No. 15-_____

IN THE
Supreme Court of the United States

DEERE & COMPANY, CNH AMERICA LLC, AND AGCO CORPORATION,
Petitioners,
v.

STATE OF NEW HAMPSHIRE,
Respondent.

On Petition for a Writ of Certiorari to the New Hampshire Supreme Court

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The Constitution's Contract Clause prohibits States from passing any "Law impairing the Obligation of Contracts." In 2013, the New Hampshire legislature amended its existing automobile dealer franchise law by deeming heavy equipment like tractors and excavators to be "motor vehicles," thus extending the reach of the automobile-dealer law to the heavy-equipment industry. The law voided all of the preexisting contracts between petitioners and their New Hampshire dealers, on pain of criminal penalties for any attempt to enforce their provisions. The New Hampshire Supreme Court sanctioned the destruction of these contracts against a Contract Clause challenge, holding that it was reasonable and necessary to advance a significant and legitimate public purpose—specifically, "leveling the playing field" in the private dealings between equipment dealers and manufacturers. That holding placed the New Hampshire Supreme Court squarely in conflict with the holdings of multiple other courts on essentially identical facts.

The question presented is whether the Contract Clause prohibited the New Hampshire legislature from retroactively voiding petitioners' private contracts, in the name of "leveling the playing field" between the parties to those contracts.

PARTIES TO THE PROCEEDING

Deere & Company, CNH America LLC, and AGCO Corporation, petitioners on review, were plaintiff-appellants below.

Kubota Tractor Corporation and Husqvarna Professional Products, Inc. also were plaintiff-appellants below.

Frost Farm Service, Inc. and the New Hampshire Automobile Dealers Association were intervenors below.

The State of New Hampshire, respondent on review, was the defendant-appellee below.

RULE 29.6 DISCLOSURE STATEMENT

1. Deere & Company is a publicly held company whose shares are traded on the New York Stock Exchange. No public company owns 10% or more of its stock.

2. CNH America LLC, now known as CNH Industrial America LLC, is wholly owned by Case New Holland Industrial Inc., which is in turn wholly owned by CNH Industrial N.V., a publicly held company whose stocks are traded on the New York Stock Exchange.

3. AGCO Corporation is a publicly held company whose shares are traded on the New York Stock Exchange. No publicly held company owns 10% or more of its stock.

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Deere & Company, CNH America LLC, and AGCO Corporation (collectively, petitioners) respectfully petition for a writ of certiorari to review the judgment of the New Hampshire Supreme Court in this case.

OPINIONS BELOW

The New Hampshire Supreme Court's opinion is reported at 130 A.3d 1197. Pet. App. 1a-33a. The Merrimack Superior Court's order on cross-motions for summary judgment is unreported. *Id.* at 34a-50a. The Hillsborough Superior Court, Northern District's order entering a preliminary injunction is also unreported. *Id.* at 51a-77a.

JURISDICTION

The New Hampshire Supreme Court entered

judgment on December 29, 2015. This Court's jurisdiction is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article I, Section 10, Clause 1 of the U.S. Constitution provides, in relevant part:

"No State shall * * * pass any * * * Law impairing the Obligation of Contracts, or grant any Title of Nobility."

New Hampshire Senate Bill 126 is reproduced in the appendix to this petition.[1] Pet. App. 78a-103a. The as-amended N.H. Rev. Stat. Ann. § 357-C follows. Pet. App. 104a-182a.

INTRODUCTION

This Court has described the Contract Clause in our Nation's early days as "the strongest single constitutional check on state legislation." *Allied Structural Steel Co.* v. *Spannaus*, 438 U.S. 234, 241 (1978). It is found alongside prohibitions against bills of attainder and ex post facto laws, all of which "reflect the strong belief of the Framers of the Constitution that men should not have to act at their peril, fearing always that the State might change its mind and alter the legal consequences of their past acts so as to take away their lives, their liberty or their property." *City of El Paso* v. *Simmons*, 379

[1] Senate Bill 126 revised N.H. Rev. Stat. Ann. § 357-C and simultaneously repealed § 347-A. The bill was signed into law on June 25, 2013 and became effective on September 23, 2013. Petitioners include the final Senate Bill in their Appendix, followed by the as-revised statute, to show exactly which changes were effected by the 2013 legislation.

U.S. 497, 522 (1965) (Black, J., dissenting). As James Madison put it in describing the necessity of the Contract Clause: "The sober people of America are weary of the fluctuating policy which has directed the public councils." The Federalist No. 44 at 279 (James Madison) (C. Rossiter ed., 2003).

While in subsequent decades the force of the Contract Clause receded somewhat from its early high-water mark, this Court repeatedly has confirmed that the Clause "remains part of the Constitution. It is not a dead letter." *Spannaus*, 438 U.S. at 241; *see also United States Tr. Co.* v. *New Jersey*, 431 U.S. 1, 16 (1977) (noting that the "Contract Clause [is not] without meaning in modern constitutional jurisprudence").

The New Hampshire Supreme Court did not heed that message. Its decision below, which deferred entirely to the state legislature's retroactive reallocation of rights and responsibilities, has stripped the Contract Clause of all force and meaning, rendering it precisely the "dead letter" this Court warned against. *Spannaus*, 438 U.S. at 241.

Before New Hampshire passed Senate Bill 126, heavy equipment manufacturers and their dealers contracted relatively freely. Unlike motor vehicle manufacturers and their dealers, who for 40 years had been bound by the Automobile Dealer's Bill of Rights, N.H. Rev. Stat. Ann. § 357-C, the statute governing the equipment industry was passed only in 1995. *Id.* § 347-A. And unlike its motor-vehicle counterpart, the equipment-industry statute contained only rudimentary ground rules; it did not regulate dealer area, did not impose statutory limits upon a manufacturer with regard to establishing or

relocating a dealership, did not outlaw pre-dispute arbitration agreements, did not include an administrative enforcement mechanism, did not provide for criminal penalties, and did not dictate a list of practices deemed unfair and deceptive.

That all has now radically changed. In 2013, the New Hampshire legislature passed Senate Bill 126, which redefined "motor vehicle" in the Automobile Dealer's Bill of Rights to include certain types of heavy equipment, like tractors and construction equipment. Pet. App. 80a. The legislature simultaneously repealed Section 347-A, the provision that previously governed the contractual arrangements between equipment manufacturers and their dealers. *Id.* at 103a. The new law was heralded by one of its sponsors, Senator Joseph E. "Jeb" Bradley, as "necessary to protect dealers, make sure that we have a level playing field." N.H. H. Comm. on Commerce & Consumer Affairs, Public Hr'g on SB 126-FN (Apr. 16, 2013).

Thus, in two quick strokes, the legislature razed the landscape for equipment manufacturers and their dealers. Following Senate Bill 126, large swaths of petitioners' contracts, entered into between 1990 and 2012, were retroactively rendered void as against public policy. And by the statute's own terms, equipment manufacturers risked *criminal liability* if they sought to enforce the terms of those contracts.

There could be no clearer example of legislation running afoul of the Contract Clause. Far from furthering a significant and legitimate societal interest, Senate Bill 126 served only to retroactively renegotiate private contracts among equipment

manufacturers and their dealers, as a sop to the dealers' lobby. It is exactly that retroactive meddling with private contracts the Framers sought to prevent. Hence the conflict the New Hampshire Supreme Court creates with other state courts of last resort and with the federal courts of appeals.

Nor is the constitutional problem presented here one reserved to tractors and harvesters; absent this Court's intervention, any industry could be the next target of legislative overreach.

Certiorari should be granted.

STATEMENT

The Contract Clause. In order to provide a "constitutional bulwark" against a State's attempts to rewrite private contracts pursuant to "fluctuating policy," The Federalist No. 44, the Contract Clause provides that "[n]o State shall * * * pass any * * * Law impairing the Obligation of Contracts." U.S. Const. art. I, § 10, cl. 1. This language is not as absolute as it may at first appear. States may, for example, " 'promot[e] the common weal' " and act " 'for the general good of the public' " despite some ancillary effects on private contracts. *Spannaus*, 438 U.S. at 241 (quoting *Manigault* v. *Springs*, 199 U.S. 473, 480 (1905)). *See, e.g., Keystone Bituminous Coal Ass'n* v. *DeBenedictis*, 480 U.S. 470, 487-488 (1987) (approving law passed to protect the public from mining subsidence damage); *Energy Reserves Grp., Inc.* v. *Kansas Power & Light Co.*, 459 U.S. 400, 416-417 (1983) (approving law passed to mitigate escalating energy costs); *Home Bldg. & Loan Ass'n* v. *Blaisdell*, 290 U.S. 398, 444-445 (1934) (approving law passed to ameliorate mass losses of homes at time of economic crisis). But States may *not*

substantially impair a private contractual relationship absent a significant and legitimate public purpose that justifies the extent of the impairment. *Energy Reserves Grp.*, 459 U.S. at 411-412; *Spannaus*, 438 U.S. at 244.

New Hampshire's Automobile Dealer Bill of Rights. The Automobile Dealer Bill of Rights, formally titled "Regulation of Business Practices Between Motor Vehicle Manufacturers, Distributors, and Dealers," was passed by the New Hampshire legislature in 1981. The Automobile Dealer Bill of Rights is detailed and demanding. It contains 20 sections and requires those it regulates to participate in an administrative process before the New Hampshire Motor Vehicle Industry Board to resolve disputed issues related to warranty, relevant market area, and termination. *See*, *e.g.*, N.H. Rev. Stat. Ann. §§ 357-C:5; 357-C:7; 357-C:9; 357-C:12. The statute restricts a manufacturer's ability to terminate, cancel, or fail to renew dealerships unless it can show "good cause" for doing so. *Id.* § 357-C:3.III(c). It restricts a manufacturer's ability to add a new franchise to an existing franchise's "relevant market area" or to change the coverage of that area absent a showing of good cause. *Id.* § 357-C:3. III(l), (o). It requires manufacturers to sell or offer to sell all models manufactured for a line make to all franchisees of that line make. *Id.* § 357-C:3.III(q). It prohibits manufacturer-owned dealerships from competing against dealers unless the manufacturer-owned dealer is able to obtain relief from the Board. *Id.* 357-C:3.III(k). Any violation of the statute is chargeable as a misdemeanor. *Id.* § 357-C:15.

The Automobile Dealer Bill of Rights had long been

in place when the state legislature passed the statute governing equipment manufacturers, N.H. Rev. Stat. Ann. § 347-A (repealed 2013), in 1995. But the legislature took a different approach to those manufacturers. Section 347-A permitted equipment manufacturers to terminate dealerships for any breach of the dealership agreement. N.H. Rev. Stat. Ann. § 347-A:2.I. It imposed no restrictions on manufacturers with respect to adding new dealerships or selling only certain segments of a line make to certain dealers. It permitted manufacturer-owned dealerships without restriction. It did not require manufacturers to obtain permission from an administrative board before taking certain actions. It allowed for pre-dispute mandatory arbitration agreements. And the statute made no provision for criminal liability.

Because the contracts at issue in this case were entered into against the backdrop of Section 347-A, they provided negotiated answers to the statute's open questions. Manufacturers and dealers provided by contract how termination would be handled, how new dealerships would be added, which models of a line make would be sold to which dealers, and whether conflicts arising under the contract's provisions would be resolved by mandatory arbitration.

Senate Bill 126. All that changed in 2013. At the urging of the New Hampshire Automobile Dealers Association, *see* NHADA Mot. For Leave to File Amicus Curiae Br. 1 (Merrimack Super. Ct., No. 216-2013-CV-554), the New Hampshire legislature passed Senate Bill 126, which simultaneously repealed Section 347-A and brought equipment manufacturers and dealers within the sweep of the

Automobile Dealer Bill of Rights. State Representative Edward A. Butler explained that the new law sought to "level the playing field," to repair what he viewed as an "autocratic relationship" between manufacturers and New Hampshire tractor and equipment dealers. *See* 35 N.H. H. Rec. No. 43, at 1473 (May 22, 2013). Senator Jeb Bradley agreed, acknowledging that although "[s]ome say that this is an unnecessary intrusion into what is essentially a contract dispute, [*it is*] *necessary to protect dealers*, make sure that we have a level playing field." N.H. H. Comm. on Commerce & Consumer Affairs, Public Hr'g on SB 126-FN (Apr. 16, 2013) (emphasis added).

Under the regime now in place, equipment manufacturers can no longer immediately terminate a dealer, N.H. Rev. Stat. Ann. § 357-C:7, no longer have cause to terminate a dealer under many circumstances that previously would have supported termination for cause under their agreements, *id.* § 357-C:7.III(a), (c)-(e), and may only terminate a dealer for "good cause" in two narrow circumstances, *id.* § 357-C:7.II. And before a manufacturer may terminate, cancel, or even decline to renew a dealership, it now must preemptively litigate the issue before the Motor Vehicle Industry Board. *Id.* § 357-C:7.I(d).

Nor can equipment manufacturers alter a dealer's sales territory at their discretion, as their contracts previously provided. The new statute converts these non-exclusive territories into "relevant market areas" that may not be changed by a manufacturer without "good cause." N.H. Rev. Stat. Ann. § 357-C:3.III(a), (k)(l); *id.* § 357-C:9. For the first time, manufacturers are prohibited from competing or authorizing others to compete within a "relevant market area."

Id. § 357-C:3. Nor can they add a dealership or relocate a dealership within a "relevant market area" without showing "good cause" and securing a finding from the Board that good cause (in the Board's wisdom) exists. *Id.* § 357-C:9.

The statute not only affects *where* a dealer may sell, but also *what* it may sell. N.H. Rev. Stat. Ann. § 357-C:1.XXVII defines a "line make" as all equipment that manufacturers "offer[] for sale, lease, or distribution under a common name, trademark, service mark, or brand name." The statute now renders it an "unfair and deceptive practice" for a manufacturer to "[f]ail or refuse to sell or offer to sell to all motor vehicle franchisees of a line make, all models manufactured for that line make." *Id.* § 357-C:3.III(q). That is true without regard to the type of equipment involved or to whether there is market demand for these models in the relevant market area. But petitioners' preexisting contracts specifically contemplated that a dealer would be limited to selling only certain equipment within a given line make. *See* Pet. App. 62a. That makes sense: Unlike the automotive industry, in which a line make refers to a limited variety of cars or trucks, a line make in the equipment industry encompasses a wide variety of equipment sizes, shapes, prices, and functions. Within a single line make, for example, Deere & Company manufactures construction, forestry, agriculture, landscaping and golf course maintenance products. John Deere, John Deere Products, Machines & Equipment, https://goo.gl/MnyEXc (last visited Mar. 27, 2016).

The statute also upends contracting parties' settled expectations that any disputes will be resolved by binding arbitration. The statute renders it an "un-

fair and deceptive practice" for petitioners to require equipment dealers to agree to a term or condition in a dealership agreement containing a binding pre-dispute arbitration clause. N.H. Rev. Stat. Ann. § 357-C:3.III(p)(3). Instead, the statute requires warranty disputes and disputes relating to termination, cancellation, and non-renewal to be litigated first before the Board. *Id.* § 357-C:5, C:7. Certain disputes related to adding or relocating dealerships to an existing "relevant market area" must also be presented first to the Board for resolution. *Id.* §357-C:9. In fact, Section 357-C:12.II provides that only the Board has "exclusive powers" to enforce the statute, except where the Superior Court is expressly authorized to do so.

Section 357-C:15 of the law makes any violation of the statute a misdemeanor.

This Litigation. Petitioners promptly challenged the constitutionality of the statute under the Contract Clause of the United States Constitution, U.S. Const. art. I, § 10, cl. 1, and its New Hampshire counterpart, N.H. Const. pt. I, art. 23.[2] They also argued that the statute violated the Supremacy Clause of the U.S. Constitution by voiding the arbitration provisions of Deere & Company's and AGCO Corporation's contracts in contravention of the

[2] Part I, Article 23 of the New Hampshire Constitution provides: "Retrospective laws are highly injurious, oppressive, and unjust. No such laws, therefore, should be made, either for the decision of civil causes, or the punishment of offenses." This proscription is read to be coextensive with the federal Contract Clause with respect to the impairment of contracts. *Tuttle* v. *New Hampshire Med. Malpractice Joint Underwriting Ass'n*, 992 A.2d 624, 640-641 (N.H. 2010).

Federal Arbitration Act, 9 U.S.C. § 1 *et seq*. They sought declaratory and injunctive relief.

Before the statute went into effect, the Hillsborough County trial court granted a preliminary injunction on the ground that petitioners had demonstrated a likelihood of success on the merits of their claim that the new law violated the federal and state Contract Clauses. Pet. App. 51a-77a. On the State's motion, and over petitioners' objections, the court subsequently transferred the case to Merrimack Superior Court.

Petitioners and the State then filed cross-motions for summary judgment. Pet. App. 34a-35a. Petitioners' motion set forth the standard courts apply when assessing whether legislation passes muster under the Contract Clause: Has the law substantially impaired a contractual relationship? How severe is the impairment? *Spannaus*, 438 U.S. at 244. Is there a "significant and legitimate public purpose behind the regulation"? *Energy Reserves Grp.*, 459 U.S. at 411-412. And if there is, is the contractual intrusion "necessary to meet an important general social problem"? *Spannaus*, 438 U.S. at 247.

Invoking that test, petitioners explained that Senate Bill 126 violated the federal and state Contract Clauses because it retroactively and substantially impaired—in at least ten respects—valid contracts between manufacturers and their dealers without a genuine legitimate and significant public (as opposed to special, private) purpose. *See* Plaintiffs' Mem. In Support of Mot. For Summ. J. 12-26 (Merrimack Super. Ct. No. 216-2013-CV-00554). It thus was impermissible special-interest

legislation. Petitioners also argued that Senate Bill 126 violated the Supremacy Clause because its prohibition against arbitration violated the Federal Arbitration Act. *Id.* at 46-49.

The State, needless to say, resisted petitioners' arguments at nearly every turn. As to the substantiality of the impairment, the State responded that the statutory changes worked by Senate Bill 126 were merely "refinements" to the State's prior regulation of the equipment industry. Defendants' Mem. In Support of Mot. For Summ. J. 8 (Merrimack Super. Ct. No. 216-2013-CV-554). As to the statute's "public purpose," the State claimed that it was designed to prevent abuses by manufacturers against dealers and by manufacturers and dealers against the public. *Id.* at 14. And with regard to the Supremacy Clause, the State noted only that if the statute's provisions prohibiting arbitration agreements were held to violate the Federal Arbitration Act, the law's severability clause would allow the remaining provisions to remain in force. *Id.* at 20-21. (The State failed to explain, however, how that was possible, given the pervasive nature of the preempted provisions; nor did the State explain how petitioners could shield themselves from potential criminal liability if they ran afoul of the State's view of the required compliance.)

The trial court ruled against petitioners on their Contract Clause claims. While agreeing with them that the statute plainly "created added requirements by which [petitioners] must act," the court found such additions to represent mere "refinements in the law," not substantial impairments of their existing contracts. Pet. App. 42a. Therefore, the court concluded, neither the federal nor the state Contract

Clause was violated. The court added that certain provisions of Senate Bill 126 conflicted with the Federal Arbitration Act and were therefore invalid. *Id.* at 48a-49a. But because the statute contained a severability provision, the remaining provisions continued in force. *Id.* at 49a.

Petitioners appealed.

The New Hampshire Supreme Court affirmed.[3] It first assumed that the new law indeed terminated petitioners' existing contracts with their dealers in whole or in significant part, thereby substantially impairing them. Pet. App. 12a-13a. The court should next have addressed the severity of that impairment. *See Keystone Bituminous Coal Ass'n*, 480 U.S. at 504 & n.31. It did not. Instead, it turned immediately to the public-purpose element, applying a standard it described as similar but "not identical to rational basis review in the equal protection or due process context." *Id.* at 18a. Applying that most deferential of constitutional standards, the court held that the statute served a significant and legitimate public purpose by protecting equipment dealers and consumers from perceived abuses, *id.* at 17a, and that retroactive application of Senate Bill 126 was reasonable and necessary to further this public purpose. *Id.* at 19a-21a. The court did not, however,

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[3] The New Hampshire Supreme Court's opinion in this case also resolved a consolidated appeal brought by Husqvarna Professional Products, Inc. This petition is being filed concurrently with the petition in that case. Because the petitioners present some overlapping, but not identical, issues, petitioners in both cases believe the petitions both should be granted. The Court may then wish to consolidate the cases for oral argument.

pause to assess the fit of the law to its purported purpose.

Petitioners sought a stay of the New Hampshire Supreme Court's mandate pending the filing and resolution of a petition for a writ of certiorari, explaining that if the statute were to be permitted to enter into force, they would immediately risk criminal penalties merely by enforcing their preexisting agreements with dealers. The New Hampshire Supreme Court denied the motion to stay and issued the mandate. Petitioners' request for a stay of enforcement of the judgment in this Court was denied. *See* Docket, No. 15A910.

This petition followed.

REASONS FOR GRANTING THE PETITION

I. THIS COURT SHOULD GRANT REVIEW TO CLARIFY THE LEVEL OF SCRUTINY TO BE APPLIED TO A STATUTE THAT SUBSTANTIALLY IMPAIRS PRIVATE CONTRACTS.

