remaining claims in this action.

IT IS SO ORDERED.

S/Sean F. Cox
Sean F. Cox
United States District Judge

Dated: March 27, 2012

I hereby certify that a copy of the foregoing document was served upon counsel of record on March 27, 2012, by electronic and/or ordinary mail.

S/Jennifer Hernandez
Case Manager

APPENDIX D

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Nos. 10-12984, 10-13290 & 10-13908

Chrysler Group LLC, Plaintiff,
v.
South Holland Dodge, Inc., et al., Defendants;

Consolidated with
Livonia Chrysler Jeep, Inc., a Michigan for profit corporation, Plaintiff,
v.
Chrysler Group, LLC, et al., Defendants;

Consolidated with
Chrysler Group LLC, Plaintiff,
v.
Sowell Automotive, Inc., et al., Defendants.

Decided: April 11, 2013

ORDER DENYING FRED MARTIN MOTOR COMPANY'S MOTION FOR SEPARATE TRIAL

COX, District Judge.

Following the 2009 bankruptcies of Chrysler LLC ("Old Chrysler") and General Motors Corporation ("Old GM"), and actions taken to consolidate their respective

dealer networks, Congress enacted Section 747 of the Consolidated Appropriations Act of 2010, Pub. L. No. 111- 117 ("Section 747"). That Act was passed to grant certain arbitration rights to dealerships that were rejected or terminated in connection with the those bankruptcies. Several dealers who had been rejected by Old Chrysler initiated, and prevailed in, Section 747 arbitrations with Chrysler Group LLC ("New Chrysler"). Those arbitration determinations gave rise to this litigation because the parties disagree as to what happens next following those Section 747 arbitration determinations.

In addition to New Chrysler, there are two different groups of dealers who became parties to this action. First, eight dealers whose franchise agreements were rejected by Old Chrysler and who prevailed in Section 747 arbitrations with New Chrysler became parties in these consolidated actions (collectively, the "Rejected Dealers"), including Spitzer Autoworld Akron, LLC ("Spitzer"). Second, there are a number of existing dealers who became parties because they oppose New Chrysler establishing or relocating a dealer who prevailed in a Section 747 arbitration into their area without following the provisions of state-law dealer acts ("Interested Dealers"). Fred Martin Motor Company ("Fred Martin") is one of those Interested Dealers.

Fred Martin's position, expressed in both its Answer to New Chrysler's complaint seeking a declaratory judgment, and in its cross-claim against Spitzer seeking a declaratory judgment (*see* Docket Entry No. 341), is that: 1) Section 747 is unconstitutional; and 2) Section 747 does not preempt the state-law dealer act that governs the relationships between automobile manufacturers and dealers in Ohio (Ohio Rev. Code. § 4517.43).

Fred Martin, like some other parties, also filed a Notice of Constitutional Question (Docket Entry No. 96). Thereafter, the United States intervened in this action in order to defend the constitutionality of Section 747.

In March of 2012, this matter came before the Court on multiple motions to dismiss and motions for summary judgment, filed by the parties prior to discovery, including a Motion for Partial Summary Judgment filed by Fred Martin. (Docket Entry No. 215). In that motion, Fred Martin requested the following relief from this Court:

IX. CONCLUSIONS AND RELIEF REQUESTED.

WHEREFORE, Fred Martin respectfully request that this Honorable Court determine the action before it with respect to Fred Martin by granting Fred Martin summary judgment, holding that:

(I) Section 747 of the Consolidated Appropriates Act, 2010 Pub. L. No. 111-117 violates the separation of power doctrine of the Constitution of the United States; *or, alternatively*

(II) Section 747 of the Consolidated Appropriates Act, 2010 Pub. L. No. 111-117 does not preempt Ohio Revised Code § 4517.50.

(Docket Entry No. 215-1 at 19) (emphasis added).

In an Opinion & Order issued on March 27, 2012 (Docket Entry No. 361), this Court ruled upon the pending motions, including the motion filed by Fred Martin. Among other things, this Court ruled that: 1) The sole and exclusive remedy for a dealer rejected by Old Chrysler who prevails in a Section 747 arbitration with New Chrysler is a customary and usual letter of intent to en-

ter into a sales and service agreement with New Chrysler; and 2) Section 747 does not provide for reinstatement of a dealer rejected by Old Chrysler who prevails in a Section 747 arbitration with New Chrysler. (*Id.*). This Court further noted that "New Chrysler and several Interested Dealers assert that Section 747 would violate the Constitution, if the Court were to interpret Section 747 as the Rejected Dealers urge it to do." (*Id.* at 22 n.5). This Court ruled that "[g]iven that the Court rejects the Rejected Dealers' interpretation of the Act, the Court need not reach the Constitutional issue." (*Id.*). This Court also ruled that Section 747 does not preempt the state-law dealer acts that govern the relationships between automobile manufacturers and dealers in several states, including Ohio (Ohio Rev. Code. § 4517.43). (*Id.* at 3-4).