Any Contract Clause analysis proceeds in four steps. First, a court must determine whether the state law has substantially impaired a contractual relationship. *Spannaus*, 438 U.S. at 244. If it has, the court must analyze the severity of the impairment to "measure[] the height of the hurdle the state legislation must clear." *Id.* at 245. Once the severity of the impairment and the applicable level of scrutiny have been established, the State must present a "significant and legitimate public purpose behind the regulation." *Energy Reserves Grp.*, 459 U.S. at 411-412. The court then compares the fit of the statute to the asserted purpose to determine whether the intrusion in private contracts

was "necessary to meet an important general social problem." *Spannaus,* 438 U.S. at 247.

The New Hampshire Supreme Court went off the rails at Step 2. It never analyzed the extent to which Senate Bill 126 impaired the private contracts between manufacturers and dealers. And because it did not, the court also never calculated the appropriate level of scrutiny to be applied in assessing the statute's constitutionality.

In *Keystone Bituminous Coal Ass'n* v. *DeBenedictis*, 480 U.S. 470 (1987), this Court stated in no uncertain terms that the extent-of-the-impairment analysis is "essential to determine the 'severity of the impairment,' which in turn affects 'the level of scrutiny to which the legislation will be affected.' " *Id.* at 504 & n.31 (quoting *Energy Reserves Grp.*, 459 U.S. at 411). By failing to engage in this analysis, the New Hampshire Supreme Court acted in flat contravention of *Keystone*'s admonishment.

The New Hampshire Supreme Court's failure to assess the level of impairment in this case was not just in conflict with this Court's precedent; it was outcome-determinative. "[T]he more severe the impairment, the closer scrutiny the statute will receive." *Equipment Mfrs. Inst.*v. *Janklow*, 300 F.3d 842, 854 (8th Cir. 2002) (citing *Spannaus*, 438 U.S. at 245). And here, the statute worked *several* substantial impairments on multiple private contracts; indeed, it destroyed them.

For just one example, the New Hampshire statute did away with the petitioners' contractual rights to terminate dealers unilaterally for breach of the dealership agreement. Compare N.H. Rev. Stat. Ann. § 357-C:7, with *id.* § 347-A:2 (1995) (repealed

2013). Courts have repeatedly found impairment of the right of unilateral termination, *standing alone*, to be a fundamental impairment for purposes of Contract Clause analysis. *See Garris* v. *Hanover Ins. Co.*, 630 F.2d 1001, 1006 (4th Cir. 1980) (noting that the "right of unilateral termination * * * must be accounted a critical feature of [Hanover's] total contractual relationships"); *Reliable Tractor, Inc.* v. *John Deere Const. & Forestry Co.*, 376 F. App'x 938, 942 (11th Cir. 2010) (per curiam) (law extending dealer agreements indefinitely absent proof of "good cause" to terminate violates Contract Clause).

Other statutes purporting to eliminate termination rights regularly have been found to violate the Contract Clause. The Eighth Circuit has concluded, for example, that a statutorily imposed, retroactive limitation on a manufacturer's ability to terminate dealership agreements unconstitutionally impaired those agreements. *Equipment Mfrs. Inst.*, 300 F.3d at 856, 862. The Delaware Supreme Court similarly has concluded that a statute prohibiting cancellation of franchise agreements except for "just cause" and on reasonable notice substantially impaired those agreements in violation of the Contract Clause. *Globe Liquor Co.* v. *Four Roses Distillers Co.*, 281 A.2d 19, 20 (Del.), *cert. denied*, 404 U.S. 873 (1971). The termination restrictions at issue in these cases are essentially indistinguishable from those present in § 357-C:7.

The New Hampshire Supreme Court parted company with all these decisions, many of them on closely comparable facts. This Court's guidance is needed to establish the appropriate level of scrutiny to be applied to a statute's substantial retroactive

impairment of private contracts.

II. THE NEW HAMPSHIRE SUPREME COURT'S DECISION CONFLICTS WITH THIS COURT'S PRECEDENTS REQUIRING THAT RETROACTIVE LEGISLATION MUST BE REASONABLE AND NECESSARY TO EFFECTUATE A PUBLIC PURPOSE.

1. Another casualty of the New Hampshire Supreme Court's analytical errors and omissions was its failure to make any but the most superficial inquiry into whether the retroactive destruction of petitioners' contracts was reasonable and necessary to accomplish the State's ostensible objective. Consistent with the "deeply rooted presumption against retroactive legislation," *Vartelas* v. *Holder*, 132 S. Ct. 1479, 1484, 1486 (2012), the Contract Clause thus "must be understood to impose *some* limits upon the power of a State to abridge existing contractual relationships, even in the exercise of its otherwise legitimate police power." *Spannaus*, 438 U.S. at 242. After all, if a State could justify any intrusion into private contracts by reference to some distant collateral effect on the public interest, the Framers' "constitutional bulwark in favor of personal security and private rights," The Federalist No. 44 at 279, has been divested of all vitality.

That is why "complete deference to a legislative assessment of reasonableness and necessity is not appropriate" in a Contract Clause analysis. *See United States Tr. Co.*, 431 U.S. at 26. A court instead "must undertake its own independent inquiry to determine the reasonableness of the law and the importance of the purpose behind it." *Id.*

The New Hampshire court did not. Rather, it uncritically reviewed the State's proffered rationale for the law under a "rational speculation" standard that *no* other court of appeals appears ever to have adopted in the Contract Clause context. Pet. App. 19a.

That approach cannot be the law. The inquiry *must* be "more searching" than rational basis review as applied to due process or equal protection analysis. *Mercado-Boneta* v. *Administracion del Fondo de Compensacion al Pacienteo*, 125 F.3d 9, 13 (1st Cir. 1997). After all, it is always possible to "rationally speculate" that a law dedicated to advancing *some* interests could collaterally enhance the *public* interest, according to some sort of vague "trickle-down" public-interest theorem. A State could, for example, conclude that it will eradicate the student loans or mortgages of a select group of people; that in turn might advance a public purpose by permitting those persons to open a small business, to advance their station in life, or to inject those saved funds into the economy through investment, donations to charity, or buying more local products. And thus one group's improved bargain may leach through to the indirect benefit of others.

But the Contract Clause was designed in our Nation's earliest days to prohibit exactly this: It was intended to preclude the government from using private bills to relieve certain persons or groups from their contractual obligations. The Federalist No. 44 at 279. And thus before a State may enact a broadly sweeping statute that destroys many contracts, it must do more than offer a naked and generalized claim of public purpose to survive Contract Clause scrutiny. After all, "[l]egislation adjusting the rights and responsibilities of contracting parties must be

upon reasonable conditions and of a character appropriate to the public purpose justifying its adoption." *United States Tr. Co.*, 431 U.S. at 22; *see also Pension Benefit Guar. Corp.* v. *R.A. Gray & Co.*, 467 U.S. 717, 733 (1984) (noting contrast between "limitations imposed on States by the Contract Clause with the less searching standards imposed on economic legislation by the Due Process Clauses").

2. When a court applies its "more searching" standard of review to state legislation, it must also ensure that a State has not "impose[d] a drastic impairment when an evident and more moderate course would serve its purposes equally well." *United States Tr. Co.*, 431 U.S. at 31. Although the New Hampshire Supreme Court purported to "assume" contractual impairment, Pet. App. 12a-13a, it neither assessed the substantiality of that impairment, as we have explained, *nor* did it rigorously assess whether the statute's degree of interference with private contracts was properly tailored to the public interest it purported to protect. *Home Bldg. & Loan Ass'n*, 290 U.S. at 445.

It should have. A court hearing a Contract Clause challenge must consider "the ends and means chosen by the state legislature" and apply its "independent, considered judgment as to whether the legislative enactment makes a rational accommodation between the affirmative power exercised by the state and the negative safeguard embodied in the Contract Clause." *Garris*, 630 F.2d at 1009 (footnotes omitted) (citing Alexander M. Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics*, 37-41 (1962)). Exercise of that "independent, considered judgment" sometimes means that the language of the Act will not be found to be "reasonably related to the

public purpose asserted [therefor] by the legislature." *Id.* at 1009-10. *See W.B. Worthen Co.* v. *Thomas*, 292 U.S. 426, 433-434 (1934) (striking down Arkansas law under the Contract Clause because it was not appropriately tailored to its purpose; it was not "temporary nor conditional" and contained "no limitations as to time, amount, circumstances, or need"); *W.B. Worthen Co.* v. *Kavanaugh*, 295 U.S. 56, 60 (1935) (striking down another Arkansas law because "[e]ven when the public welfare is invoked as an excuse" a mortgage security cannot be destroyed "without moderation or reason or in a spirit of oppression").

3. The State, for its part, "must do more than mouth the vocabulary of the public weal in order to reach safe harbor" from a Contract Clause challenge. *McGrath* v. *Rhode Island Ret. Bd.*, 88 F.3d 12, 16 (1st Cir. 1996). This is important: the State must offer a substantial and legitimate *public* purpose to "guarantee[] that the State is exercising its police power, rather than providing a benefit to special interests." *Energy Reserves Grp.*, 459 U.S. at 412. One need only review the backdrop against which Senate Bill 126 was passed to understand that this law is precisely the special-interest legislation the Contract Clause forbids.

By its own admission, the New Hampshire Automobile Dealers Association "has been instrumental in assisting the Legislature to enact amendments to New Hampshire RSA 357-C." NHADA Mot. For Leave to File Amicus Curiae Br. 1 (Merrimack Super. Ct., No. 216-2013-CV-554). The bill's legislative history confirms as much, with both Representative Butler and Senator Bradley invoking the legislature's interest in "level[ing] the playing

field." *See* 35 N.H. H. Rec. No. 43, at 1473 (May 22, 2013); N.H. H. Comm. on Commerce & Consumer Affairs, Public Hr'g on SB 126-FN (Apr. 16, 2013).

But retroactive renegotiation of contracts is not a prize to be awarded for dogged lobbying or political largesse. Quite the contrary. The very purpose of the Contract Clause was to prevent "legislative interferences" directed by "enterprising and influential speculators" at the expense of "the more-industrious and less-informed part of the community." The Federalist No. 44 at 279. Senator Bradley's refreshingly candid admission is a quintessential example of prohibited special-interest legislation, and no amount of "mouth[ing] the vocabulary of the public weal" can adequately transform it.

Senate Bill 126 lays waste to all of petitioners' contracts—all of them. New Hampshire was bound to justify such a complete impairment by showing that Bill 126 was both a reasonable and necessary way to protect dealers from manufacturers. It is manifestly neither. The State of New Hampshire offers no explanation of how destroying existing dealership agreements through its retrospective legislation is preferable to more measured, prospective, constitutional alternatives that would leave functioning agreements intact. The New Hampshire Supreme Court, for its part, flatly declined to measure the constitutional validity of the law by the yardstick of its asserted purpose, as this Court's precedents require. Certiorari should be granted for this reason as well.

III. THIS COURT SHOULD GRANT REVIEW TO DECIDE WHETHER "LEVELING THE PLAYING FIELD" BETWEEN PRIVATE CONTRACTING PARTIES IS A LEGITIMATE AND SUBSTANTIAL PUBLIC PURPOSE JUSTIFYING RETROACTIVE LEGISLATION.

1. Applying a unique and markedly deferential level of scrutiny, the New Hampshire Supreme Court held that Senate Bill 126 possessed a significant and legitimate "public purpose" sufficient to pass constitutional muster. It did so in the face of the numerous statements made by House representatives that the purpose of the law was not "public" in the least, but indeed was quintessentially private: to "level[] the playing field" between equipment manufacturers and their dealers. 35 N.H. H. Rec. No. 43, at 1473 (May 22, 2013). According to the New Hampshire Supreme Court, however, the State has a significant and legitimate interest in protecting dealers from their own contracts. Pet. App. 13a-19a. This aspect of the New Hampshire Supreme Court's decision supplies an equally strong ground for certiorari.

Indeed, there is a split among the federal courts of appeals and state courts of last resort as to whether "leveling the playing field"—essentially reallocating settled contractual rights from one side of the contract to the other—is a substantial and legitimate "public purpose." The Eighth Circuit has answered that question in the negative, explaining that "directly adjust[ing] the rights and responsibilities of dealers and manufacturers under the pre-existing dealership agreements" was not a substantial and

legitimate public purpose. *Equipment Mfrs. Inst.*, 300 F.3d at 861. The Southern District of Iowa, in a decision later affirmed by the Eighth Circuit, agreed, explaining that "adjust[ing] the balance of power between contracting parties * * * does not supply a broad societal interest." *McDonald's Corp.* v. *Nelson*, 822 F. Supp. 597, 608-609 (S.D. Iowa 1993), *aff'd sub nom. Holiday Inns Franchising, Inc.* v. *Branstad*, 29 F.3d 383 (8th Cir.), *cert. denied*, 513 U.S. 1032 (1994). As the *McDonald's* court explained, there was no substantial and legitimate "broad societal interest" where the Act's goals were "the equalization of bargaining power, the promotion of fair dealing, and the protection of franchisees from fraudulent and abusive practices by franchisors." *Id.* at 608.

The Sixth Circuit, however, has concluded that such a purpose *is* legitimate and substantial—to a point. In *Cloverdale Equipment Co.* v. *Manitowoc Engineering Co.*, 149 F.3d 1182 (6th Cir. 1998) (tbl.), 1998 WL 385906, the court reviewed the retroactive application of Michigan's Farm and Utility Equipment Act to an existing contract between an equipment manufacturer and its dealer. The court blessed the statute's public purpose, describing it as an "attempt to balance the bargaining power of farm equipment dealers, usually small businesses, against that of manufacturers, typically large corporations, by regulating the terms of contracts between dealers and manufacturers." *Id.* at *4. The court went on to conclude, however, that retroactive application of the statute to a preexisting contractual relationship *was not reasonable* and necessary to effectuate the stated purpose. *Id.* at *5.

2. The New Hampshire Supreme Court selectively followed the Sixth Circuit's reasoning. Like the

Sixth Circuit, the New Hampshire court concluded that the New Hampshire legislature's goal of retroactively altering a perceived disparity in bargaining power between private contracting commercial parties was a significant and legitimate public purpose. *Unlike* the Sixth Circuit, however, the New Hampshire court found that purpose sufficient to justify retroactive legislation—by applying a "rational speculation" theory no other court of appeals appears ever to have applied. *See supra* at 18.

3. Because it parted ways with the Sixth Circuit on the question whether retroactive application of the law was necessary to effectuate New Hampshire's averred "public" purpose, the New Hampshire Supreme Court began, and largely ended, its analysis of the legitimacy and substantiality of the State's asserted public purpose by citing this Court's decision in *New Motor Vehicle Board* v. *Orrin W. Fox Co.*, 439 U.S. 96 (1978). *See* Pet. App. 3a-4a. In that case, an automobile manufacturer and two automobile dealers brought a substantive due process challenge to the California Automobile Franchise Act. 439 U.S. at 104. The Court upheld the statute, explaining that the state legislature "was empowered to subordinate the franchise rights of automobile manufacturers to the conflicting rights of their franchisees where necessary to prevent unfair or oppressive trade practices." *Id.* at 107.

That is all true as far as it goes. But *New Motor Vehicle Board*—and all but one of the other decisions the New Hampshire Supreme Court cited for that proposition—were not Contract Clause cases evaluating the power of a State to legislate retroactively. They were, rather, decisions

addressing whether state legislatures may legislate *prospectively* to prevent what they believe to be "injurious practices." *See id.* at 107 (citation omitted). Of course they may. But that a state legislature may prospectively change the regulatory allocation of benefits and burdens does not mean that it may retroactively legislate without consequence. That is precisely why this Court was careful to specify in *New Motor Vehicle Board* that States' power to legislate extends only "so long as their laws do not run afoul of some specific federal constitutional prohibition," *id.* at 107—such as, for example, the Contract Clause.

The one decision on which the New Hampshire Supreme Court relied that *did* involve a Contract Clause challenge, *Alliance of Auto. Mfrs.* v. *Gwadosky*, 430 F.3d 30 (1st Cir. 2005), *cert. denied*, 547 U.S. 1143 (2006), relied on a "dispositive" finding that the particular recoupment bar at issue, which precluded motor vehicle manufacturers from recovering their reimbursement costs for a dealer's warranty repair parts and labor, did not substantially impair the franchise agreements at issue. *Id.* at 42. In light of that dispositive finding, the court's musings on the legitimacy of the statute's public purpose are nothing more than dicta.

IV. THIS CASE PRESENTS AN IDEAL VEHICLE TO ADDRESS THE QUESTION PRESENTED.

This petition presents a clean, clear opportunity to address and resolve the question presented here.

First, the question presented is outcome-determinative. If New Hampshire Senate Bill 126 violates the Contract Clause, petitioners' contracts with their dealers remain in place, without the manufacturers risking criminal liability. If it does not violate the Contract Clause, petitioners' contracts are no more.

Second, there is an existing split among the lower courts on the operation of the Contract Clause *in precisely this context*. The Eighth Circuit has concluded that retroactive legislation significantly impairing contracts between equipment manufacturers and their dealers does not pass constitutional muster when the State is attempting only to "level the playing field" by reshuffling the contractual rights and obligations assigned to manufacturers and dealers. *Equipment Mfrs. Inst.*, 300 F.3d at 862. So has the Sixth. *Cloverdale Equip. Co.*, 1998 WL 385906, at *4. So has the Eleventh. *Reliable Tractor*, 376 F. App'x at 942. All those decisions squarely conflict with the New Hampshire Supreme Court's decision in this case—meaning that if New Hampshire were somehow gerrymandered into the Sixth, Eighth, or Eleventh Circuits, its special-interest legislation would not fly. *See also Cloverdale Equip. Co.*, 1998 WL 385906, at *4; *Reliable Tractor*, 376 F. App'x at 942.

Third, there is no need for further percolation on the issue. Multiple courts of appeal have set forth their views on the topic, and they clash. In future,

lower courts will merely be selecting one or the other analytical framework, giving no further assistance to this Court's consideration of the issue.

And there is much to be gained through the Court's intervention now. The New Hampshire Supreme Court has given its blessing to retroactively rejiggering the private contracts of favored groups. Its view of a toothless Contract Clause sets no practical limits on a State's ability to target any industry's contracts. Without knowing which is next in a legislature's sights, confidence in any manner of private contracts is imperiled. This slippery slope has been evident since the Framing, when James Madison warned that "one legislative interference is but the first link of a long chain of repetitions, every subsequent interference being naturally produced by the effects of the preceding." The Federalist No. 44 at 279.

For example, Kentucky has passed—and Florida is currently considering passing—an unclaimed life insurance statute requiring life insurance companies to investigate each year whether policy holders have died so that beneficiaries can be paid. *See* Kentucky Unclaimed Life Insurance Benefits Act, Ky. Rev. Stat. Ann. § 304.15-420 (2014); H.B. 1041, Reg. Sess. (Fl. 2016). These statutes would retroactively rewrite the terms of existing life insurance policies, which had assigned to the beneficiary the duty to inform the insurer of a policyholder's death. Nevada, for its part, has passed a law, at the urging of the fossil fuel lobby, to revise the State's solar energy policy. S.B. 374, 78th Leg., Reg. Sess. (Nev. 2015). Regulations enacted pursuant to the new law, Senate Bill 374, retroactively altered the energy contracts of net-metering customers who put solar panels on

their property. Those customers previously could receive credits against their energy bills in proportion to the energy the panels produced, but regulations enacted pursuant to the new law cut those credits by three-quarters and tripled the monthly fees customers had expected would remain constant for the twenty- or thirty-year life of their contracts. Nevada S.B. 374; Jacques Leslie, Opinion, *Nevada's Solar Bait-and-Switch*, N.Y. Times, Feb. 1, 2016.

The Court should grant review to decide this important question. It should not wait for the next blatant incursion on an industry's settled contractual rights.

V. THE DECISION BELOW IS SO MANIFESTLY INCORRECT THAT SUMMARY REVERSAL IS WARRANTED.

The New Hampshire Supreme Court did not only skip analytical steps (setting it in conflict with this and multiple other courts), and did not only bless an impermissible protective statute by a hat-tip to a thinly disguised "public purpose" (again setting it in conflict with this Court and multiple others). The court simply got it wrong, and in several respects. Given the New Hampshire Supreme Court's utter failure to comply with this Court's precedents setting forth the proper Contract Clause analysis, the Court should summarily reverse and remand to the New Hampshire Supreme Court. *See Maryland* v. *Kulbicki*, 136 S. Ct. 2, 3 (2015) (per curiam) (summarily reversing where the court applied governing Supreme Court case "in name only"); *Grady* v. *North Carolina*, 135 S. Ct. 1368, 1370 (2015) (per curiam) (summarily reversing a judgment

inconsistent with the Court's Fourth Amendment precedents); *Martinez* v. *Illinois*, 134 S. Ct. 2070, 2077 (2014) (per curiam) (summarily reversing a holding that "r[an] directly counter to [this Court's] precedents").

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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MARCH 2016

APPENDIX

APPENDIX A

THE SUPREME COURT OF NEW HAMPSHIRE

Merrimack
Nos. 2014-0315
2014-0441
2014-0575

DEERE & COMPANY & a.

v.

THE STATE OF NEW HAMPSHIRE
KUBOTA TRACTOR CORPORATION

v.

THE STATE OF NEW HAMPSHIRE
HUSQVARNA PROFESSIONAL PRODUCTS, INC.

v.

THE STATE OF NEW HAMPSHIRE

Argued: September 10, 2015
Opinion Issued: December 29, 2015

NOTICE: This opinion is subject to motions for rehearing under Rule 22 as well as formal revision before publication in the New Hampshire Reports. Readers are requested to notify the Reporter, Supreme Court of New Hampshire, One Charles Doe Drive, Concord, New Hampshire 03301, of any editorial errors in order that corrections may be made before the opinion goes to press. Errors may be reported by E-mail

at the following address: reporter@courts.state.nh.us. Opinions are available on the Internet by 9:00 a.m. on the morning of their release. The direct address of the court's home page is: http://www.courts.state.nh.us/supreme.

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McLane Middleton, Professional Association, of Manchester (Michael A. Delaney on the brief), and Thompson Hine LLP, of Cleveland, Ohio (Thomas J. Collin and Jennifer S. Roach on the brief, and Mr. Collin orally), for petitioner Husqvarna Professional Products, Inc.

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Holmes Law Offices PLLC, of Concord (Gregory A. Holmes on the brief and orally), for the intervenor, Frost Farm Service, Inc.

Douglas, Leonard 85 Garvey, P.C., of Concord (Jason R.L. Major and Charles G. Douglas, III on the brief), for Association of Equipment Manufacturers, as amicus curiae.

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Guerry and Shaun Gehan on the brief), for Outdoor Power Equipment Institute, as amicus curiae.

DALIANIS, C.J. In these consolidated appeals, the petitioners, Deere 85 Company (Deere), CNH America LLC (CNH), AGCO Corporation (AGCO), Kubota Tractor Corporation (Kubota), and Husqvarna Professional Products, Inc. (Husqvarna), appeal orders of the Superior Court (Smukler, J.) granting summary judgment to the respondent, the State of New Hampshire, on the petitioners' constitutional challenges to Senate Bill (SB) 126. We affirm in part, vacate in part, and remand.

D. Brief Factual Summary

The pertinent facts follow. SB 126, enacted in 2013, amended RSA chapter 357-C to define "motor vehicle" as including "equipment," which "means farm and utility tractors, forestry equipment, industrial equipment, construction equipment, farm implements, farm machinery, yard and garden equipment, attachments, accessories, and repair parts." Laws 2013, 130:1 (quotations omitted); see RSA 357-C:1, I (Supp. 2015); see also STIHL, Inc. v. State of N.H., 168 N.H. ___ (decided Oct. 27, 2015) (concluding that the statutory definition of motor vehicle, as amended by SB 126, pertains to equipment that is analogous to automobiles, that is, equipment with an engine, wheels, and a transmission). Because of this amendment, manufacturers, distributors, and dealers of such equipment are, for the first time, subject to the New Hampshire Motor Vehicle Franchise Act, RSA chapter 357-C. See STIHL, Inc., 168 N.H. at ___; see also RSA ch. 357-C (2009 85 Supp. 2015).

Like its federal counterpart and similar state statutes, RSA chapter 357-C, "the so-called 'dealer bill of rights,' STIHL, Inc., 168 N.H. at ___, was enacted "to protect retail car dealers from perceived abusive and oppressive acts by the manufacturers." New Motor Vehicle Bd. of Cal. V. Orrin W.

Fox Co., 439 U.S. 96, 101 (1978) (discussing such laws in general), see id. at 100-01 n.4 (quoting Congressional report that gave rise to the federal legislation); see also Roberts v. General Motors Corp., 138 N.H. 532, 536 (1994). As first enacted in 1981, RSA chapter 357-C provided motor vehicle dealers certain protections from the actions of manufacturers. See Laws 1981, ch. 477; see also STIHL, Inc., 168 N.H. at ___. Over time, the legislature increased the level of regulation by, for instance, creating the New Hampshire Motor Vehicle Industry Board (Board) to enforce the statute, see Laws 1996, 263:8, and expanding the definition of motor vehicle to include off highway recreational vehicles, see Laws 2002, 215:4, and snowmobiles, see Laws 2007, 372:3. See STIHL, Inc., 168 N.H. at ___.

RSA chapter 357-C regulates, among other things, a manufacturer's delivery and warranty obligations and termination of dealership agreements. See RSA 357-C:4 (2009), :5, :7 (Supp. 2015). RSA chapter 357-C also defines unfair methods of competition and deceptive practices. See RSA 357-C:3 (Supp. 2015). Violation of any provision of RSA chapter 357-C constitutes a misdemeanor. See RSA 357-C:15 (2009).

Among other safeguards, RSA chapter 357-C "protects the equities of existing dealers by prohibiting" motor vehicle "manufacturers from adding dealerships to the market areas of its existing franchisees where the effect of such intrabrand competition would be injurious to the existing franchisees and to the public interest." New Motor Vehicle Bd. of Cal., 439 U.S. at 101 (describing California Automobile Franchise Act, a law similar to RSA chapter 357-C); see RSA 357-C:9 (Supp. 2015). To enforce this prohibition, RSA chapter 357-C requires a motor vehicle manufacturer that seeks to establish a new motor vehicle dealership or relocate an existing new motor vehicle dealership "within a relevant market area where the same line make is then represented," to give written notice of such intention to the Board and to

"each new motor vehicle dealer of such line make in the relevant market area." RSA 357-C:9, I; see New Motor Vehicle Bd. of Cal., 439 U.S. at 103 (describing California Automobile Franchise Act). RSA chapter 357-C defines the "[r]elevant market area" as "any area within the town or city where the motor vehicle dealer maintains his place of business or the area, if any, set forth in a franchise or agreement, whichever is larger." RSA 357-C:1, XXI (2009). If a new motor vehicle dealership protests to the Board within a statutorily-defined period of time, the Board then holds a hearing to determine whether there is "good cause," as statutorily-defined, for "not permitting such new motor vehicle dealership." RSA 357-C:9, I; see RSA 357-C:9, II, III. Among the factors to consider when determining whether "good cause" exists are: (1) "[a]ny effect on the retail new motor vehicle business and the consuming public in the relevant market area," RSA 357-C:9, II(b); (2) whether establishing an additional new dealership "is injurious or beneficial to the public welfare," RSA 357-C:9, II(c); and (3) whether establishing an additional dealership "would increase competition, and therefore be in the public interest," RSA 357-C:9, III.

As the legislature expanded RSA chapter 357-C, it also enacted RSA chapter 347-A, a similar but less comprehensive regulatory scheme providing protections to equipment dealers. STIHL, Inc., 168 N.H. at ___; see Laws 1995, ch. 210. RSA chapter 347-A regulated: (1) the termination of dealer agreements; (2) a supplier's duty upon termination of such an agreement; (3) the terms for repurchasing inventory upon termination of such an agreement and exceptions thereto; (4) a dealer's right to transfer its business; (5) warranty obligations; and (6) the obligation of a successor in interest. See RSA 347-A:2-:6, :8, :11 (2009) (repealed 2013). Unlike RSA chapter 357-C, RSA chapter 347-A did not include an administrative enforcement mechanism, provide for criminal penalties,

impose statutory limits upon the ability of a manufacturer to establish or relocate a dealership, or specify the methods of competition and practices that were deemed unfair and deceptive. See RSA ch. 347-A (2009) (repealed 2013).

When the legislature, through SB 126, amended the definition of "motor vehicle" in RSA chapter 357-C to bring certain equipment manufacturers and dealers within the aegis of that chapter, it also repealed RSA chapter 347-A. STIHL, Inc., 168 N.H. at ___; see Laws 2013, ch. 130. SB 126 became effective in September 2013. Laws 2013, 130:19.

In August 2013, Deere, CNH, and AGCO, collectively referred to as the Deere petitioners, sued the State for declaratory and injunctive relief related to SB 126. The Deere petitioners manufacture agricultural, construction, forestry, industrial, lawn, and garden equipment, including commercial mowers, wheel loaders, backhoes, and agricultural tractors. Their complaint alleges that: (1) retroactive application of SB 126 substantially impairs their existing dealership agreements in violation of the State and Federal Contract Clauses; and (2) SB 126 violates the Supremacy Clause of the Federal Constitution because it voids or otherwise renders unenforceable mandatory binding arbitration clauses in existing dealership agreements, thereby conflicting with the Federal Arbitration Act (FAA). Thereafter, the Deere petitioners obtained a court order that preliminarily enjoined the State "from including farm and equipment manufacturers within the definition of motor vehicles" in RSA chapter 357-C "as provided for under SB 126." In October 2013, the trial court granted intervenor status to Frost Farm Service, Inc., an equipment dealer and franchisee of AGCO.

The Deere petitioners and the State subsequently filed cross-motions for summary judgment. In April 2014, the trial court granted the State's motion and denied the Deere petitioners' motion, concluding that the Deere petitioners had

"not sustained their burden of showing that SB 126 unconstitutionally impairs existing contracts." The court observed that the Deere petitioners had identified "ten substantial SB 126 impairments," but that "[n]ot all of the [identified] impairments . . . apply to each of the contracts in question." Ultimately, the court concluded that, although including the Deere petitioners "within the purview of RSA [chapter] 357-C has created added requirements by which [they] must act, such additions represent refinements in the law," and do not constitute substantial impairments of their existing contracts. For example, the court observed, although RSA chapter 357-C requires that a dealership agreement may not be terminated except upon "good cause," RSA chapter 347-A contained a similar mandate. RSA 357-C:7, I(c); see RSA 347-A:2, I. Under RSA chapter 347-A, a dealership agreement could not be terminated "without cause" and "cause" was defined as "failure by an equipment dealer to comply with requirements imposed upon the equipment dealer by the dealer agreement," provided that those requirements were not substantially different from those imposed upon other similarly situated dealers. Id.

The trial court further concluded that, even if SB 126 substantially impaired the Deere petitioners' existing contracts, their contract clause claim failed because SB 126 serves the legitimate and significant public purpose of safeguarding consumer interests and "constitutes broad-based economic legislation that is directed to meet a societal need." However, the court agreed with the Deere petitioners that, as applied to equipment manufacturers, portions of RSA 357-C:3, III(p)(3) and RSA 357-C:6, III violate the Supremacy Clause because they conflict with, and are preempted by, the FAA. Nonetheless, the court rejected their argument that those provisions are so integral to RSA chapter 357-C that they are not severable. The Deere petitioners appeal the trial court's decision. The trial court stayed its summary judgment order pending the instant appeal.

Shortly before the court ruled upon the summary judgment motions in the Deere action, Husqvarna brought its own action challenging the constitutionality of SB 126. Husqvarna manufactures forestry, lawn and garden equipment, including mowers, garden tractors, and snow throwers, which it sells through more than 40 independent dealers in New Hampshire. In addition to alleging counts for unconstitutional impairment of contract and violation of the Supremacy Clause, Husqvarna alleges that SB 126 violates the Equal Protection and dormant Commerce Clauses of the Federal Constitution.

Thereafter, Husqvarna and the State filed cross-motions for summary judgment. In August 2014, the trial court granted the State's motion and denied Husqvarna's motion. Husqvarna appeals the trial court's order. The trial court stayed application of SB 126 to Husqvarna pending final disposition of this appeal.

In April 2014, Kubota brought its own action against the State, alleging a single count — that SB 126 substantially impairs its existing dealer agreements in New Hampshire in violation of the State and Federal Contract Clauses. Kubota describes itself as "a long standing distributor of construction, farm, and lawn equipment." In June 2014, Kubota and the State filed a joint motion for a final order asking the trial court to confirm that the final order it had entered in the Deere action applied to Kubota. The trial court granted the motion and stayed application of the Deere order to Kubota pending the resolution of Kubota's appeal.

II. Analysis

On appeal, all petitioners argue that SB 126 violates the State and Federal Contract Clauses. See N.H. CONST. pt. I, art. 23; U.S. CONST. art. I, § 10, cl. 1. The Deere petitioners and Husqvarna assert that SB 126 also offends the Supremacy Clause. See U.S. CONST. art. 6, cl. 2. Finally,

Husqvarna contends that SB 126 violates the federal Equal Protection Clause, see U.S. CONST. amend. XIV, and the dormant Commerce Clause, see U.S. CONST. art. I, § 8, cl. 3. We first address the petitioners' claims under the State and Federal Contract Clauses and then address claims arising only under the Federal Constitution. "Throughout, we keep in mind the elementary rule that every reasonable construction must be resorted to in order to save a statute from unconstitutionality." Alliance of Auto. Mfrs. v. Gwadosky, 430 F.3d 30, 35 (1st Cir. 2005) (quotation, brackets, and ellipses omitted). We confine our analysis to the questions raised on appeal and do not otherwise opine upon the wisdom and reasonableness of the legislature's decision to amend RSA chapter 357-C by defining "motor vehicle" to include "equipment." RSA 357-C:1, I. "The wisdom and reasonableness of the legislative scheme are for the legislature, not the courts, to determine." Blackthorne Group v. Pines of Newmarket, 150 N.H. 804, 810 (2004).

D. Standards of Review

"In reviewing the trial court's rulings on cross-motions for summary judgment, we consider the evidence in the light most favorable to each party in its capacity as the nonmoving party and, if no genuine issue of material fact exists, we determine whether the moving party is entitled to judgment as a matter of law." Bovaird v. N.H. Dep't of Admin. Servs., 166 N.H. 755, 758 (2014) (quotation omitted). "If our review of that evidence discloses no genuine issue of material fact and if the moving party is entitled to judgment as a matter of law, then we will affirm the grant of summary judgment." Id. (quotation omitted). "We review the trial court's application of the law to the facts de novo." Id. (quotation omitted).

We review the trial court's statutory interpretation de novo. Id. On questions of statutory interpretation, we are the final arbiter of the intent of the legislature as expressed in the

words of a statute considered as a whole. Eby v. State, 166 N.H. 321, 341 (2014). We first examine the language of the statute and ascribe the plain and ordinary meanings to the words used. Id. We interpret legislative intent from the statute as written and will not consider what the legislature might have said or add language that the legislature did not see fit to include. Id. at 341-42.

We review the constitutionality of a statute de novo. Am. Fed'n of Teachers — N.H. v. State of N.H., 167 N.H. 294, 300 (2015). "The party challenging a statute's constitutionality bears the burden of proof." Id. (quotation omitted). "In reviewing a legislative act, we presume it to be constitutional and will not declare it invalid except upon inescapable grounds." Id. (quotation omitted). "In other words, we will not hold a statute to be unconstitutional unless a clear and substantial conflict exists between it and the constitution." Id. (quotation omitted). Thus, a statute will not be construed to be unconstitutional when it is susceptible of a construction rendering it constitutional. Id. "When doubts exist as to the constitutionality of a statute, those doubts must be resolved in favor of its constitutionality." Id. (quotation omitted).

B. Contract Clauses

The petitioners' primary contention is that SB 126 violates the State and Federal Contract Clauses because it substantially impairs their existing New Hampshire dealership agreements. Part I, Article 23 of our State Constitution provides that "[r]etrospective laws are highly injurious, oppressive, and unjust. No such laws, therefore, should be made, either for the decision of civil causes, or the punishment of offenses." N.H. CONST. pt. I, art. 23. The Contract Clause of the Federal Constitution provides: "No State shall . . . pass any . . . Law impairing the Obligation of Contracts . . . ." U.S. CONST. art. I, § 10, cl. 1. Although Part I, Article 23 does not expressly reference existing

contracts, "we have held that its proscription duplicates the protections found in the contract clause of the United States Constitution." State v. Fournier, 158 N.H. 214, 221 (2009) (quotation omitted). "The Federal and State Constitutions offer equivalent protections where a law impairs a contract, or where a law abrogates an earlier statute that is itself a contract." Id. (quotation omitted). We first address the petitioners' arguments under the State Constitution and rely upon federal law only to aid our analysis. See State v. Ball, 124 N.H. 226, 231-33 (1983).

The threshold inquiry in a contract clause analysis is whether the law has a retroactive effect upon an existing contract. Fournier, 158 N.H. at 218 (explaining that in "testing legislation against Part I, Article 23," we first "discern whether the legislature intended the law to apply retroactively," and, if so, "we then inquire whether such retroactive application is constitutionally permissible"). Here, the parties do not dispute that the legislature intended SB 126 to apply retroactively. Accordingly, we assume for the purposes of this appeal that such is the case and confine our analysis to the remaining elements of the petitioners' claim of a contract clause violation.

When evaluating a contract clause claim, a court must determine "whether a change in state law has resulted in the substantial impairment of a contractual relationship." Am. Fed'n of Teachers — N.H., 167 N.H. at 301 (quotation omitted). "This inquiry, in turn, has three components: whether there is a contractual relationship, whether a change in law impairs that contractual relationship, and whether the impairment is substantial." Id. (quotation omitted).

To survive a contract clause challenge, a legislative enactment that constitutes a substantial impairment of a contractual relationship "'must have a significant and legitimate public purpose.'" Id. (quoting Energy Reserves Group v. Kansas Power 85 Light, 459 U.S. 400, 411 (1983));

see Tuttle v. N.H. Med. Malpractice Joint Underwriting Assoc., 159 N.H. 627, 653 (2010) (using the phrases "important public purpose" and "significant and legitimate public purpose" interchangeably). "The requirement of a legitimate public purpose guarantees that the State is exercising its police power, rather than providing a benefit to special interests." Energy Reserves Group, 459 U.S. at 412; see Tuttle, 159 N.H. at 642 (explaining that "the core task involved in resolving Contract Clause claims" is "striking a balance between constitutionally protected contract rights and the State's legitimate exercise of its reserved police power").

Once a significant and legitimate public purpose is identified, the next inquiry

> is whether the adjustment of the rights and responsibilities of contracting parties is based upon reasonable conditions and is of a character appropriate to the public purpose justifying the legislation's adoption. Unless the State itself is a contracting party, as is customary in reviewing economic and social regulation, courts properly defer to legislative judgment as to the necessity and reasonableness of a particular measure.

Energy Reserves Group, 459 U.S. at 412-13 (quotation, brackets, citations, and ellipsis omitted); cf. Tuttle, 159 N.H. at 653-55 (determining that traditional deference to legislature's judgment as to necessity and reasonableness of challenged law was unwarranted, even though State was not a contracting party, because State's financial self-interest was at stake).

Although, with regard to some of their challenges, it is questionable whether SB 126 substantially impairs the petitioners' existing agreements with their New Hampshire dealers, for the purposes of this appeal, we assume that it

does. Nevertheless, we conclude that SB 126 does not violate the State and Federal Contract Clauses because it has a "significant and legitimate public purpose" and because the legislature's "adjustment of the rights and responsibilities of contracting parties is based upon reasonable conditions and is of a character appropriate to the public purpose" justifying the adoption of SB 126. Energy Reserves Group, 459 U.S. at 412 (quotation and brackets omitted).

D. Significant and Legitimate Public Purpose

SB 126 was enacted to provide to equipment dealers the same level of protection provided to automobile dealers under RSA chapter 357-C. See N.H.H.R. Jour. 765 (May 22, 2013). The legislature deemed such protection necessary because it considered the "relationship between equipment dealers and manufacturers" to be "identical to that [between] car/truck dealers" and car/truck manufacturers. Id. The legislature determined that "[e]quipment dealers . . . have business operations that are nearly identical in all respects to car/truck/motorcycle etc. dealers." Id. The legislature further found that equipment dealership agreements, like automobile dealership agreements, had been "one-sided" and reflected that the dealers and manufacturers had "an autocratic relationship." Id. The legislature was concerned that manufacturers shifted costs "onto dealers and ultimately consumers" through the use of such "one-sided, non-negotiable contracts." Id. It concluded that equipment manufacturers, like automobile manufacturers previously, "were abusing their power in the relationship" and that New Hampshire "businesses and consumers were being harmed as a result." Id.

The purpose of SB 126 — to protect equipment dealers and consumers from perceived abusive and oppressive acts by manufacturers — is unquestionably a significant and legitimate public purpose. See New Motor Vehicle Bd. of Cal., 439 U.S. at 101. As the United States Supreme Court

explained when examining a substantive due process challenge to the California Automobile Franchise Act, a state legislature is "empowered to subordinate the franchise rights of [motor vehicle] manufacturers to the conflicting rights of their franchisees where necessary to prevent unfair or oppressive trade practices." Id. at 107. The Court specifically identified "the promotion of fair dealing and the protection of small business" as valid state interests. Id. at 102 n.7.

Numerous federal and state courts, addressing constitutional challenges to laws similar to RSA chapter 357-C, have concluded that protecting dealers and consumers from the oppressive acts of manufacturers constitutes a legitimate public purpose. See, e.g., Fireside Nissan, Inc. v. Fanning, 30 F.3d 206, 218 (1st Cir. 1994) (analyzing argument that Rhode Island automobile dealership law violated the dormant Commerce Clause and explaining that "the state's desire to protect local dealers and consumers from harmful franchising practices is a lawful legislative goal"); Am. Motor Sales v. Div. of Motor Vehicles, Etc., 592 F.2d 219, 222-23 (4th Cir. 1979) (addressing dormant Commerce Clause claim and concluding that a "Virginia statute regulating the establishment of new automobile franchises serves a legitimate local purpose" because it fulfills the same interests identified by the Court in New Motor Vehicle Board of California); Acadia Motors, Inc. v. Ford Motor Co., 844 F. Supp. 819, 827-28 (D. Me. 1994) (in contract clause case, determining that Maine had significant and legitimate interests in rectifying "[t]he disparity in bargaining power between automobile manufacturers and their dealers" and in protecting dealers from abusive and oppressive manufacturer practices), affirmed in part and reversed in part on other grounds, 44 F.3d 1050 (1st Cir. 1995); Mon-Shore Management, Inc. v. Family Media, Inc., 584 F. Supp. 186, 191 (S.D.N.Y. 1984) (rejecting dormant Commerce Clause claim and concluding that New York had

"a valid interest in protecting prospective franchisees from unscrupulous franchisors" and that the "protection of investors" is a legitimate state objective); General Motors v. Motor Vehicle Review Bd., 862 N.E.2d 209, 229 (Ill. 2007) (in the context of an equal protection claim, concluding that Illinois statute is rationally related to the "legitimate government purposes of redressing the disparity in bargaining power between automobile manufacturers and their existing dealers and of protecting the public from the negative impact of harmful franchise practices by automobile manufacturers"); Anderson's Vehicle Sales, Inc. v. OMC-Lincoln, 287 N.W.2d 247, 250 (Mich. Ct. App. 1979) (in a contract clause case, finding "that the Legislature has the power to regulate the potential inequities inherent in the relationship between manufacturers and dealers of motor vehicles").