Accordingly, Fred Martin's cross-claims were resolved by virtue of the rulings in this Court's March 27, 2012, Opinion & Order.

If Fred Martin wished to seek reconsideration of any of the rulings contained in this Court's March 27, 2012, Opinion & Order, it was required to file a motion for reconsideration within fourteen days after it was issued. Local Rule 7.1(h). Fred Martin did not do so.

Nevertheless, on March 13, 2012 – nearly *a full year* after this Court resolved Fred Martin's cross-claims – Fred Martin filed the instant "Motion for Separate Trial Pursuant To FRCP 42(b)." (Docket Entry No. 463). In substance, this is a motion seeking reconsideration of this Court's March 27, 2012, Opinion & Order. Fred Martin asks the Court to reconsider its ruling that the Court need not reach the constitutional issue given its interpretation of Section 747. Fred Martin asserts that the "constitutional issues remain ripe for determination"

and asks this Court to grant it a separate trial, wherein the Court would rule upon the constitutionality of Section 747. Fred Martin's motion states that neither Chrysler nor Spitzer concur with its motion.

On March 22, 2013, the United States filed a brief opposing Fred Martin's motion. (Docket Entry No. 465). The United States contends that the Court should deny the motion "for two independent reasons. First, the Court has already determined that the Constitutional issue is not implicated by the Court's interpretation of Section 747, and Fred Martin's motion to reconsider that ruling is untimely and improper. Second, Fred Martin lacks standing because it has not establish that it will be injured by Section 747 as interpreted by the Court, or that this claimed injury is redressable by a judgment against another dealer." (*Id.* at 1). The Court agrees.

This Court hereby ORDERS that Fred Martin's motion will be decided without oral argument. *See* Local Rule 7.1(f)(2), U.S. District Court, Eastern District of Michigan.

IT IS FURTHER ORDERED that Fred Martin's motion is DENIED.

IT IS SO ORDERED.

S/Sean F. Cox
Sean F. Cox
United States District Judge

Dated: April 11, 2013

I hereby certify that a copy of the foregoing document was served upon counsel of record on April 11, 2013, by electronic and/or ordinary mail.

S/Jennifer McCoy
Case Manager

APPENDIX E

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Nos. 10-12984, 10-13290 & 10-13908

Chrysler Group LLC, Plaintiff,
v.
Fox Hills Motor Sales, Inc., d/b/a Fox Hills Chrysler Jeep, et al., Defendants.
and
Village Chrysler Jeep, Inc., Counter-Plaintiff,
v.
Chrysler Group LLC, Counter-Defendant;

Consolidated with
Livonia Chrysler Jeep, Inc., Plaintiff,
v.
Chrysler Group, LLC, Defendants;

Consolidated with
Chrysler Group LLC, Plaintiff,
v.
Sowell Automotive, Inc. d/b/a/ Dodge City Chrysler-Jeep, et al., Defendants.

Decided: August 8, 2013

JUDGMENT

COX, District Judge.

The Court having consolidated cases numbered 10-12984, 10-13290, and 10-13908 (D.Ed. 92);

The Court having granted various motions for partial summary judgment on March 27, 2012 (D.E. 361);

The Court having denied subsequent motions for summary judgment on April 11, 2013 (D.E. 468);

The Court having conducted a bench trial on the remaining issues on July 9, 2013; and

The Court having issued its Opinion and Order on July 23, 2013 (D.E. 500), finding in favor of Chrysler;

IT IS HEREBY ORDERED that Judgment is entered in favor of Chrysler and against Fox Hills Motor Sales, Inc. d/b/a Fox Hills Chrysler Jeep, Village Chrysler Jeep, Inc. d/b/a Village Automotive Center, Livonia Chrysler Jeep, Inc., and Jim Marsh American Corporation d/b/a Jim Marsh Chrysler-Jeep;

IT IS FURTHER HEREBY ORDERED that all claims and counterclaims against all parties having thus been adjudicated, this matter is now closed.

s/Sean F. Cox
Sean F. Cox
U. S. District Judge

Dated: August 8, 2013

I hereby certify that the above document was served on counsel and/or parties of record by electronic means.

s/Jennifer McCoy
Case Manager

Dated August 8, 2013

APPENDIX F

The Consolidated Appropriations Act of 2010, Pub. L. No. 111-117, § 747, 123 Stat. 3219-3221 (2009), provides:

SEC. 747. (a) DEFINITIONS.—For purposes of this section the following definitions apply:

(1) The term "covered manufacturer" means—

(A) an automobile manufacturer in which the United States Government has an ownership interest, or to which the Government has provided financial assistance under title I of the Emergency Economic Stabilization Act of 2008; or

(B) an automobile manufacturer which acquired more than half of the assets of an automobile manufacturer in which the United States Government has an ownership interest, or to which the Government has provided financial assistance under title I of the Emergency Economic Stabilization Act of 2008.