Relying upon Equipment Manufacturers Institute v. Janklow, 300 F.3d 842, 861 (8th Cir. 2002), the Deere petitioners and Husqvarna argue that protecting equipment dealers "from perceived abusive and oppressive acts by . . . manufacturers," New Motor Vehicle Bd. of Cal., 439 U.S. at 101, is not a significant and legitimate public purpose. In Janklow, equipment manufacturers, including Deere and AGCO, sought a declaration that a 1999 amendment to a South Dakota law governing the relationships between such manufacturers and their dealers violated the federal Contract Clause because it substantially impaired their pre-existing dealership contracts. Janklow, 300 F.3d at 847, 848. The State conceded that the purpose of the South Dakota law was to "level the playing field between manufacturers and dealers." Id. at 860. The Eighth Circuit Court of Appeals held that "leveling the playing field between contracting parties is expressly prohibited as a significant and legitimate public interest." Id. at 861.

Janklow is distinguishable because SB 126 has a broader purpose "than a simple reallocation of existing contractual

rights." Gwadosky, 430 F.3d at 43 (discussing Maine law that precludes motor vehicle manufacturers from recovering from dealers their costs for warranty repairs). SB 126, like the Maine statute at issue in Gwadosky, "aspires to protect consumers as well as dealers." Id.; see N.H.H.R. Jour. 765 (May 22, 2013). The legislature was specifically concerned that manufacturers shifted costs "onto dealers and ultimately consumers" through the use of "one-sided, non-negotiable contracts." N.H.H.R. Jour. 765 (May 22, 2013). That rationale brings SB 126 "squarely within the category of remedies to generalized social or economic problems that constitute legitimate subjects for legislation, notwithstanding the imperatives of the Contracts Clause." Gwadosky, 430 F.3d at 43; see Greenwood Trust Co. v. Com. Of Mass., 971 F.2d 818, 828 (1st Cir. 1992) (describing "consumer protection" as a "subject[ ] over which the states have traditionally exercised their police powers").

In Janklow, the court also concluded that "the only real beneficiaries" under the South Dakota law were "the narrow class of dealers of agricultural machinery," and that "such special interest legislation runs afoul of the Contract Clause when it impairs pre-existing contracts." Janklow, 300 F.3d at 861. The Deere petitioners argue that, like the law at issue in Janklow, SB 126 constitutes special interest legislation.

To support this argument, they rely upon Allied Structural Steel Co. v. Spannaus, 438 U.S. 234 (1978). Their reliance upon Allied Structural Steel is misplaced. At issue in Allied Structural Steel was whether the application of Minnesota's Private Pension Benefits Protection Act to Allied Structural Steel violated the Federal Contract Clause. Allied Structural Steel, 438 U.S. at 236. Under the act, "a private employer of 100 employees or more — at least one of whom was a Minnesota resident — who provided pension benefits under a plan meeting the qualifications of § 401 of the Internal Revenue Code, was subject to a 'pension funding charge' if [the employer] either terminated the plan or closed a

Minnesota office." Id. at 238. In concluding that the act lacked a significant and legitimate public purpose, the Court observed that the act "was not even purportedly enacted to deal with a broad, generalized economic or social problem." Id. at 250. Rather, it had "an extremely narrow focus," applying only to certain private employers with 100 employees or more, at least one of whom was a Minnesota resident. Id. at 248. "Indeed," as the Court observed in a later case, the act "even may have been directed at one particular employer planning to terminate its pension plan when its collective-bargaining agreement expired." Energy Reserves Group, 459 U.S. at 412 n.13; see Allied Structural Steel, 438 U.S. at 247-48, 248 n.20.

The same cannot be said of SB 126. SB 126 was expressly enacted to address "a broad, generalized economic or social problem." Allied Structural Steel, 438 U.S. at 250; see N.H.H.R. Jour. 765 (May 22, 2013); see also Gwadosky, 430 F.3d at 43. The State has a significant and legitimate interest in protecting equipment dealers from "perceived abusive and oppressive acts by the manufacturers." New Motor Vehicle Bd. of Cal., 439 U.S. at 101. As one court explained, eliminating unfair methods of competition and unfair and deceptive practices can foster "a salubrious and more stable business climate" for all businesses, "thus aiding the state economy" and providing a "secondary benefit that inures to . . . consumers." N.A. Burkitt, Inc. v. J.I. Case Co., 597 F. Supp. 1086, 1092 (D. Me. 1984); cf. Sanitation and Recycling Industry v. City of N.Y., 107 F.3d 985, 994 (2d Cir. 1997) (concluding that "eradicating the vestiges of criminal control accompanied by bid-rigging, 'evergreen' contracts and predatory pricing in the carting industry," constitutes a "broad societal goal, not the pursuit of the interests of a narrow class").

The Deere petitioners argue that we cannot view legislative history to determine whether SB 126 has a significant and legitimate public purpose; however, their argument conflates

our general principles of statutory interpretation with our inquiry under the State and Federal Contract Clauses. Although generally, when interpreting a statute, we consider legislative history only when statutory language is ambiguous, see ATV Watch v. N.H. Dep't of Transp., 161 N.H. 746, 752 (2011), that principle does not apply here. Here, we are not interpreting SB 126, but rather are determining whether the legislature had a significant and legitimate public purpose for enacting the statute. Indeed, the Deere petitioners have not cited any cases, and we are not aware of any, that stand for the proposition that a court is precluded from examining a statute's legislative history when analyzing whether it offends the State or Federal Contract Clause.

Husqvarna contends that we must find that the legislature lacked a significant and legitimate purpose for enacting SB 126 because, to the extent that it found the relationship between car/truck dealers and manufacturers to be identical to that between yard and lawn equipment dealers and manufacturers, its finding is unsupportable and was made in an "evidentiary vacuum." However, it is not our role to second-guess this legislative determination. Although our review in a contract clause case involving purely private contracts is not identical to rational basis review in the equal protection or due process context, it is similar. See Bunham, Public Pension Reform and the Contract Clause: A Constitutional Protection for Rhode Island's Sacrificial Economic Lamb, 20 Roger Williams U. L. Rev. 523, 537-38 (Summer 2015) (discussing differences between rational basis review and review in a contract clause case); see also E. Chemerinsky, Constitutional Law: Principles and Policies § 8.3.3, at 652 (4th ed. 2011) (when government is not a contracting party, describing contract clause analysis as similar to "traditional rational basis review"). As with rational basis review in other contexts, when examining, for contract clause purposes, whether the legislature had a

significant and legitimate public purpose for enacting a law, we will not require of the legislature "courtroom factfinding" and will uphold a legislative choice "based on rational speculation." FCC v. Beach Communications, Inc., 508 U.S. 307, 315 (1993) (discussing rational basis review in an equal protection case).

To the extent that Husqvarna argues that, for public policy reasons, equipment manufacturers, such as itself, should not be subject to the mandates of RSA chapter 357-C, this must be accomplished by legislative action and not by judicial decree.

Although Kubota asserts that the public policy underlying SB 126 is not legitimate because it was not a response to an emergency, we disagree. An emergency need not exist before a state may enact a law that impairs a private contract. Energy Reserves Group, 459 U.S. at 412 (explaining that, to be legitimate, "the public purpose need not be addressed to an emergency or temporary situation").

2. Reasonableness and Necessity

"Upon finding a legitimate public purpose, the next step . . . involves ascertaining the reasonableness and necessity of the adjustment of contract obligations effected by the regulation to determine finally whether the regulation offends the Contract Clause." Houlton Citizens' Coalition v. Town of Houlton, 175 F.3d 178, 191 (1st Cir. 1999). However, "when the contracts at issue are private and no appreciable danger exists that the governmental entity is using its regulatory power to profiteer or otherwise serve its own pecuniary interests . . . , a court properly may defer to the legislature's judgment." Id.; see Energy Reserves Group, 459 U.S. at 412-13. As the Supreme Court explained in Keystone Bituminous Coal Assn. v. DeBenedictis, 480 U.S. 470, 505 (1987), although "the finding of a significant and legitimate public purpose is not, by itself, enough to justify

the impairment of contractual obligations," and although "[a] court must . . . satisfy itself that the legislature's adjustment of the rights and responsibilities of contracting parties is based upon reasonable conditions and is of a character appropriate to the public purpose justifying the legislation's adoption, . . . unless the State is itself a contracting party, courts should properly defer to legislative judgment as to the necessity and reasonableness of a particular measure." (Quotations, brackets, and citations omitted; emphasis added.)

Here, SB 126 "plainly survives scrutiny" under the standards for evaluating impairments of purely private contracts. Keystone Bituminous Coal Assn., 480 U.S. at 506. The legislature has determined that, to prevent equipment manufacturers from engaging in abusive and oppressive acts with their dealers, it must subject them to the same level of regulation that it imposes upon automobile manufacturers. See N.H.H.R. Jour. 765 (May 22, 2013). Thus, as a result of SB 126, equipment manufacturers are specifically precluded from engaging in methods of competition and practices that the legislature has deemed unfair and deceptive. See RSA 357-C:3. To deter them from engaging in such conduct, the legislature has made a violation of any provision of RSA chapter 357-C a misdemeanor. See RSA 357-C:15. Additionally, among other regulations, equipment manufacturers are precluded from adding dealerships to the market areas of existing franchises when "it is injurious . . . to the public welfare" to do so, RSA 357-C:9, II(c). See New Motor Vehicle Bd. of Cal., 439 U.S. at 102 (describing California Automobile Franchise Act). As a result of SB 126, to enforce this prohibition, an equipment manufacturer proposing to establish a new dealership in a dealer's relevant market area, must give prior notice of its intention to the Board and to other dealers of the same "line make" in the same market area. RSA 357-C:9, I; see New Motor Vehicle

Bd. of Cal., 439 U.S. at 103 (describing California Automobile Franchise Act).

The provisions of RSA chapter 357-C, as applied to equipment manufacturers through SB 126, reasonably accomplish the legislature's goal of preventing equipment manufacturers from engaging in abusive and oppressive trade practices. Because the contracts at issue are private and, thus, there is no danger that the State is using its regulatory power to serve its own pecuniary interests, we "refuse to second-guess" the legislature's determination that including equipment manufacturers within the aegis of RSA chapter 357-C was a reasonable and necessary way to address its concern. Keystone Bituminous Coal Assn., 480 U.S. at 506; see Houlton Citizens' Coalition, 175 F.3d at 191; see also Sanitation and Recycling Industry, 107 F.3d at 994 (observing that "[w]hen reviewing a law that purports to remedy a pervasive economic or social problem," the court's "analysis is carried out with a healthy degree of deference to the legislative body that enacted the measure"). To the extent that Tuttle can be read to require that we conduct a more searching inquiry with regard to the reasonableness and necessity of SB 126, we note that our inquiry in Tuttle was more exacting than our inquiry here because, unlike SB 126, the legislation in Tuttle inured to the State's financial benefit.

For all of the foregoing reasons, therefore, we hold that the petitioners have not sustained their burden of establishing that SB 126 offends the State Contract Clause. Because the Federal Constitution affords the petitioners no greater protection than does the State Constitution in these circumstances, see Energy Reserves Group, 459 U.S. at 411-13; Gwadosky, 430 F.3d at 43; Houlton Citizens' Coalition, 175 F.3d at 191, we reach the same conclusion under the Federal Constitution as we do under the State Constitution.

C. Supremacy Clause

The Deere petitioners argue that, as applied to equipment manufacturers, portions of RSA 357-C:3, III(p)(3) and RSA 357-C:6, III conflict with the Federal Arbitration Act (FAA) and, therefore, violate the Supremacy Clause of the Federal Constitution. RSA 357-C:3, III(p)(3) provides, in relevant part, that it is "an unfair method of competition and unfair and deceptive practice" for any manufacturer to "[r]equire a motor vehicle franchisee to agree to a term or condition in a franchise . . . as a condition to the offer, grant, or renewal of the franchise . . . or agreement, which . . . [r]equires that disputes" between the franchisor and the franchisee "be submitted to arbitration." RSA 357-C:3, III(p)(3) specifically allows arbitration if the franchisor and franchisee "agree to submit the dispute to arbitration . . . at the time the dispute arises." RSA 357-C:6, III provides, in relevant part, that any provision in a new dealership agreement, including an arbitration provision, that "denies or purports to deny access to the procedures, forums, or remedies provided for by [New Hampshire] laws or regulations" shall be deemed void and unenforceable.

The Deere petitioners assert that, as applied to equipment manufacturers, these portions of RSA 357-C:3, III(p)(3) and RSA 357-C:6, III conflict with the FAA because they limit the applicability of an arbitration clause. See Preston v. Ferrer, 552 U.S. 346, 359 (2008) (holding that "[w]hen parties agree to arbitrate all questions arising under a contract, the FAA supersedes state laws lodging primary jurisdiction in another forum, whether judicial or administrative"); see also Champion Auto Sales, LLC v. Polaris Sales Inc., 943 F. Supp. 2d 346, 353 (E.D.N.Y. 2013) (deciding that New York provision similar to RSA 357-C:3, III(p)(3) conflicts with the FAA).

The Deere petitioners acknowledge that these portions of RSA 357-C:3, III(p)(3) and RSA 357-C:6, III, as applied to

certain other manufacturers, do not conflict with the FAA because those manufacturers are subject to a federal law that provides, in relevant part: "Notwithstanding any other provision of law, whenever a motor vehicle franchise contract provides for the use of arbitration to resolve a controversy arising out of or relating to such contract, arbitration may be used to settle such controversy only if after such controversy arises all parties to such controversy consent in writing to use arbitration to settle such controversy." 15 U.S.C. § 1226(a)(2) (2012); see Champion Auto Sales, LLC, 943 F. Supp. 2d at 354. The Deere petitioners contend that this exception to the FAA applies only to manufacturers of "motor vehicle[s]," as defined by 49 U.S.C. § 30102(a)(6) (2012), see 15 U.S.C. § 1226(a)(1) (2012), and argue that they and other equipment dealers are not "motor vehicle" manufacturers. See Champion Auto Sales, LLC, 943 F. Supp. 2d at 354 (concluding that snowmobiles, all-terrain vehicles, and low-speed vehicles were not subject to 15 U.S.C. § 1226(a)(2) because such vehicles do not constitute "motor vehicle[s]" under 49 U.S.C. § 30102(a)(6)).

The trial court agreed with the Deere petitioners that, as applied to equipment manufacturers, the challenged portions of RSA 357-C:3, III(p)(3) and RSA 357-C:6, III are preempted by the FAA, but concluded that they are also severable from the remaining provisions of RSA chapter 357-C. Because the trial court's preemption determination has not been appealed, the only issue before us is the severability of the challenged provisions.

In determining whether the valid provisions of a statute are severable from the invalid ones, we presume that the legislature intended that the invalid part shall not destroy the validity of the entire statute. See Associated Press v. State of N.H., 153 N.H. 120, 141 (2005). We then examine "whether the unconstitutional provisions of the statute are so integral and essential in the general structure of the act that they may

not be rejected without the result of an entire collapse and destruction of the structure" of the statute. Id. (quotation omitted). Based upon our review of the entire statutory scheme, of which the challenged portions of RSA 357-C:3, III(p)(3) and RSA 357-C:6, III are but a small part, we conclude that those portions of RSA 357-C:3, III(p)(3) and RSA 357-C:6, III are severable from the remaining provisions of RSA chapter 357-C.

The Deere petitioners argue that the challenged portions of RSA 357-C:3, III(p)(3) and RSA 357-C:6, III are inseparable from the numerous provisions in RSA chapter 357-C that pertain to administrative proceedings before the Board (the Board provisions). They contend that the Board provisions "manifest a legislative understanding (or, in this case, a legislative misunderstanding) that the contracts RSA [chapter] 357-C regulates are exempt from the FAA." They argue that those provisions demonstrate that RSA chapter 357-C "is not designed to regulate contractual relationships under which pre-dispute arbitration agreements are enforceable." Accordingly, they assert, because the Board provisions are integral to RSA chapter 357-C, the entire chapter, as applied to "equipment dealership agreements that contain pre-dispute mandatory arbitration agreements," is invalid. We are not persuaded that the challenged portions of RSA 357-C:3, III(p)(3) and RSA 357-C:6, III are inextricably linked to the Board provisions in RSA chapter 357-C, and, thus, we reject this argument. To the extent that the Deere petitioners assert that the Board provisions themselves conflict with the FAA and, therefore, are void under the Supremacy Clause, we conclude that they have not developed this argument sufficiently for our review. See In re G.G., 166 N.H. 193, 197 (2014).

Husqvarna requests that we "foreclose any uncertainty as to the effect of the Superior Court's Order on Husqvarna's arbitration rights" by holding that "a dealer with an agreement containing an arbitration clause . . . may not resort

to the Board for resolution of any dispute arising under or in connection with the dealer relationship." We decline this request without prejudice to Husqvarna raising this argument in any future litigated case between it and a dealer.

D. Husqvarna's Separate Federal Constitutional Claims

We next address the two constitutional claims that Husqvarna alone asserts: (1) that the trial court erred by determining that SB 126 does not violate Husqvarna's rights under the Federal Equal Protection Clause; and (2) that the trial court erred by ruling that SB 126, as applied to Husqvarna, does not violate the dormant Commerce Clause of the Federal Constitution.

1. Equal Protection Clause

Husqvarna argues that SB 126 violates the Federal Equal Protection Clause because it amends the definition of "motor vehicle" in RSA chapter 357-C to include yard and garden equipment. Husqvarna contends that including such equipment in the statutory definition of "motor vehicle" is arbitrary and irrational, in violation of its equal protection rights. See Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432, 446 (1985) ("The State may not rely on a classification whose relationship to an asserted goal is so attenuated as to render the distinction arbitrary or irrational."). However, Husqvarna concedes that it does not allege that it has been treated differently from any other similarly situated manufacturer. In its brief, Husqvarna explains: "It is not treatment different from other manufacturers of this equipment that violates Husqvarna's constitutional rights," but, rather, "the arbitrary and irrational classification of Husqvarna as a manufacturer of 'motor vehicles' that deprives Husqvarna of equal protection."

The Supreme Court "has long held that a classification neither involving fundamental rights nor proceeding along suspect lines cannot run afoul of the Equal Protection Clause

if there is a rational relationship between the [classification] and some legitimate governmental purpose." Armour v. City of Indianapolis, Ind., 132 S. Ct. 2073, 2080 (2012) (quotation and ellipsis omitted). The Court has "made clear . . . that, where ordinary commercial transactions are at issue, rational basis review requires deference to reasonable underlying legislative judgments." Id. (quotation omitted). The classification at issue here, including yard and garden equipment in the statutory definition of motor vehicle, see RSA 357-C:1, I, involves neither a fundamental right nor a suspect class. See Armour, 132 S. Ct. at 2080. "Its subject matter is . . . economic, social, and commercial." Id. As Husqvarna apparently concedes by not arguing otherwise, we, therefore, apply rational basis review. See id.

Under rational basis review, "a law [is] constitutionally valid if there is a plausible policy reason for the classification, the legislative facts on which the classification is apparently based rationally may have been considered to be true by the governmental decisionmaker, and the relationship of the classification to its goal is not so attenuated as to render [the classification] arbitrary or irrational." Id. (quotation omitted). The legislature is deemed to have had "a plausible reason if there is any reasonably conceivable state of facts that could provide a rational basis for the classification." Id. (quotation omitted). "Moreover, . . . we are not to pronounce [a] classification unconstitutional unless in the light of the facts made known or generally assumed it is of such a character as to preclude the assumption that it rests upon some rational basis within the knowledge and experience of the legislators." Id. (quotation and brackets omitted). Because the classification is presumed constitutional, Husqvarna has the burden "to negative every conceivable basis which might support" classifying yard and garden equipment as motor vehicles under RSA chapter 357-C. Id. at 2080-81.

For all of the reasons that we have discussed previously in relation to the petitioners' contract clause claim, we hold that Husqvarna has failed to establish that classifying yard and garden equipment as motor vehicles for the purposes of RSA chapter 357-C is not rationally related to the legislature's legitimate purpose of protecting the dealers of such equipment from perceived abusive and oppressive acts by manufacturers. See New Motor Vehicle Bd. of Cal., 439 U.S. at 101.

2. Dormant Commerce Clause

Husqvarna next argues that SB 126 violates the dormant Commerce Clause of the Federal Constitution. The Constitution grants Congress the power "[t]o regulate Commerce . . . among the several States." U.S. CONST. art. I, § 8, cl. 3. "That grant embodies a negative aspect as well — the 'dormant Commerce Clause' — which prevents state and local governments from impeding the free flow of goods from one state to another." Gwadosky, 430 F.3d at 35 (quotation omitted). "Put another way, the dormant Commerce Clause prohibits protectionist state regulation designed to benefit in-state economic interests by burdening out-of-state competitors." Id. (quotation omitted).

"The type of inquiry needed to determine whether a state law transgresses the [dormant] Commerce Clause varies depending upon the nature of the law at issue." Id. "A state statute that purports to regulate commerce occurring wholly beyond the boundaries of the enacting state outstrips the limits of the enacting state's constitutional authority and, therefore, is per se invalid." Id. "A state statute that has no direct extraterritorial reach but that discriminates against interstate commerce on its face, in purpose, or in effect receives a form of strict scrutiny so rigorous that it is usually fatal." Id. "[S]uch a statute is invalid unless it advances a legitimate local purpose that cannot be served by reasonable non-discriminatory means." Id. "The state bears the burden

of showing legitimate local purposes and the lack of non-discriminatory alternatives, and discriminatory state laws rarely satisfy this exacting standard." Family Winemakers of California v. Jenkins, 592 F.3d 1, 9 (1st Cir. 2010).

By contrast, a state statute that "regulates evenhandedly and has only incidental effects on interstate commerce" engenders a lower level of scrutiny. Gwadosky, 430 F.3d at 35 (quotation omitted). Such a statute "will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits." Id. (quotation omitted); see Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970).

Husqvarna does not argue, nor could it argue, that SB 126 discriminates against out-of-state manufacturers on its face. Instead, Husqvarna argues that SB 126 has a discriminatory purpose and/or effect. Husqvarna reasons that SB 126 violates the dormant Commerce Clause because the State has "not articulated a legitimate public interest in economically favoring New Hampshire dealers over out-of-state manufacturers." See Chemical Waste Management, Inc. v. Hunt, 504 U.S. 334, 342 (1992) (explaining that the State has the burden to justify a discriminatory statute "both in terms of the local benefits flowing from the statute and the unavailability of nondiscriminatory alternatives adequate to preserve the local interests at stake").

To support its assertion that SB 126 has a discriminatory purpose, Husqvarna relies upon two isolated statements, one by a member of the Nashua Chamber of Commerce at a public hearing on SB 126 that "It's them vs. out-of-state manufacturers," and the other by the sponsor of SB 126 that "New Hampshire businesses should have the right to do business with New Hampshire businesses." We agree with the trial court that Husqvarna has failed to sustain its burden of showing a discriminatory purpose.

"Where, as here, a party presents circumstantial evidence of an allegedly discriminatory purpose in support of a dormant Commerce Clause argument, it is that party's responsibility to show the relationship between the proffered evidence and the challenged statute." Gwadosk 430 F.3d at 39. "While statements by a law's private-sector proponents sometimes can shed light on its purpose, the [statement] of a single lobbyist has little (if any) probative value in demonstrating the objectives of the legislative body as a whole." Id. (citation omitted). An isolated statement by the bill's sponsor during a floor debate on a failed amendment likewise has little probative value regarding the legislature's intent in enacting the bill. Cf. Appeal of Reid, 143 N.H. 246, 253 (1998) (cautioning against "imputing too much weight to comments of proponents of bills offered in legislative committee hearings" (quotation omitted)). "This is particularly so when, as in this case, far stronger statements of intent can be gleaned from official legislative sources." Gwadosky, 430 F.3d at 39.

Husqvarna next asserts that SB 126 has a discriminatory effect. For the purposes of the dormant Commerce Clause analysis, "discrimination" means "differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter." Oregon Waste Systems, Inc. v. Department of Environmental Quality of Ore., 511 U.S. 93, 99 (1994) (quotation omitted). The "differential treatment" must be between entities that are similarly situated. See General Motors Corp. v. Tracy, 519 U.S. 278, 298-99 (1997); see also National Ass'n of Optometrists 85 Opt. v. Brown, 567 F.3d 521, 525, 527-28 (9th Cir. 2009).

Husqvarna contends that SB 126 has a discriminatory effect "because it insulates in-state dealers from intrabrand competition while Husqvarna must pursue a lengthy administrative process." Husqvarna argues that because it must now seek a finding of the Board before it puts a new dealer into another dealer's territory or before it relocates a

dealer, it is more burdensome for it to do business in New Hampshire than elsewhere.

We agree with the trial court that Husqvarna has failed to satisfy its burden of showing discriminatory effect. Husqvarna has not presented any evidence regarding the effects of SB 126 upon similarly situated entities. Equipment dealers and manufacturers are not similarly situated. Accordingly, Husqvarna cannot meet its burden of demonstrating that SB 126 has a discriminatory effect by comparing its effect upon New Hampshire dealers against its effect upon Husqvarna.

Nor can Husqvarna meet its burden of establishing that SB 126 has discriminatory effect by alleging, upon information and belief, that "none of [its] competitors for [yard and garden equipment] has a facility in New Hampshire where [such] equipment . . . is manufactured." That allegation, even if true, cannot establish discrimination as between in-state and out-of-state equipment manufacturers. See Exxon Corp. v. Governor of Maryland, 437 U.S. 117, 126, n.16 (1978) (explaining that discrimination under the dormant Commerce Clause occurs when "the effect of a state regulation is to cause local goods to constitute a larger share, and goods with an out-of-state source to constitute a smaller share, of the total sales in the market"); see also Cherry Hill Vineyard, LLC v. Baldacci, 505 F.3d 28, 36, 38 (1st Cir. 2007) (concluding that plaintiffs had failed to show discriminatory effect of Maine law, which allowed only "farm" wineries to sell directly to consumers, absent any evidence that out-of-state wineries suffered any disproportionate loss of business, that Maine law acts to protect Maine wineries, or that Maine consumers even purchase wine directly from Maine vineyards).

In its reply brief, Husqvarna likens this case to Yamaha Motor Corp. v. Jim's Motorcycle, 401 F.3d 560 (4th Cir. 2005), and argues that the analysis used in that case should

apply here. In Yamaha, a Virginia statute gave an existing motorcycle dealer the "right to protest the establishment of a new dealership for the same line-make (brand) in its 'relevant market area,' defined as a seven to ten-, fifteen-, or twenty-mile radius around the existing dealer, depending on population density." Yamaha, 401 F.3d at 563. This statutory provision had previously been upheld against a dormant Commerce Clause challenge. See Am. Motor Sales, 592 F.2d at 220-24.

The dispute in Yamaha concerned a second statutory provision that allowed "[a]ny existing franchise dealer," regardless of its relevant market area, to file a protest whenever any "new or additional motorcycle dealer franchise" was "established in any county, city or town" in Virginia. Yamaha, 401 F.3d at 563-64 (quotations omitted). This provision, the court explained, allowed "an existing dealer at one end of Virginia" to "protest a proposed dealership some 500 miles away at the other end of the state." Id. at 573. The court determined that the second statutory provision was not discriminatory on its face, in its purpose, or in effect. Id. at 568-69.

However, the court invalidated the second statutory provision under the so-called Pike balancing test. Id. at 569-74. Under that test, the court weighs the putative local benefits of the statute against its burden upon interstate commerce, and invalidates the statute only when the burdens clearly outweigh the benefits. See Pike, 397 U.S. at 142. "A statute need not be perfectly tailored to survive Pike balancing, but it must be reasonably tailored: the extent of the burden that will be tolerated depends on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities." Yamaha, 401 F.3d at 569 (quotation, ellipsis, and brackets omitted). In determining whether a statute has "a legitimate local purpose" and "putative local benefits," a court defers to the state legislature. Yamaha, 401 F.3d at 569 (quotations

omitted). "Courts are not inclined to second-guess the empirical judgments of lawmakers concerning the utility of legislation." Id. (quotation omitted). "The Pike test requires closer examination, however, when a court assesses a statute's burdens, especially when the burdens fall predominantly on out-of-state interests." Id.

Although Husqvarna raised its Pike balancing test argument in its objection to the State's cross-motion for summary judgment, the trial court did not address it. Because the Pike balancing test is "fact-intensive," we decline to address Husqvarna's argument in the first instance. United Haulers v. Oneida-Herkimer Solid Waste, 261 F.3d 245, 264 (2d Cir. 2001); see Lebanon Farms Disposal, Inc. v. County of Lebanon, 538 F.3d 241, 251-52 (3d Cir. 2008); see also National Ass'n of Optometrists & Opt., 567 F.3d at 528. "In its present form, the record is incomplete regarding the burden on interstate commerce and, more importantly, the putative local benefits," and we lack the benefit of the trial court's findings of fact and conclusions of law on these issues. Lebanon Farms Disposal, Inc., 538 F.3d at 252. Therefore, we vacate the trial court's order granting summary judgment to the State on Husqvarna's dormant Commerce Clause claim and remand for the court to consider whether RSA chapter 357-C, as amended by SB 126, passes constitutional muster under the Pike balancing test. See National Ass'n of Optometrists 85 Opt., 567 F.3d at 528; see also United Haulers, 261 F.3d at 263-64; Lebanon Farms Disposal, Inc., 538 F.3d at 251-52.

III. Conclusion

In sum, we uphold SB 126 against the petitioners' claims that it violates the State and Federal Contract Clauses. The trial court's decision that the challenged portions of RSA 357-C:3, III (p)(3) and RSA 357-C:6, III are preempted has not been appealed. We agree with the trial court that the preempted provisions are severable from the remaining

provisions of RSA chapter 357-C as applied to the petitioners. We reject Husqvarna's argument that SB 126 violates the Equal Protection Clause of the Federal Constitution. We also reject Husqvarna's contention that SB 126 has either a discriminatory purpose or effect within the meaning of the dormant Commerce Clause. Nonetheless, we vacate the trial court's grant of summary judgment to the State on Husqvarna's dormant Commerce Clause claim and remand for the trial court to consider, in the first instance, whether SB 126 is unconstitutional under the Pike balancing test.

2014-0315 Affirmed;
2014-0441 Affirmed;
2014-0575 Affirmed in part; vacated in part; and remanded.

HICKS, CONBOY, and LYNN, JJ., concurred.

APPENDIX B

THE STATE OF NEW HAMPSHIRE
MERRIMACK, SS
SUPERIOR COURT

No. 216-2013-CV-554

DEERE & COMPANY, CNH AMERICA LLC, and AGCO CORPORATION

v.

THE STATE OF NEW HAMPSHIRE

ORDER

The plaintiffs, Deere & Company ("Deere"), CNH America LLC ("CNH"), and AGCO Corporation ("AGCO"), brought this action against the defendant, the State of New Hampshire, challenging the constitutionality of Senate Bill 126 ("SB 126"), which adds farm, forestry, and industrial equipment, such as tractors, to the RSA 357-C definition of motor vehicle. Before the court are the parties' cross-motions for summary judgment. The plaintiffs assert that retroactive application of SB 126 will unconstitutionally impair their existing contracts in violation of article 1, section 10 of the United States Constitution and part I, article 23 of the New Hampshire Constitution. The defendant disagrees. The court heard argument on February 18, 2014. Because the plaintiffs have not sustained their burden of showing that SB 126 unconstitutionally impairs existing contracts and cannot be reconciled with the Federal Arbitration Act, 9

U.S.C. § 1, *et seq.* ("FAA"), the plaintiffs' motion for summary judgment is DENIED and the defendant's motion for summary judgment is GRANTED.

In ruling on cross-motions for summary judgment, the court "consider[s] the evidence in the light most favorable to each party in its capacity as the nonmoving party and, if no genuine issue of material fact exists, [the court] determine[s] whether the moving party is entitled to judgment as a matter of law." *N.H. Ass'n of Counties v. State*, 158 N.H. 284, 287-88 (2009). A fact is material if it affects the outcome of the litigation under the applicable substantive law. *Palmer v. Nan King Rest., Inc.*, 147 N.H. 681, 683 (2002). In considering a party's motion for summary judgment, the evidence must be considered in the light most favorable to the nonmoving party, together with all reasonable inferences therefrom. *Sintros v. Hamon*, 148 N.H. 478, 480 (2002). Mindful of this standard, the court sets forth the undisputed facts below.

The plaintiffs manufacture industrial, construction, forestry, agricultural, and lawn and garden equipment. The equipment includes commercial mowing products, agricultural tractors, wheel loaders, and backhoes. The plaintiffs sell their products through a number of dealerships in New Hampshire. The relationship between the plaintiffs and the dealerships are governed by dealership agreements (the "agreements"). For example, Deere has three different types of dealership agreements and eight total dealership agreements at issue here. CNH has four different types of dealership agreements and ten total dealership agreements at issue. AGCO has one type of dealership agreement and three total dealership agreements at issue.

Before SB 126, RSA chapter 347-A governed the agreements. The purpose of RSA 347-A was to protect equipment dealers. Enacted in 1995, the statute established certain ground rules for the relationship between equipment

manufacturers and dealers, including regulation in areas where manufacturer and dealer disputes commonly arise, such as warranty reimbursement, termination of franchise agreements, and transfers of dealership interests.

On June 25, 2013, Governor Hassan signed SB 126 into law. The measure *inter alia* amended the terms "motor vehicle" and "motor vehicle dealer" under RSA 357-C:1, I and VIII(a) to include "farm and utility tractors, forestry equipment, industrial equipment, farm implements, farm machinery, yard and garden equipment, attachments, accessories and repair parts." SB 126 did not "grandfather" existing agreements. Thus, the plaintiffs' current and future contracts are now subject to the provisions of RSA chapter 357-C and are no longer governed by RSA 347-A.

In response, the plaintiffs initiated the instant action in the Hillsborough County Superior Court—Northern District, seeking declaratory relief, a preliminary injunction and permanent injunctive relief. On September 19, 2013, the court (*Mangones*, J.) granted the plaintiffs' request for preliminary injunctive relief to maintain the *status quo.* The court also granted the defendant's request to transfer venue to this county. In the interim, two parties—the New Hampshire Automobile Dealers Association and Frost Farm Services, Inc.—intervened.

The plaintiffs make two substantive arguments. First, the plaintiffs assert that SB 126 unconstitutionally impairs the 21 contracts at issue, contrary to part I, article 23 of the state constitution and article 1, section 10 of the federal constitution. Second, the plaintiffs contend that SB 126 violates the Supremacy Clause of the federal constitution by voiding arbitration provisions in Deere's and AGCO's respective contracts. Not surprisingly, the defendant disagrees. It asserts first that SB 126 does not unconstitutionally impair the plaintiffs' contracts. The defendant also argues that even if certain portions of RSA

357-C violate the Supremacy Clause, such violations do not void the entire statutory scheme. The court will address the parties' arguments in turn.

The analytical framework for assessing a constitutional challenge to legislative action is well established. "Whether or not a statute is constitutional is a question of *law...." Akins v. Sec'*y *of State*, 154 N.H. 67, 70 (2006). "The party challenging a statute's constitutionality bears the burden of proof." *State v. Pierce*, 152 N.H. 790, 791 (2005). Accordingly, "the constitutionality of an act passed by the coordinate branch of the government is to be presumed." *Opinion of the Justices*, 118 N.H. 582, 584 (1978) (quotation omitted). "A statute will not be construed to be unconstitutional where it is susceptible to a construction rendering it constitutional." *City of Claremont v. Truell*, 126 N.H. 30, 39 (1985).

In this case, the court need not engage in the exercise of statutory interpretation. "The effects of the legislation are obvious and acknowledged. If those effects infringe on constitutionally protected rights, [the court] cannot avoid [its] obligation to say so." *Tuttle v. N.H. Med. Malpractice Joint Underwriting Assoc.*, 159 N.H. 627, 640 (2010), citing *Alliance of American Insurers v. Chu,* 571 N.E.2d 672, 678 (N.Y. 1991).

Under part I, article 23 of the New Hampshire Constitution, "[r]etrospective laws are highly injurious, oppressive, and unjust. No such laws, therefore, should be made, either for the decision of civil causes, or the punishment of offenses." While this section does not reference existing contracts, its "proscription duplicates the protections found in the contract clause of the United States Constitution." *State v. Fournier*, 158 N.H. 214, 221 (2009). Thus, "article I, section 10 [of the federal constitution] and part I, article 23 [of the state constitution] ... offer equivalent protections where a law

impairs a contract, or where a law abrogates an earlier statute that is itself a contract...." *Tuttle*, 159 N.H. at 641.

The threshold inquiry in a Contract Clause analysis is whether the law has a retroactive effect on an existing contract. The party asserting a Contract Clause violation has the burden of demonstrating retroactive application of the law. *Petition of Concord Teachers*, 158 N.H. 529, 537 (2009). Here, the parties do not dispute that SB 126 has a retroactive effect. Thus, the court will direct its analysis at the remaining elements of the plaintiffs' claim of a Contract Clause violation.

"Contract Clause analysis in New Hampshire requires a threshold inquiry as to whether the legislation operates as a substantial impairment of a contractual relationship." *Tuttle*, 159 N.H. at 641 (quotation and citation omitted). "This inquiry has three components: whether there is a contractual relationship, whether a change in law impairs that contractual relationship, and whether the impairment is substantial." *Id.* If the legislation substantially impairs the contract, "a balancing of the police power and the rights protected by the contract clauses must be performed, and … [the] law ... may pass constitutional muster only if it is reasonable and necessary to serve an important public purpose." *Opinion of the Justices (Furlough)*, 135 N.H. 625, 634 (1992).

While the parties do not dispute the existence of the plaintiffs' contracts, they do dispute whether the contracts are impaired by the enactment of SB 126 and whether that impairment is substantial. *See General Motors Corp. v. Romein*, 503 U.S. 182, 186 (1992). "Although the United States Supreme Court has provided little specific guidance as to what constitutes a 'substantial' contract impairment, total destruction of contractual expectations is not necessary for a finding of substantial impairment." *Tuttle*, 159 N.H. at 649 (citation omitted).

> The severity of an impairment of contractual obligations can be measured by the factors that reflect the high value the Framers placed on the protection of private contracts. Contracts enable individuals to order their personal and business affairs according to their particular needs and interests. Once arranged, those rights and obligations are binding under the law, and the parties are entitled to rely on them.

Furlough, 135 N.H. at 633, quoting *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 245 (1978).

> The severity of the impairment measures the height of the hurdle the state legislation must clear. Minimal alteration of contractual obligations may end the inquiry at its first stage. Severe impairment, on the other hand, will push the inquiry to a careful examination of the nature and purpose of the state legislation.

Allied Structural Steel, 438 U.S. at 245.

To evaluate whether a law substantially impairs a contract, the court examines "(1) the nature of the contract and the affected contractual terms; (2) the degree to which the parties reasonably relied upon those terms at the time they formed the contract; and (3) the practical effect the challenged law would have upon parties." *Tuttle*, 159 N.H. at 668 *(Dalianis and Duggan*, JJ., dissenting), citing *Lower Village Hydroelectric Assocs. v. City of Claremont*, 147 N.H. 73, 77 (2001). "In determining whether contract impairment is substantial, some courts look to whether the subject matter of the contract has been the focus of heavy state regulation." *Id.* at 650. "If so, further regulation might be foreseeable and, thus, any change to the contract caused by such regulation would not necessarily constitute a substantial impairment." *Id.* "However, standing alone, 'a history of regulation is never a sufficient condition for rejecting a challenge based on

the contracts clause.' *Id.*, citing and quoting *Chrysler Corp. v. Kolosso Sales, Inc.*, 148 F.3d 892, 895 (7th Cir. 1998), cert. denied, 525 U.S. 1177 (1999).

Applying the foregoing standards, the court concludes that SB 126 does not substantially impair the plaintiffs' existing contracts. In their brief, the plaintiffs identify ten substantial SB 126 impairments:

1. The plaintiffs were originally permitted to define each dealer's relevant market area without advance notice. Under RSA 357-C:3, it is an unfair and deceptive practice to change the relevant market area set forth in the franchise agreement without good cause.

2. Although the plaintiffs could compete or authorize others to compete with a dealer in the dealer's dealership area, the statute now removes the plaintiffs discretion to add or relocate a dealership into an existing area without good cause and without a finding by the New Hampshire Motor Vehicle Board ("MVIB") that good cause exists.

3. RSA 357-C:3, III(h) removes the plaintiffs' discretion to set dealer minimum equity level or capital standards.

4. RSA 357-C limits the plaintiffs' discretion to decline to deliver or fill orders to situations where the plaintiffs have no control.

5. While the plaintiffs previously could terminate, cancel, or non-renew a dealership agreement upon notice for any failure to abide by the terms of the dealership agreement consistent with RSA 347-A:2, I, the plaintiffs now can only do so if good cause exists. Further, the plaintiffs must satisfy certain requirements, including: (1) notice; (2) good faith; (3) good cause; and (4) a MVIB finding that there is good

cause to cancel, terminate, fail to renew, or refuse to continue any franchise relationship. RSA 357-C:7, III (a-e).

6. RSA 357-C will prohibit the plaintiffs from enforcing the arbitration agreements contained in their existing contracts.

7. The plaintiffs will lose control over the compensation they provide for warranty services by forcing them to compensate at the dealer's retail labor rates and product prices.

8. The plaintiffs will no longer be able to limit the types of equipment a particular dealer may sell.

9. At least one of the plaintiffs' contracts places express restrictions on whether a dealer may carry a competitive line of equipment. Under RSA 357-C:3, II(c), it will be an unfair and deceptive act to "coerce or attempt to coerce, any motor vehicle dealer to . . . [r]efrain from participation in the management of, investment in, or acquisition of any other line of new motor vehicle or related products."