(2) The term "covered dealership" means an automobile dealership that had a franchise agreement for the sale and service of vehicles of a brand or brands with a covered manufacturer in effect as of October 3, 2008, and such agreement was terminated, not assigned in the form existing on October 3, 2008 to another covered manufacturer in connection with an acquisition of assets related to the manufacture of that vehicle brand or brands, not renewed, or not continued during the period beginning on October 3, 2008, and ending on December 31, 2010.

(b) A covered dealership that was not lawfully terminated under applicable State law on or before April 29, 2009, shall have the right to seek, through binding arbi-

tration, continuation, or reinstatement of a franchise agreement, or to be added as a franchisee to the dealer network of the covered manufacturer in the geographical area where the covered dealership was located when its franchise agreement was terminated, not assigned, not renewed, or not continued. Such continuation, reinstatement, or addition shall be limited to each brand owned and manufactured by the covered manufacturer at the time the arbitration commences, to the extent that the covered dealership had been a dealer for such brand at the time such dealer's franchise agreement was terminated, not assigned, not renewed, or not continued.

(c) Before the end of the 30-day period beginning on the date of the enactment of this Act, a covered manufacturer shall provide to each covered dealership related to such covered manufacturer a summary of the terms and the rights accorded under this section to a covered dealership and the specific criteria pursuant to which such dealer was terminated, was not renewed, or was not assumed and assigned to a covered manufacturer.

(d) A covered dealership may elect to pursue the right to binding arbitration with the appropriate covered manufacturer. Such election must occur within 40 days of the date of enactment. The arbitration process must commence as soon as practicable thereafter with the selection of the arbitrator and conclude with the case being submitted to the arbitrator for deliberation within 180 days of the date of enactment of this Act. The arbitrator may extend the time periods in this subsection for up to 30 days for good cause. The covered manufacturer and the covered dealership may present any relevant information during the arbitration. The arbitrator shall balance the economic interest of the covered dealership, the economic interest of the covered manufacturer, and the

economic interest of the public at large and shall decide, based on that balancing, whether or not the covered dealership should be added to the dealer network of the covered manufacturer. The factors considered by the arbitrator shall include (1) the covered dealership's profitability in 2006, 2007, 2008, and 2009, (2) the covered manufacturer's overall business plan, (3) the covered dealership's current economic viability, (4) the covered dealership's satisfaction of the performance objectives established pursuant to the applicable franchise agreement, (5) the demographic and geographic characteristics of the covered dealership's market territory, (6) the covered dealership's performance in relation to the criteria used by the covered manufacturer to terminate, not renew, not assume or not assign the covered dealership's franchise agreement, and (7) the length of experience of the covered dealership. The arbitrator shall issue a written determination no later than 7 business days after the arbitrator determines that case has been fully submitted. At a minimum, the written determination shall include (1) a description of the covered dealership, (2) a clear statement indicating whether the franchise agreement at issue is to be renewed, continued, assigned or assumed by the covered manufacturer, (3) the key facts relied upon by the arbitrator in making the determination, and (4) an explanation of how the balance of economic interests supports the arbitrator's determination.

(e) The arbitrator shall be selected from the list of qualified arbitrators maintained by the Regional Office of the American Arbitration Association (AAA), in the Region where the dealership is located, by mutual agreement of the covered dealership and covered manufacturer. If agreement cannot be reached on a suitable arbitrator, the parties shall request AAA to select the arbitrator. There will be no depositions in the proceed-

ings, and discovery shall be limited to requests for documents specific to the covered dealership. The parties shall be responsible for their own expenses, fees, and costs, and shall share equally all other costs associated with the arbitration, such as arbitrator fees, meeting room charges, and administrative costs. The arbitration shall be conducted in the State where the covered dealership is located. Parties will have the option of conducting arbitration electronically and telephonically, by mutual agreement of both parties. The arbitrator shall not award compensatory, punitive, or exemplary damages to any party. If the arbitrator finds in favor of a covered dealership, the covered manufacturer shall as soon as practicable, but not later than 7 business days after receipt of the arbitrator's determination, provide the dealer a customary and usual letter of intent to enter into a sales and service agreement. After executing the sales and service agreement and successfully completing the operational prerequisites set forth therein, a covered dealership shall return to the covered manufacturer any financial compensation provided by the covered manufacturer in consideration of the covered manufacturer's initial determination to terminate, not renew, not assign or not assume the covered dealership's applicable franchise agreement.

(f) Any legally binding agreement resulting from a voluntary negotiation between a covered manufacturer and covered dealership(s) shall not be considered inconsistent with this provision and any covered dealership that is a party to such agreement shall forfeit the right to arbitration established by this provision.

(g) Notwithstanding the requirements of this provision, nothing herein shall prevent a covered manufactur-

er from lawfully terminating a covered dealership in accordance with applicable State law.