10. SB 126 will impair one contracting party's commercial worksite products contract.

The defendant disputes the plaintiffs' claim of substantial impairment.

Not all of the impairments identified by the plaintiffs apply to each of the contracts in question. According to the plaintiffs, "SB 126 impairs [their] existing contracts in at least 10 respects." Pl.'s Mem. of Law at 12. The court disagrees. Upon review of each individual contract, it is clear that all ten factors do not affect all of the agreements. The court must therefore analyze the plaintiffs' substantial impairment argument as it pertains to each individual contract—not all the contracts listed as a whole.

A review of each individual contract does not support a conclusion of substantial impairment. The provisions of RSA 347-A previously governed the plaintiffs' agreements. Thus, as the defendant correctly notes, "SB 126's assignment of tractors and other equipment to RSA 357-C is not equivalent to an entirely unregulated industry suddenly being faced with extensive regulation." Def.'s Mem. of Law at 6. The plaintiffs' agreements were subject to a statutory scheme that regulated the behavior of the manufacturers and dealers. While including the plaintiffs within the purview of RSA 357-C has created added requirements by which the plaintiffs must act, such additions represent refinements in the law. For example, subjecting the plaintiffs to the "good cause" requirement, while not in RSA 347-A, is consistent with the RSA 347-A general prohibition of bad faith. *See Ford Motor Co. v. Meredith Motor Co.*, No. 99-456-B, 2000 U.S. Dist. LEXIS 13099, at *24-25 (D.N.H., Aug. 24, 2000), vacated on abstention grounds, 257 F.3d 67 (1st Cir. 2001); *see also Veix v. Sixth Ward Bldg. & Loan Assoc.*, 310 U.S. 32, 38 (1940).

The plaintiffs' reliance on *Tuttle* does not avail them, as that case is factually distinct. *Tuttle* involved legislation requiring the New Hampshire Medical Malpractice Joint Underwriting Association ("JUA") to transfer surplus funds directly to the general fund, despite the fact that the JUA's plans entitled participating physicians to surplus funds. The court held that the measure impaired existing contract rights. *Tuttle,* 159 N.H. at 633. It is true that the insurance industry is heavily regulated; however, the *Tuttle* legislation was not regulatory legislation meant to protect insurers, insureds or the public. *Id.* at 650. In contrast, the issues raised by SB 126 are more analogous to those addressed in *Ford,* which examined the expansion of existing regulation pertaining to previously regulated agreements. SB 126 does not change the fundamental nature of the contracts in question. Unlike the legislation in *Tuttle,* which effectively eliminated the

"participating" character of the policies and thus changed the nature of the contracts, SB 126's requirement that manufacturer decisions be made with good cause does not change the very nature or "heart" of these agreements to buy and sell equipment parts. *See id.* at 651.

Given these considerations, the court concludes that SB 126 does not substantially impair the plaintiffs' existing contracts. Importantly, a contrary conclusion would not be helpful to the plaintiffs because the plaintiffs have also not sustained their burden of showing that SB 126 is not reasonable and necessary to serve an important public purpose.

"[I]t is to be accepted as commonplace that the Contract Clause does not operate to obliterate the [State's] police power...." *Furlough*, 135 N.H. at 634, quoting *Allied Structural Steel*, 438 U.S. at 241.

> It is the settled law of this court that the interdiction of statutes impairing the obligation of contracts does not prevent the State from exercising such powers as are vested in it for the promotion of the common weal, or are necessary for the general good of the public, though contracts previously entered into between individuals may. thereby be affected. This power, which in its various ramifications is known as the police power, is an exercise of the sovereign right of the Government to protect the lives, health, morals, comfort and general welfare of the people, and is paramount to any rights under contracts between individuals.

Allied Structural Steel, 438 U.S. at 241. "If the Contract Clause is to retain any meaning at all, however, it must be understood to impose some limits upon the power of a State to abridge existing contractual relationships, even in the exercise of its otherwise legitimate police power." *Id.* at 242.

"Thus, a balancing of the police power and the rights protected by the contract clauses must be performed, and a bill or law which substantially impairs a contractual obligation may pass constitutional muster only if it is reasonable and necessary to serve an important public purpose." *Furlough*, 135 N.H. at 635. Given the nature of this case, it is appropriate for the court to engage in the exercise of examining whether SB 126 is reasonable and necessary to accomplish the stated public purpose, assuming a substantial impairment of contract rights.

The police power side of the equation requires the court to examine whether the law serves an important public purpose. The defendant asserts that "SB 126 serves a proper public purpose because it broadens the reach of RSA 357-C, a statute created to regulate vehicle manufacturers, distributors ... and dealers doing business in this state, ... premised on the 1981 general court's finding that the distribution and sale of vehicles within this state vitally affects the general economy of the state and the public interest.'" Def.'s Mem. of Law at 14. In addition to the stated purpose of RSA 357-C, the legislative history of SB 126 establishes the measure's public purpose. Three equipment dealers discussed issues with manufacturers at an April 16, 2013 house committee public hearing. *See* Def.'s Exh. C. One dealer testified about how unfair manufacturer practices hurt customers and small family owned businesses. *Id.* A farmer testified that fewer local dealerships hurt farmers because these farmers have to travel great distances to larger dealers they do not know. *Id.*

This testimony was thoroughly considered by the legislature. In a May 22, 2013 hearing on SB 126, Representative Jones stated:

> In the past farm equipment was sold and serviced by many smaller dealers in towns all across the state. This practice was beneficial because local

> dealers can be called at home, after hours, or on Sundays or holidays to provide service or parts in emergencies. Local dealers will open their stores when a farmer needs a baler part on Sunday morning and rain is forecast for Sunday afternoon. This is a true emergency for a farmer whose hay crop is at risk.
>
> According to the Northeast Equipment Dealers Association in 1999 they had 41 member dealers in New Hampshire and today they only have nine. The move by equipment manufacturers to fewer mega dealers is detrimental to agriculture and the economy of rural New Hampshire because a mega dealer 100 miles away will not provide the level of support of a local dealer and, even if they would, the distance is too great to be of use.

H.R. Session Hearing on SB 126 at 1:09:15 (May 22, 2013). Representative Sad responded by stating: "Last month R.N. Johnson, a family owned John Deere dealership in my town, closed its doors after 84 years of service to our large agricultural community. Do you think that this bill would have had any impact at all on that decision to close?" *Id.* Representative Jones answered that it would.

The legislative history and the stated purpose of the bill establish the legislative findings as to the public purpose of the bill. There is sufficient record support to accord an appropriate level of deference. While the plaintiffs correctly assert that leveling the playing field between manufacturers and dealers is not a significant and legitimate public interest, *see Allied Structural Steel*, 438 U.S. at 247, the purpose of SB 126 goes beyond that purpose to "ensure consumer interests are safeguarded...." *See* SB 126. As a result, the court must assign significant weight to the public purpose. *See Allied Structural Steel*, 438 U.S. at 247; *see also Alliance of Auto Mfrs. v. Gwadosky*, 430 F.3d 30 (1st Cir. 2005).

Accordingly, the court is persuaded that the bill serves a legitimate and significant public purpose.

The police power analysis also requires the court to examine whether the law is reasonable and necessary. "In assessing the reasonableness and necessity of the Act, the threshold question is the degree of deference [the court] must afford the legislature's decision as to the means chosen to accomplish its purpose." *Tuttle*, 159 N.H. at 653. "Unless the State itself is a contracting party, 'as is customary in reviewing economic and social regulation, courts properly defer to legislative judgment as to the necessity and reasonableness of a particular measure.' *Furlough*, 135 N.H. at 634-35 (quotation, brackets and ellipses omitted). "This deference serves to ensure that the constitutional prohibition against the impairment of contracts does not prevent the State from legitimate exercises of police power 'to protect the vital interests of its people." *Tuttle*, 159 N.H. at 653, citing *W.B. Worthen Co. v. Thomas*, 292 U.S. 426,432-33 (1934).

"The exercise of that reserved power has repeatedly been sustained by this Court as against a literalism in the construction of the contract clause which would make it destructive of the public interest by depriving the State of its prerogative of self-protection." *Thomas*, 292 U.S. at 432-33. "In cases where the State is itself a party to the contract, heightened review is warranted and courts generally accord minimal deference to legislative acts affecting such contracts." *Tuttle*, 159 N.H. at 654, citing *Lower Village Hydroelectric Assocs.*, 147 N.H. at 78. If, on the other hand, the state is not a party to the contracts, more deference is warranted, "but complete deference is unsupportable." *Tuttle*, 159 N.H. at 655.

In analyzing the reasonableness of legislation, courts consider whether: "(1) the law meets an emergency need; (2) the law was enacted to protected a basic societal interest, rather than a favored group; (3) the law is appropriately

tailored to the targeted emergency; (4) whether the imposed conditions are reasonable; and (5) whether the law is limited to the duration of the emergency." *Tuttle*, 159 N.H. at 675 (*Dalianis and Duggan*, JJ., dissenting), citing *Home Bldg. & L. Ass'n v. Blaisdell*, 290 U.S. 398, 441 17 (1934). "An emergency need not exist, however, before a state may enact a law that impairs a private contract." *Id.*, citing *Energy Reserves Group, Inc. v. Kansas Power & Light Co.*, 459 U.S. 400, 412 (1983).

Here, SB 126 survives the aforementioned scrutiny under this deferential standard. The state is not a party to the existing contracts. Moreover, nothing before the court suggests that the state has some type of indirect financial interest at stake. This is in stark contrast to the *Tuttle* situation. The legislation in question is a reasonable decision by the legislature to protect the general welfare of the public through valid economic legislation. As a result, the court is satisfied that SB 126 constitutes broad-based economic legislation that is directed to meet a societal need. *See Nieves v. Hess Oil Virgin Islands Corp.*, 819 F.2d 1237, 1249 (3d Cir. 1987) ("Courts are required to defer to the legislature's judgment concerning the necessity and reasonableness of economic and social legislation.").

The other side of the balancing equation involves the rights protected by the contract clause. In this context, the court's analysis as to whether SB 126 substantially impairs the plaintiffs' contract rights is dispositive. The court acknowledges that SB 126 may have some economic impact on the plaintiffs; however, as addressed above, their pre-SB 126 relationship with dealers was not unfettered. RSA 347-A previously governed the plaintiffs' agreements. Any SB 126 burden caused by extending the plaintiffs' dealer relationships to the regulatory requirements of RSA 357-C does not outweigh the state's police power.

In addition to their contract clause claim, the plaintiffs assert that SB 126 violates the Supremacy Clause. Under 11 of the contracts at issue in this case, the parties agreed that any disputes would be resolved by binding arbitration. The plaintiffs contend that RSA chapter 357-C prohibits predetermined agreements to arbitrate. In so doing, the plaintiffs argue that these provisions violate the FAA and are therefore void under the Supremacy Clause of the United States Constitution.

The FAA provides, in pertinent part:

> A written provision in any ... contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract ... or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract ... or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

9 U.S.0 § 2. The Supremacy Clause provides:

> The Constitution, and the Law of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding.

U.S. CONST. ART. IV, CL. 2. Where state law invalidates an arbitration provision that falls under the FAA, the state law is preempted. *See Doctor's Assocs. v. Casarotto*, 517 U.S. 681, 688 (1996).

The plaintiffs have persuaded the court that the foregoing authority that SB 126 and RSA chapter 357-C are void under

the Supremacy Clause to the extent that they attempt to render void and unenforceable arbitration agreements in existing contracts. This is not dispositive, however. As the defendant asserts, "the conflicting provision is 'displaced' by the federal law in that singular instance." Def.'s Mem. of Law at 21. As a result, only those provisions that conflict with the FAA are considered invalid, leaving the rest of the statutory scheme intact. *See* RSA 357-C:16 ("If any provision of this chapter or application thereof to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of the chapter....").

The plaintiffs argue that RSA 357-C MVIB regulation is pervasive to the point where the statute cannot stand if the arbitration provisions of the contracts are enforced. The court disagrees. The arbitration provisions relate to the procedural mechanism that will be employed to resolve disputes between the plaintiffs and the dealers—those provisions do not establish the substantive law that will govern the resolution of the disputes. An arbitration panel cart apply RSA 357-C substantive law as it applies any other substantive law that would govern the resolution of a dispute. Thus, pursuant to RSA 357-C:16, the procedural dispute resolution mechanisms can be severed from the other provisions of the chapter.

Based on the foregoing, the court concludes that SB 126 does not impair the plaintiffs' existing contracts in violation of part I, article 23 of the New Hampshire Constitution. Additionally, the court concludes that article I, section 10 of the United States Constitution provides no additional Contract Clause protection. Finally, in view of the RSA 357-C:16 severability provision, SB 126 does not run afoul of article IV, clause 2 of the United States Constitution—the Supremacy Clause. Accordingly, the plaintiffs' motion for summary judgment is DENIED and the defendant's motion for summary judgment is GRANTED.

So ORDERED.

Date: April 15, 2014

/s/ Larry M. Smukler
LARRY M. SMUKLER
PRESIDING JUSTICE

APPENDIX C

THE STATE OF NEW HAMPSHIRE
SUPERIOR COURT

HILLSBOROUGH, SS
NORTHERN DISTRICT

216-2013-CV-00554

DEERE & COMPANY, CNH AMERICA LLC, and AGCO CORPORATION

v.

THE STATE OF NEW HAMPSHIRE

ORDER

The plaintiffs, Deere & Company, CNH America LLC, and AGCO Corporation (collectively referred to as "plaintiffs"), have filed a civil action for a declaratory judgment and preliminary and permanent injunctive relief against the defendant, the State of New Hampshire. The parties are presently before the Court on plaintiffs' request for preliminary injunctive relief.

The plaintiffs' action arises out of a new statute, SB 126 (enacted as 2013 Laws, ch. 130), that becomes effective on September 23, 2013. The plaintiffs seek to preliminarily enjoin SB 126 from taking effect on September 23, 2013 in regards to their existing contracts with New Hampshire equipment dealers. The defendant and intervenor(s) (collectively referred to as "defendants") object.

This matter was heard on a preliminary hearing basis pursuant to New Hampshire Superior Court Rule 161. Accordingly, any findings and orders entered herein are entered without prejudice to entry of any further and other findings and orders that may be entered after further proceedings. For the reasons set forth below, the plaintiffs' motion for preliminary injunctive relief is granted.

Factual Background

The three plaintiffs, Deere & Company, CNH America LLC, and AGCO Corporation, manufacture agricultural, industrial, and commercial equipment. Each of the plaintiffs has several dealerships in New Hampshire. Each of the dealerships has a dealership agreement with the plaintiffs. Pursuant to these agreements, plaintiffs manufacture or provide equipment and the dealerships sell the equipment.

Prior to 1995, New Hampshire had no laws in place specifically regulating the relationship between equipment manufacturers and dealers. In 1995, the New Hampshire Legislature enacted RSA 347-A. RSA 347-A specifically regulates the relationship between equipment manufacturers and dealers.

On June 25, 2013, Governor Hassan signed SB 126 into law. SB 126 becomes effective on September 23, 2013. SB 126, among other provisions, adds farm, forestry, and industrial equipment such as tractors to the RSA 357-C definition of motor vehicles. The effect of the added language is that existing equipment manufacturer-dealership agreements; formerly governed by RSA 347-A, would become regulated by the more comprehensive RSA 357-C motor vehicle statute. The plaintiffs seek to preliminarily enjoin SB 126 from going into effect on September 23, 2013 in regards to their existing contracts with New Hampshire dealers.

The Parties' Arguments

The plaintiffs' argument is two-fold. The plaintiffs assert that a retroactive application of RSA 357-C to existing dealership agreements would violate Part I, Article 23 of the New Hampshire Constitution and Article I, Section 10 of the United States Constitution ("the Contract Clause"). The plaintiffs also assert that. RSA 357-C's arbitration provision would run afoul of the Federal Arbitration Act ("FAA") and would be void under the Supremacy Clause of the United States Constitution.

In regards to the Contract Clause claim, the plaintiffs assert that SB 126, which brings equipment manufacturers under the purview of RSA 357-C, would be unconstitutional because it calls for a retroactive application of RSA 357-C on the plaintiffs' existing contracts. Specifically, the plaintiffs contend that RSA 357-C's provisions directly conflict with or are otherwise, inconsistent with the provisions of RSA 347-A which had guided the undertakings of their existing dealership agreements. Thus, the plaintiffs argue that RSA 357-C's retroactive application substantially impairs the plaintiffs' existing contracts by rendering void and unenforceable many of the material provisions contained in the dealership agreements. Furthermore, the plaintiffs submit that the enactment of SB 126 does not serve a public interest. instead, the, plaintiffs contend that SB 126 constitutes "special interest" legislation designed to serve a narrow group of people.

In regards to the Supremacy Clause claim, the plaintiffs note that the FAA provides that contractual arbitration provisions "shall be valid, irrevocable, and enforceable." The plaintiffs argue that the combination of four of RSA 357-C's provisions—RSA 357-C:3, 111(p); RSA 357-C:6; RSA 357-C:7, RSA 357-C:12—would prohibit the plaintiffs from enforcing their existing arbitration provisions as written in the existing contracts. Therefore, the plaintiffs assert that

the. State's ban on arbitration would conflict with the FAA and would be void under the Supremacy Clause of the United States Constitution.

The defendants assert that the plaintiffs' motion for preliminary injunction should be denied because SB 126 is constitutional. The defendants acknowledge, for the purpose of this motion, that there are existing contractual relationships between the plaintiffs and New Hampshire equipment dealers, and that SB 126 would apply RSA 357-C retroactively to existing dealership agreements. However, the defendants submit that RSA 357-C's application would not cause a substantial impairment of the plaintiffs' existing contracts, and, therefore, would not run afoul of constitutional protections regarding retrospective legislation.

The defendants assert that the equipment manufacturer-dealership relationship has been regulated since 1995 when the New Hampshire Legislature passed RSA 347-A. The defendants also submit that the past industry regulation makes it foreseeable that changes in the regulation could occur over time. Therefore, the defendants submit that the inclusion of farm, forestry, and industrial equipment in RSA 357-C's definition of motor vehicle would not constitute a substantial impairment, but, rather, would constitute a plausible and not unforeseeable refinement of applicable law.

Further, the defendants assert that even if the retroactive application of RSA 357-C *were* to be found to constitute a substantial impairment, there is a valid public interest being served that is sufficient to exempt the statute from the general prohibition against retroactive legislation. The defendants contend that SB 126 constitutes an economic measure designed to strengthen the general economy of the State. Additionally, the defendants argue that SB 126 helps to counter practices of equipment manufacturers said by defendants to be causing harm to New Hampshire businesses, consumers, and industries such as agriculture.

Finally, the defendants assert that the Supremacy Clause issues need not be determined at this stage of litigation. The defendants explain that any provision of RSA 357-C which may violate the Supremacy Clause would be void. Thus, if RSA 357-C's arbitration provision were found to violate the FAA, the arbitration provision would be displaced and the FAA would control.

Lanai Standard for Consideration of Injunctive Relief

The legal standards for consideration of injunctive relief are well established. "The issuance of injunctions, either temporary or permanent, has long been considered an extraordinary remedy." Murphy v. McQuade Realty, 122 N.H. 314, 316 (1982) (citing Timberlane Reqs1 Sch. Dist. v. Timberlane Real Educ. Ass'n, 114 N.H. 245, 250 (1974)). The standard for granting injunctive relief requires the plaintiffs to demonstrate that: 1) plaintiffs are likely to succeed on the merits; 2) there is an immediate danger of irreparable harm; (3) that they have no adequate remedy at law; and (4) that public interest would be served by granting the injunction. See UniFirst Corp. v. City of Nashua, 130 N.H. 11, 13-14 (1987) (citations omitted); see also Thompson v. N.H. Bd. of Med., 143 N.H. 107, 108 (1998); 5 G. MacDonald Wiebusch on New Hampshire Civil Practice and Procedure §§ 19.05 - 19.16.

One purpose of a preliminary injunction can be to preserve the status quo pending a final determination of the request for injunctive relief. Kukene v. Genualdo, 145 N.H. 1, 4 (2000). The granting or denial of preliminary injunction does not serve as a final determination concerning the merits of the claims or defenses of a party. See id. at 4. "Injunctive relief is an equitable remedy, requiring the trial court to consider the circumstances of the case" at the time of the motion and does not constitute a final adjudication of the merits of the case. See id.

Issues of Potential Success on the Merits

The parties' dispute "centers upon the tension between the constitutional proscription against governmental impairment of contract rights and the State's sovereign authority to safeguard the welfare of it citizens." Tuttle v. N.H. Med. Malpractice Joint Underwriting Ass'n., 159 N.H. 627, 640 (2010). Therefore, in order to determine the plaintiffs' likelihood of success on the merits, the Court must consider the strength of the plaintiffs' assertion that SB 126's retroactive application of RSA 357-C on the existing equipment dealership agreements is an unconstitutional violation of the Contract Clause.

Part I, Article 23 of the New Hampshire Constitution provides: "Retrospective laws are highly injurious, oppressive, and unjust. No such laws, therefore, should be made, either for the decision of civil causes, or the punishment of offenses." The Part I, Article 23 proscription duplicates the protections found in Article 1, Section 10 of the United States Constitution. Cloutier v. State, 163 N.H. 445, 452 (2012). The New Hampshire Supreme Court has noted that "Article I, Section 10 [of the Federal Constitution] and Part I, Article 23 [of the State Constitution] ... offer equivalent protections where a law impairs a contract, or where a law abrogates an earlier statute that is itself a contract." Tuttle, 159 N.H. at 641.

"The party challenging a statute's constitutionality bears the burden of proof." Id. at 634. A statute is presumed to be constitutional, and will not be declared invalid except upon inescapable grounds. North Country Envtl. Servs. v. State, 157 N.H. 15, 18 (2008). In as much as the Court has before it a constitutional challenge to a new statute, the Court will address the present issues' at some length. The Court reiterates, however, that these preliminary, discussions and determinations, regardless of length, are entered without prejudice to further consideration of any issues presented.

The party asserting a Contract Clause violation must demonstrate that: (1) the law applies retroactively; and (2) the legislation substantially impairs the contractual relationship. Tuttle, 159 N.H. at 641. Substantial impairment issues give rise to a three component inquiry: (1) whether there is a contractual relationship; (2) whether a change in law impairs that contractual relationship; and (3) whether the impairment is substantial. Id. If the legislation does substantially impair a contract, "a balancing of the police power and the rights protected by the contract clauses must be performed, and ... Ethel law ... may pass constitutional muster only if it is reasonable and necessary to serve an important public purpose." Opinion of the Justices (Furlough), 135 N.H. 625, 641 (1992).

Here, for the purposes of the preliminary injunction, the parties do not disagree that, under SB 126, RSA 357-C would apply retroactively to existing dealership agreements. Nor do they disagree that the plaintiffs have various existing contracts with New Hampshire equipment dealers. Rather the parties disagree whether the provisions of RSA 357-C impair the existing contract provisions, and if so, whether the impairments are substantial.

Issues of Impairment of Dealership Agreements

The plaintiffs submit that the application of RSA 357-C impairs their existing contractual relationship with equipment dealers by creating new obligations imposing new duties, and attaching new disabilities to plaintiffs' existing dealership agreements. Specifically, the plaintiffs point to provisions in RSA 357-C that are either inconsistent or additions to their existing dealership agreements that were written in light of RSA 347-A. To assess whether the current contracts are impaired, the Court "must first identify what contractual rights, if any, have been impaired." Equip. Mfrs. lnst v. Janklow, 300 F.3d 842, 851 (8th Cir. 2002).

Issues of Dealership Agreement Terms Governing Dealership Area

The plaintiffs' dealership agreements contain a provision that permits the plaintiffs to enlarge or reduce a dealer's dealership area or relevant market area for any reasons with or without advanced notice. Under RSA 357-C:3, III(o) plaintiffs may only alter a dealer's dealership area or relevant market area with good cause. "Dealership area" had not been regulated under RSA 347-A. Thus, it appears to constitute a new requirement on the plaintiffs that is inconsistent with the current "discretion" the plaintiffs hold in this area.

Issues of Dealership Agreement Terms Regarding Competing Dealerships

The plaintiffs' dealership agreements each contain a section that permits the plaintiffs to compete with, or to authorize others to compete with, a dealer in the dealer's dealership area or relevant market area. Additionally, the plaintiffs' agreements contain sections that permit the plaintiffs to add, relocate, or discontinue dealer locations' or reassign a portion of a dealership area to meet changing market needs without notice or good cause. Under RSA 357-C:3,111(k), except in certain circumstances, the plaintiffs would not be permitted to compete with a dealer operating under an agreement with the plaintiffs in the relevant market area. Similarly, RSA 357-C:3, 111(1) prevents the plaintiffs from granting a competitive franchise in the relevant market area already held by another dealer other than in accordance with the provisions of RSA 357-C. Finally, RSA. 357-C:9 requires the plaintiffs to notify a dealer of any proposal to add or relocate a competing dealership within an existing dealer's relevant market area and if the dealer chooses it may file a protest to the New Hampshire Motor Vehicle Industry Board who will only allow the adding or relocating of the competing dealership if the plaintiffs can show good cause for the decision.

Taken together, RSA 357-C:3, 111(k), RSA 357-C:3, 111(1), and RSA 357-C:9 seek to remove the plaintiffs' discretion to compete or authorize others to compete in a particular dealership area and to eliminate plaintiffs' discretion to add or relocate a dealership into an existing dealership area (or relevant market area) without good cause. Also, "completion" and "relocation" was not an area that RSA 347-A had regulated.

Issues of Dealership Agreement Terms Covering Maintenance of Capital

Many of the plaintiffs' dealership agreements contain a provision that permits the plaintiffs to set the minimum equity level or capital standards that a dealer must meet. RSA 357-C:3, 111(h) seeks to remove the plaintiffs' discretion to set the minimum equity level or capital standards a dealer must maintain and would require the plaintiffs to set these numbers through a negotiated agreement with the dealers. "Maintenance of capital" was not an area that had been regulated by RSA 347-A.

Issues of Dealership Agreement Terms Governing Fulfilling Dealer Orders

Many of the plaintiffs' dealership agreements contain a provision that permits the plaintiffs to delay, fail to accept, or refuse to accept a dealer's order or to ship product to a dealer for any reason or for reasons that were specifically listed in the manufacturer-dealer agreement. RSA 357-C:3, III(a) and RSA 357-C:3, III(q) appears to only allow the plaintiffs to decline to deliver or fill orders for reasons that plaintiffs have no control over. Additionally, RSA 357-C:3, 111(q) would not allow plaintiffs to limit the types of equipment a dealer may sell and requires the plaintiffs to make available to the dealer all equipment that it sells under its brand name. Therefore, these RSA 357-C provisions seek to remove the

plaintiffs' existing discretion in these areas. Also, "fulfilling dealer orders" had not been regulated by RSA 347-A.

Issues of Dealership Agreement Terms Regarding Termination, Cancelation, or Non-renewal

Various of the plaintiffs' dealership agreements contain a provision that permits the plaintiffs and their dealers to agree mutually to terminate, cancel, or non-renew a dealership agreement for any reason. Other of the dealership agreements allow the plaintiffs to terminate, cancel, or non-renew a dealership agreement upon notice for any failure to abide by the terms of the dealership agreement. Finally, other dealership agreements provide for immediate termination, cancellation, or non-renewal under certain specific circumstances. Under RSA 357-C:3, III(c), the plaintiffs would not be permitted to terminate, cancel, or non-renew a dealership agreement absent good cause. The plaintiffs assert that the "good cause" showing constitutes a new requirement. However, RSA 347-A provides, in relevant part, "[n]o supplier shall terminate, cancel, or fail to renew a dealership agreement without cause. … '[C]ause' means failure by an equipment dealer to comply with requirements imposed upon the equipment dealer by the dealer agreement ...." Therefore, RSA 357-C:3, III(c)'s showing of "good cause" does not appear to constitute a completely new duty on the plaintiffs.

However, unlike RSA 347-A, RSA 357-C does not allow for the immediate termination, cancelation, or non-renewal under specific circumstances that do not relate to the terms of the dealership agreement Thus, the removal of the immediate termination, cancelation, or non-renewal statutory provisions would raise issues concerning a material change from the previous regulation. Additionally, RSA 357-C requires that "good cause", be determined by the New Hampshire Motor Vehicle Industry Board prior to the terminating, cancelling, or non-renewal of a contract. Neither of these changes had

been earlier regulated or required by RSA 347-A. Thus, they appear to raise constitutional issues concerning new rights and obligations.

Issues of Dealership Agreement Terms Covering Arbitration

Deere & Company's and AGCO Corporation's dealership agreements provide that the sole forum for resolution of disputes arising between Deere & Company and AGCO Corporation and their respective dealers would be binding arbitration. RSA 357-C:3, III(p)(3) prohibits parties from contractually agreeing to arbitration or any binding alternate dispute resolution prior to a dispute arising. Additionally, RSA 357-C:7 requires disputes regarding "good cause" showings to be litigated before the New Hampshire Motor Vehicle Industry Board. Finally, RSA 357-C:12 allows all disputes arising from a dealership agreement to also be heard by the New Hampshire Motor Vehicle Industry Board. RSA 347-A provided, "[n]othing contained in this chapter shall bar the right of an agreement to provide for binding arbitration of disputes." Therefore, plaintiffs have made a sufficient preliminary showing that RSA 357-C's arbitration provisions appear inconsistent with RSA 347-A's arbitration provisions and with the plaintiffs current existing contracts.

Issues of Dealership Agreement Terms Governing Warranties

The plaintiffs' dealership agreements provide that plaintiffs will reimburse dealers for the dealers' costs associated with performing warranty service in accordance with the plaintiffs' warranty manual or program guidelines. The dealership agreements provide that the plaintiffs retain the discretion to establish reimbursement rates associated with performing the warranty services, such as the labor rate and product prices. RSA 357-C:5(b) provides that compensation to dealers for warranty services must be set at the dealer's

retail labor rates and product prices. The plaintiffs assert that RSA 357-C:5(b) divests the plaintiffs' of their discretion in determining warranty service reimbursement amounts.

New Hampshire's version of the Uniform Commercial Code provides that manufacturers "shall be liable to such service representative in the amount equal to that which is normally and reasonably charged by the representative for like Services … rendered to retail consumers who are not entitled to warranty protection. This equality of normal and reasonable charges shalt apply both to labor and parts." RSA 382-A:2-329 (1988). This provision of the New Hampshire Uniform Commercial Code would appear to apply to the sale of "consumer goods"—goods bought for the primary purpose of personal, household, and family use. Therefore, to the extent that the plaintiffs' equipment may be sold as "consumer goods," RSA 357-C would not appear impair the existing warranty reimbursement provisions of the plaintiffs' contract. Additionally, while RSA 347-A did regulate warranties, it did not appear to regulate or provide guidance regarding proper reimbursement amounts for parts and labor.

Issues of Dealership Agreement Terms Regarding Selling Full Line Make[1]

The plaintiffs' contracts specify the type of equipment their dealers may sell, and typically limit dealers to selling that specific type of equipment unless the contract is amended to permit the dealer to sell other types of equipment under the same brand name. RSA 357-C:3, 111(q) would prevent the plaintiffs from limiting, the types of equipment a particular dealer may sell. Instead, the plaintiffs must offer for sale all equipment that it sells under its brand name. "Selling full

[1] Under RSA 357-C:1, XXVII, the term "line make" is defined as "motor vehicles that are offered for sale, lease, or distribution under a common name, trademark, service mark, or brand name of the franchisor or manufacturer of the motor vehicle.

line make" had not been regulated under RSA 347-A. Thus, this is a new requirement, in terms of equipment manufacturers. Plaintiffs have made a sufficient preliminary showing that the provision is inconsistent with the current discretion the plaintiffs may hold in this area.

Issues of Dealership Terms Covering Competing Lines of Equipment

At least one of the plaintiffs' contracts places express restrictions on whether and under what circumstances a dealer may carry a competitive line of equipment. Application of RSA 357-C:3, II(c) would prohibit the plaintiffs from placing restrictions on dealers regarding the dealers sale of competing manufacturer lines of products. RSA 347-A did not contain 'any provisions regulating this area.

Issues of Dealership Terms Governing Manufacturer Owned Dealerships

At least one plaintiff, Deere & Company, owns an equipment dealership, Nortrax, Inc., in New Hampshire. Deere apparently has dealership agreements with this manufacturer-owned dealer. Under RSA 357-0:3, III(k) a manufacturer-owned dealership may not compete with a franchise equipment dealers unless certain criteria are met. Plaintiffs assert that Nortrax would not meet the criteria provided in RSA 357-C:3, III(k) that allows it to compete with current franchise equipment dealers. Therefore, under RSA 357-C, this store would potentially become in violation of the statute. RSA 347-A did not provide any regulation of "manufacturer owned dealerships."

Based on the above comparison between the existing dealership agreements, the previous areas RSA 347-A regulated, and the forthcoming rights and obligations imposed by RSA 357-C, a sufficient preliminary showing has been made that there are a number of contractual terms

within pre-existing dealership agreements that would likely be impaired by SB 106, including: (1) dealership area (not previously regulated); (2) competing dealerships (not previously regulated); (3) maintenance of capital (not previously regulated); (4) fulfilling dealer orders (not previously regulated); (5) termination, cancelation, or non-renewal (previously regulated); (6) arbitration (previously regulated); (7) warranties (previously regulated); (8) selling full line make (not previously regulated); (9) competing lines of equipment (not previously regulated); and (10) manufacturer owned dealerships (not previously regulated).

The Court concludes, based on the current material presented, that a sufficient preliminary showing has, been made that implementation of SB 106 to existing 'contracts will likely impair the plaintiffs' existing contractual relationship with their dealers. See Janklow, 300 F.3d at 851 (finding that changes in terms governing dealership executive management or ownership, dealers' stocking machinery parts and accessories, manufacturer's attempts to further penetrate the market, dealer's sale of another line-make of machinery, and dealer participation in advertising and promotional activities impaired the manufacturer's pre-existing contractual relationship with its dealers).

Issues of Substantial Impairment

Having found that plaintiffs have made a sufficient preliminary showing that RSA 357-C will cause an impairment to the plaintiffs' contracts the Court must also determine whether plaintiffs have made a sufficient preliminary showing that the impairment will be found to be substantial. "[T]he United States Supreme Court has provided little specific guidance as to what constitutes a 'substantial' contract impairment … "Tuttle, 159 N.H. at 649 (citing Balt. Teachers Union v. Mayor and City Council of Balt., 6 F.3d 1012, 1017 (4th Cir. 1993)). However, "total destruction of contractual expectations is not necessary for a

finding of substantial impairment." Id. (quoting Energy Reserves Gm., Inc. v. Kan. City Power & Light Co., 459 U.S. 400, 411 (1983).

In considering these matters, the Court would note the following principles.

> The severity of an impairment of contractual obligations can be measured by the factors that reflect the high value the Framers placed on the protection of private contracts. Contracts enable individuals to order their personal and business affairs according to their particular needs and interests. Once arranged, those rights and obligations are binding under the law, and the parties are entitled to rely on them.

Id. (quoting Opinion of the Justices (Furlough), 135 N.H. at 633). "The degree of the Act's impairment of the contracts is particularly pertinent because

> [t]he severity of the impairment measures the height of the hurdle the State legislation must clear. Minimal alteration of contractual obligations may end the inquiry at its first stage. Severe impairment, on the other hand, will push the inquiry to a careful examination of the nature and purpose of the State legislation."

Id. (quoting Allied Structural Steel Co. v. Spannaus, 438 U.S. 234, 245 (1978)).

When determining whether a contract may be substantially impaired, courts consider whether the contracting parties had relied on the abridged contract right. Id. 'Where the right abridged was one that induced the parties to contract in the first place, a court can assume the impairment to be substantial." Id. (quoting Fraternal Order of Police Lodge No. 89 v. Prince George's Cntv., Md., 645 F. Supp. 2d 492, 510 (2009)). In the present case, the plaintiffs assert that the

manufacturers had "relied on the existence and enforceability of all of the material provisions in [their] contracts including the provisions at issue in this motion when they entered into [their] contracts." (Audio of Preliminary Injunction Hearing, September 13, 2013, 10:41:55.)

Additionally, when "determining whether impairment is substantial, some courts look to whether the subject matter of the contract has been the focus of heavy State regulation." Tuttle, 159 N.H. at 650 (citing Energy Reserves Grp., Inc., 459 U.S. at 413). "If so, further regulation might be foreseeable and, thus, any change to the contract caused by such regulation would not necessarily constitute a substantial impairment." Id. (citing Mercado-Boneta v. Admin. Del Fondo de. Comp., 125 F.3d 9, 13-14 (1st Cir. 1997)). "However, standing alone, 'a history of regulation is never a sufficient condition for rejecting a challenge based on the contracts clause.'" Id. (quoting Chrysler Corp. v. Kolosso Sales, Inc., 148 F.3d 892, 895 (7th Cir. 1998), cert. denied 525 U.S. 1177 (1999)): In Kolosso, the court noted that past regulation of some aspects of commercial activity does not "put the regulated firm on notice that an .entirely different scheme of regulation will be imposed." 148 F.3d at 895.

Here, the State contends that the regulation of equipment dealers under RSA 347-A and RSA 357-C's 2002 amendment to include snowmobiles and off-highway recreational vehicles made the enactment of SB 126 foreseeable and that the inclusion of equipment dealers in RSA 357-C essentially constitutes a refinement in the law. For support, the State cites to Ford v. Meredith Motors Co., 2000 WL 1513779 (D.N.H. 2000) (vacated on absention grounds by Ford v. Meredith Motor Co., 257 F. 3d 67 (1st Cir. 2001). In Ford, Ford argued that its 1972 agreement with its dealer was not subject to RSA 357-C (enacted in 1981). The Court found that Ford's dealership agreement had been significantly modified between 1972 and 1978, giving rise to a new contract starting in 1978. The Court

concluded that by 1978, the New Hampshire legislature had a well-established history" of regulating the relationship between manufacturers and dealers because RSA 357-B had been in effect since 1973. Ford, 2000 WL 1513779, at * 8. Additionally, the Court concluded that the retrospective effect of RSA 357-C beginning in 1981 did not substantially impair Ford's contracts. The Court explained that:

> Although the New Hampshire legislature did not expressly impose a "good cause" requirement on a manufacturer's attempt to alter a dealer's relevant market area until it enacted chapter 357-C, it did specify in chapter 357-B that manufacturers were barred from taking any "arbitrary, [j bad faith, or unconscionable" actions against dealers. Further, while the legislature did not create the Motor Vehicle Industry Board and expressly impose a "good cause" requirement on dealer relocation decisions until it replaced chapter 357-B with chapter 357-C, it did give affected dealers a right in chapter 357-B to challenge proposed dealer relocations through binding arbitration. Finally, although chapter 357-B does not contain chapter 357-C's provision for an automatic stay, chapter 357-B functioned in essentially the same way because it required a manufacturer to notify a dealer of a proposed relocation and specified that any dispute concerning the proposed relocation would have to be resolved through binding arbitration.

Id. at * 8 (internal citations omitted). Tracing expansions in RSA 357-C to provisions in RSA 357-B—which was in place at the time the parties contracted—the Court was able to conclude that the changes were "in the direct path of the plausible (though of course not inevitable) evolution of [New Hampshire's] program for regulating automobile dealership contracts ... and constituted only ... small and predictable

step[s] along that path." Id. (quoting Kolosso, 148 F.3d at 896).

Unlike in Ford, many of the obligations, requirements, and duties established by the application of RSA 357-C on equipment dealers do not appear particularly traceable to antecedent provisions in RSA 347-A. As noted above, some seven of the ten alleged affected contractual rights do not appear to have been regulated by RSA 347-A. Therefore, while the defendants' arguments are not without merit, at this point in the case, the Court finds Tuttle more on point with the offered facts of the present case.

In Tuttle, the New Hampshire Supreme Court noted that insurance is a heavily regulated business. 159 N.H. at 650. However, the Supreme Court also noted that the insurance industry had not been regulated in the manner presented in that case—requiring excess insurance funds to be transfer to the State's general fund. Id. The Supreme Court commented that "neither the [insurance] policies, nor the insurance regulations incorporated reference to any governmental reservation of power to amend the rights and obligations established by the assessable and participating policies." Id. "On the contrary, the policyholders' contracts expressly entitle them to participate in the [insurance] earnings," and the contract provisions "leave no potential outlet for the accumulated funds other than application against future assessment, or distribution to the policyholders." Id. Plaintiffs have made a sufficient preliminary showing, that, as in Tuttle, while equipment dealers have been regulated, they were not regulated in the areas or in the way that RSA 357-C intends to regulate them.

The defendants also argue that the increased regulation under RSA 357-C was foreseeable because many other states that the plaintiffs contract in currently regulate the plaintiffs in a similar way that RSA 357-C will. However, the U.S. Supreme Court, in Allied Structural Steel Co. held that even

though "the plaintiff company's pre-existing pension plan had been previously subject to regulation by the IRS, it had not previously been regulated in the area covered by the Minnesota regulation." Janklow, 300 F.3d at 859. "For that reason, the Court held the Minnesota regulation unconstitutional as applied to the plaintiff's company, as it had no reason to anticipate that the terms of the pension plan would be altered by subsequent legislation." Id. Similarly, in Janklow, when determining if previous regulation made future regulation foreseeable, the court only considered the existing regulations of South Dakota—the state where the new regulations were being imposed. Id. at 858, 858 n. 17-18.

Therefore, the Court preliminarily finds that the plaintiffs would not have reasonably expected RSA 357-A to be repealed and replaced by RSA 357-C. Accordingly, the Court finds that plaintiffs have made a sufficient preliminary showing of a likelihood of establishing that their contracts will be substantially impaired were RSA 357-C take effect.

Issues of Reasonable and Necessary Legislation

When application of a statute retrospectively impairs contracts, "it technically violates Part I, Article 23 of the State Constitution." Id. at 652. "Nevertheless, it is to be accepted as a commonplace that the Contract Clause does not operate to obliterate the [State's] police power Id. (quoting Opinion of the Justices (Furlough), 135 N.H. at 634.

> It is the settled law of this court that the interdiction of statutes impairing the obligation of contracts does not prevent the State from exercising such powers as are vested in it for the promotion of the common weal, or are necessary for the general good of the public, though contracts previously entered into between individuals may thereby be affected. This power, which in its various ramifications is

> known as the police power, is an exercise of the sovereign right of the Government to protect the lives, health, morals, comfort and general welfare of the people, and is paramount to any rights under contracts between individuals.

Id. (quoting Allied Structural Steel Co., 438 U.S. at 241) (quotation omitted).

It has been noted that "[i]f the Contract Clause is to retain any meaning at all . . . it must be understood to impose some limits upon the power of a State to abridge existing contractual relationships, even in the exercise of its otherwise legitimate police power." Id. at 653 (quoting Allied Structural Steel Co., 438 U.S. at 242). 'Thus, a balancing of the police power and the rights protected by the contract clauses must be performed, and a bill or law which substantially impairs a contractual obligation may pass constitutional muster only if it is reasonable and necessary to serve an important public purpose." Id. (quoting Opinion of the Justices (Furlough), 135 N.H. at 634). Therefore, the Court "must consider whether the [State's] proposed justification in fact serves *public* interests and whether its mechanisms to serve those interests reflect *reasonable* and *necessary* choices." Id. (quoting Mercado-Boneta, 125 F.3d at 15.

The United States Supreme Court has held that remedying a broad and general social or economic problem satisfies this requirement, while a statute with a very narrow focus might not. Allied Structural Steel Co., 438 U.S. at 249. Additionally, seeking to "level[] the playing field between contracting parties is expressly prohibited as a significant and legitimate public interest." Janklow, 300 F.3d at 861 (citing Allied. Structural Steel Co., 438 U.S. at 247; see Tuttle, 159 N.H. at 656 (noting that the statute at issue in Allied Structural Steel Co. applied so narrowly that "its sole effect was to alter contractual duties"); see Whirlpool Corp. v.

Ritter, 929 F.2d 1318, 1323 (8th Cir. 1991) ("Because the law at issue here directly alters the obligations and expectations of the contracting parties, it is not merely general, social legislation.").

Here, the State submits that SB 126 serves a proper public purpose-because it broadens the reach of RSA 357-C, a statute created to "regulate vehicle manufactures, distributors... and dealers doing business in this State ..." premised on the 1981 general court's finding that "the distribution and sale of vehicles within the State vitally affects the general economy of the State and the public interest and welfare." Laws ch. 477:1. The State notes that RSA 357-G is designed to support the State wide economy and, ultimately, consumers.

For support, the State references Defendant's Exhibit "A"—the statement of intent for the enactment of RSA 357-C. However, this statement of intent appears to have been declared at a time well before the creation of SB 126. The intent had been established when RSA 357-C covered only "traditional" motor vehicles. On a preliminary hearing basis, there has been an insufficient showing that the intent behind the enactment of RSA 357-C should be attributable to SB 126's enactment some 32 years later. Nor has sufficient evidence been presented, on a preliminary basis, to support that the legislature's determination in 1981 that "traditional" motor vehicles vitally impact the general economy of the State would translate to a similar belief that "agricultural equipment as motor vehicles" have as much effect on the State's economy today.

The legislature's "Statement of Intent" concerning SB 126 provides: "The current law and SB 126, seeks to continue to level the playing field for NH businesses and ensure [farmers]/consumers interests are safeguarded as well." (Defs.' Mot. Obj. Prel. Inj., Ex. B at 1.) The "Statement of Intent" goes on to note that the "committee heard extensive

testimony showing the dealer-manufacturer relationship is broken: contracts and terms are non-negotiable, programs are dictated, and costs are shifted onto dealers and ultimately consumers." (Defs.' Mot. Obj. Prel. Inj., Ex. B at 1.) The State also asserts that SB 126 is designed to strengthen the general economy of the State.

For support, the State points to the committee testimony of equipment dealers and farmers/consumers regarding issues with manufacturers, how unfair manufacturer practices hurt farmers and customers and small family owned businesses, how less local dealerships hurt local farmers because farmers have to travel great distances to larger dealers that they do not know, and that the decrease in local small equipment dealership harms farmers/consumers by creating a lack of local competition. Additionally, the State indicates that in 1970 there had been 40 large equipment agricultural dealers in New Hampshire and now there are only 13 or 14.

The Court acknowledges that the State has raised a number of concerns that may ultimately demonstrate an impact on broad and general social or economic interests. Loss of jobs, termination of dealerships, hardship to farmers, and impacts on rural communities and farms might well be demonstrated as a consequence if equipment dealership agreements are not regulated under RSA 357-C. However, at this preliminary point in the present case, the Court does not conclude that the State has sufficiently shown that addressing these issues by applying RSA 357-C retroactively to equipment dealers will in turn solve (or benefit) a broader State wide public interest.

For the purpose of this motion; and on a preliminary hearing basis, the Court finds that the public purpose behind SB 126 has not been established as sufficient to override the constitutional protection provided in Part I, Article 23 of the New Hampshire Constitution and Article 1, Section 10 of the United States Constitution. Because the Court does not

preliminarily find a sufficient public purpose, it need not determine the reasonableness and necessity of SB 126.

The Court recognizes that all parties have outlined good faith claims and defenses concerning these matters. However, based on the above analysis, the Court concludes, on a preliminary basis, that the plaintiffs have made a sufficient showing concerning the probability of success regarding their claims.

Issues of Immediate Danger of Irreparable Harm and Adequacy of Remedy at Law

It is well-established that a violation of constitutional rights creates a presumption of irreparable harm. See, e.g. Awad v. Ziriax, 670 F.3d 1111, 1131 (10th Cir. 2012) (m[w]hen an alleged constitutional right is involved, most courts hold that no further showing of irreparable injury is necessary."') (quoting Kikumura v. Hurley, 242 F.3d 950, 963 (10th Cir. 2001)); Donohue v, Mangano, 886 F. Supp. 2d 126, 150 (E.D.N.Y. 2012) ("First, as a general matter, there is a presumption of irreparable harm when there is an alleged deprivation of constitutional rights."); Goings v. Court Servs. & Offender Supervision Agency for the Dist. Of Columbia, 786 F. Supp. 2d 48, 78 (D.D.C. 2011) ("It has long been established that the loss of constitutional freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.") (internal quotations omitted). "This notion is not just limited to violations of free speech or due process, but may include violations of the Contract Clause as well .... Mangano, 886 F. Supp. 2d at 150; see Kendall-Jackson Winery, LTD v. Branson, 82 F. Supp. 2d 844, 878 (N.D. III. 2000) (finding that a violation of the Contracts Clause "constitutes irreparable injury"); Univ. of Haw. Prof'l Assembly v. Cavetano, 16 F. Supp. 2d 1242, 1247 (D. Haw. 1998), aff'd, 183 F.3d 1096 (9th Cir. 1999) (finding violation of the Contracts Clause would result in irreparable harm to union members); Allen v. State of Minn., 867 F. Supp. 853,

859 (D. Minn. 1994) (impairment of constitutional rights under Commerce and Contract Clauses constitutes irreparable injury in context of request for permanent injunction). "While the assertion of a constitutional injury is insufficient to automatically trigger a finding of irreparable harm, where … the constitutional deprivation is convincingly shown and that violation carries noncompensable damages, a finding of irreparable harm is warranted." Mangano, 886 F. Supp. 2d at 150 (internal citations omitted) (citing Donohue v. Paterson, 715 F. Supp, 2d 306, 315 (N.D.N.Y. 2010)).

Here, as discussed above, the plaintiffs have sufficiently met the criteria for entry of preliminary injunctive relief concerning their claim that RSA 357-C's retroactive application would violate the Contract Clause. On September 23, 2013, the date SB 126 takes effect, RSA 357-C:6, I will act to retroactively apply RSA 357-C to all pre-existing equipment dealership agreements. Under RSA 357-C:6, I any provision of an agreement that is. "inconsistent with [RSA 357-C] shall be void as against public policy and unenforceable in th6 courts or the motor vehicle industry board of [New Hampshire]." Thus, as analyzed above, either in whole or in part, some ten provisions in the plaintiffs' contracts will become void and replaced with provisions in conformity with RSA 357-C.

The plaintiffs assert that the affected provisions are some of the most "important, substantive provisions of the plaintiffs' existing contracts" and "will effectively terminate plaintiffs' existing contracts." (Pls.' Mot. Prel. Inj., at 37.) The defendants argue that because RSA 357-C's provisions will "fill" any voided provisions in the plaintiffs' contracts there is no irreparable harm. However, because these replacement provisions, in most instances, directly contradict existing contractual provisions, the Court disagrees.

Some courts have also held that irreparable harm arises where an unconstitutional law will impose civil and/or

criminal penalties on an entity for non-compliance. See, e.g., Georgia Latino Alliance for Human Rights v. Deal, 793 F. Supp. 2d 1317, 1339-40 (N.D. Ga. 2011) (finding irreparable harm where plaintiffs would be subject to criminal penalties); Villas at Parkside Partners d/b/a Villas at Parkside v. The City of Farmers Branch, 577 F. Supp. 2d 858, 877 (N.D. Tex. 2008) (finding irreparable harm where plaintiffs would be subject to fines and criminal penalties). RSA 357-C:15 provides that any violation of this chapter shall constitute a misdemeanor." Thus, if the plaintiffs seek to enforce any of the existing provisions that are voided and replaced by RSA 357-C as of September 23, 2013 plaintiffs could be potentially subjected to criminal sanctions. Therefore, the Court preliminarily finds that the plaintiffs have sufficiently established that *there* is a sufficient danger of irreparable harm and no adequate remedy in law.

Issues of Public Interest Served by Preliminary Injunction

In UniFirst v. City of Nashua, the New Hampshire Supreme Court held that the trial court had "correctly determined that the granting of an injunction would assure that, in the public interest, the due process rights of [the plaintiff] would be protected. 130 N.H. at 14. UniFirst "had a property interest that was entitled to protection under the due process clause. Id. The trial court's injunction had "prohibited the State from 'depriv[ing] any person of ... property," in violation of the Constitution. Id.

While the defendants have set forth certain bona fide concerns regarding the public interest, on a preliminary basis, the Court cannot conclude that those concerns outweigh countervailing concerns regarding the protection of contract rights that have been in operation some number of years. Here, the plaintiffs are asserting a constitutional right—protection under the Contract Clause. Therefore, like UniFirst, it is proper for the Court find that the public's

interest is served by allowing a status quo preliminary injunction until the Court renders a final determination on the plaintiffs' claims on the merits. The Court would also note that the present order is in the nature of a preservation of status quo injunction rather than an affirmative injunction mandating certain actions.

Issues of injunction Bond

New Hampshire Superior Court Rule 161(c) requires the posting of an injunction bond unless good cause exists to forego this: requirement. The purpose of an injunction bond is to mitigate the harm caused to the defendant by an erroneously issued injunction. Thus, "a bond is required where the injunction exposes the defendant to a risk of monetary loss." Crowley v. Local No. 82, Furniture and Piano Moving. Furniture Store Drivers, Helpers, Warehousemen, and Packers, 679 F.2d 978, 1000 (1st Cir. 1982). Here, there does not appear to be a risk of monetary loss to the State by enjoining SB 126 from taking effect on September 23, 2013 in regards to the plaintiffs' existing contracts with New Hampshire equipment dealers. Therefore, the Court concludes that the plaintiffs are not required to post an injunction bond.

Conclusion

For the foregoing reasons, the plaintiffs' motion for preliminary injunction is granted.[2] The following specific orders are entered.

1. As to existing contracts between plaintiffs and its dealers, defendant State of New Hampshire is preliminarily enjoined from including farm and

[2] Because the Court is granting the preliminary injunction based on the plaintiffs' claim of a Contract Clause violation, it need not make a determination on the Supremacy Clause violation claim at this time.

equipment manufacturers within the definition of motor vehicles of RSA 357-C as provided for under SB 126.

2. Entry of this preliminary injunction is conditioned upon each of the plaintiffs agreeing to govern their existing contractual relationships with their dealers under the same provisions, statutory and contractual, as presently in existence, whether or not any such statutory provisions have been otherwise repealed by SB 126.

3. In the event that any of the' parties need to seek relief concerning implementation of the: preliminary injunction, the parties are free to submit appropriate pleadings.

4. These orders are entered without prejudice to entry of such other and further findings and orders as may be considered upon further proceedings.

5. A structuring conference shall be scheduled by the Merrimack County Superior Court to address the scheduling of the future proceedings concerning these matters.

6. All future pleadings should be submitted to the Merrimack County Superior Court.

SO ORDERED

Date: 9.19.13

/s/ Philip P. Mangones
Philip Mangones
Presiding Justice

APPENDIX D

CHAPTER 130
SB 126-FN – FINAL VERSION

03/21/13 0874s
03/21/13 1066s
22May2013... 1699h
06/12/13 2027EBA
06/12/13 2050EBA

2013 SESSION

13-0766
05/10

SENATE BILL
126-FN

AN ACT relative to business practices between motor vehicle manufacturers, distributors, and dealers.

SPONSORS: Sen. Sanborn, Dist 9; Sen. Gilmour, Dist 12; Sen. Woodburn, Dist 1; Sen. Bradley, Dist 3; Sen. Watters, Dist 4; Sen. Pierce, Dist 5; Sen. Cataldo, Dist 6; Sen. Odell, Dist 8; Sen. Kelly, Dist 10; Sen. Lasky, Dist 13; Sen. Carson, Dist 14; Sen. Larsen, Dist 15; Sen. Boutin, Dist 16; Sen. D'Allesandro, Dist 20; Sen. Soucy, Dist 18; Sen. Fuller Clark, Dist 21; Sen. Morse,

Dist 22; Sen. Stiles, Dist 24; Sen. Rausch, Dist 19; Sen. Forrester, Dist 2; Rep. Packard, Rock 5; Rep. Schlachman, Rock 18; Rep. Goley, Hills 8; Rep. Bouchard, Merr 18; Rep. Chandler, Carr 1

COMMITTEE: Commerce

ANALYSIS

This bill revises business practices between motor vehicle manufacturers, distributors, and dealers.

Explanation: Matter added to current law appears in ***bold italics***.

Matter removed from current law appears [~~in brackets and struckthrough.~~]

Matter which is either (a) all new or (b) repealed and reenacted appears in regular type.

STATE OF NEW HAMPSHIRE

In the Year of Our Lord Two Thousand Thirteen

AN ACT relative to business practices between motor vehicle manufacturers, distributors, and dealers.

Be it Enacted by the Senate and *House of Representatives in General Court convened:*

130:1 Section Heading and Definition of Motor Vehicle. Amend the section heading of RSA 357-C:1, the introductory paragraph of RSA 357-C:1, and RSA 357-C:1, Ito read as follows:

357-C:1 Definitions. [~~As used in this chapter~~] ***For the purpose of this chapter only:***

I. "Motor vehicle" means every self-propelled vehicle manufactured and designed primarily for use and operation on the public highways and required to be registered and titled under the laws of New Hampshire~~, not including farm tractors and other machines and tools used in the production, harvesting, and care of farm products~~]. ***Motor vehicle shall include equipment if sold by a motor vehicle dealer primarily engaged in the business of retail sales of equipment.*** Except for RSA 357-C:3, I-b, and where otherwise specifically exempted from the provisions of this chapter, "motor vehicle" shall include off highway recreational vehicles and snowmobiles. ***"Equipment" means farm and utility tractors, forestry equipment, industrial equipment, construction equipment, farm implements, farm machinery, yard and garden equipment, attachments, accessories, and repair parts.***

130:2 Definition of Motor Vehicle Dealer. Amend RSA 357-C:1, VIII to read as follows:

VIII.(a) "Motor vehicle dealer" means any person engaged in the business of selling, offering to sell, soliciting

or advertising the sale of new or used motor vehicles or possessing motor vehicles for the purpose of resale either on his ***or her*** own account or on behalf of another, either as his *or her* primary business or incidental thereto. ***"Motor vehicle dealer" also means a person granted the right to service motor vehicles or component parts manufactured or distributed by the manufacturer but does not include any person who has an agreement with a manufacturer or distributer to perform service only on fleet, government, or rental vehicles.*** However, "motor vehicle dealer" shall not include:

(1) Receivers, trustees, administrators, executors, guardians, or other persons appointed by or acting under judgment, decree or order of any court; or

(2) Public officers while performing their duties as such officers.

(b) "New motor vehicle dealer" means a motor vehicle dealer who holds a valid sales and service agreement, franchise or contract granted by the manufacturer or distributor for the sale, ***service, or both,*** of its new motor vehicles***, but does not include any person who has an agreement with a manufacturer or distributer to perform service only on fleet, government, or rental vehicles***.

(c) The term "motor vehicle dealer" shall not include a single line equipment dealer. "Single line equipment dealer" means a person, partnership, or corporation who is primarily engaged in the business of retail sales of farm and utility tractors, forestry equipment, industrial and construction equipment, farm implements, farm machinery, yard and garden equipment, attachments, accessories, and repair parts, and who:

(1) Has purchased 75 percent or more of the dealer's total new product inventory from a single supplier; and

(2) Has a total annual average sales volume for the previous 3 years in excess of $100,000,000 for the relevant market area for which the dealer is responsible.

130:3 Definition of Franchise. Amend RSA 357-C:1, IX to read as follows:

IX. "Franchise" means one or more oral or written agreements under or by which:

(a) The franchisee is granted the right to sell new motor vehicles or component parts manufactured or distributed by the franchisor ***or the right to service motor vehicles or component parts manufactured or distributed by the manufacturer but does not include any person who has an agreement with a manufacturer or distributer to perform service only on fleet, government, or rental vehicles;***

(b) The franchisee as an independent business is a component of the franchisor's distribution or service system;

(c) The franchisee is granted the right to be substantially associated with the franchisor's trademark, trade name or commercial symbol;

(d) The franchisee's business is substantially reliant for the conduct of its business on the franchisor for a continued supply ***or service*** of motor vehicles, parts, and accessories; or

(e) Any right, duty, or obligation granted or imposed under this chapter is affected. 130:4 Definition of Designated Family Member. Amend RSA 357-C:1, XVIII to read as follows:

XVIII. "Designated family member" means the spouse, child, grandchild, parent, brother [~~or~~]***,*** sister***, or lineal descendent, including all adopted or step descendents,*** of the owner of a new motor vehicle dealership who has been designated in writing to the manufacturer, and, in the case of

the owner's death, is entitled to inherit the ownership interest in the new motor vehicle dealership under the terms of the owner's will or under the rights of inheritance by intestate succession, or who, in the case of an incapacitated owner of a new motor vehicle dealership, has been appointed by a court as the legal representative of the new motor vehicle dealer's property. ***The manufacturer, distributor, factory branch or factory representative or importer may request, and the designated family member shall provide, upon request, personal and financial data that is reasonably necessary to determine whether the succession should be honored.***

130:5 New Paragraph; Definition of Chargeback. Amend RSA 357-C:1 by inserting after paragraph XXIX the following new paragraph:

XXX. "Chargeback" means a manufacturer induced return of warranty, incentive, or reimbursement payments to a manufacturer by a dealer. The term includes a manufacturer drawing or an announced intention to draw funds from an account of a dealer.

130:6 Prohibited Conduct. Amend RSA 357-C:3, III(k) to read as follows:

(k) Compete with a motor vehicle dealer operating under an agreement or franchise from such manufacturer or distributor in the relevant market area; provided, however:

(1) If any manufacturer, distributor, distributor branch or division, or factory branch or division, either directly or indirectly, or through any subsidiary, affiliated entity, or person, owns, operates, or controls, in full or in part, a motor vehicle dealership in this state for the sale or service of motor vehicles in this state, the relevant market area shall be the area within the entire state of New Hampshire and, except for circumstances in which subparagraph (3) may apply, the New Hampshire motor vehicle industry board shall find good cause under RSA 357-

C:9 before any such ownership, operation, or control shall be permitted. In addition to those factors listed in RSA 357-C:9, II, the board in such circumstances shall also consider in its determination of good cause whether the proposed dealership will create an unfair method of competition to other franchisees of the same manufacturer, distributor, distributor branch or division, factory branch or division, subsidiary, or affiliated entity;

(2) That a manufacturer or distributor shall not be deemed to be competing when operating a dealership either temporarily, for a reasonable period in any case not to exceed 2 years; provided that if a manufacturer or distributor shows good cause, the board may extend this time limit and extensions may be granted by the board for periods of up to 12 months; or unless the manufacturer or dealer through a bona fide relationship in which an independent person has made a significant investment subject to loss in the dealership and can reasonably expect to acquire full ownership of such dealership on reasonable terms and conditions; [~~and~~]

(3) A manufacturer that has no more than 5 franchised new motor vehicle dealers [~~licensed to do~~] ***doing*** business in this state and that directly or indirectly owns one or more of them shall not be deemed to be competing with any unaffiliated new motor vehicle dealer trading in the manufacturer's line make at a distance of 18 miles or greater provided that:

(A) All the new motor vehicle dealerships selling such manufacturer's motor vehicles trade exclusively in the manufacturer's line make;

(B) As of March 1, 2000, the manufacturer shall have directly or indirectly owned one or more new motor vehicle dealers in this state for a continuous period of at least one year; and

(C) Neither the manufacturer nor any entity in which the manufacturer has a majority ownership interest shall acquire, operate, or control any dealership that the manufacturer did not directly or indirectly own as of March 1, 2000; *and*

(4) **A *manufacturer or distributor that sells and services motor vehicles in New Hampshire and is licensed as a dealer in New Hampshire shall not be deemed to be competing with any dealer if no dealer or other franchisee sells and services the same line make in New Hampshire.***

130:7 Prohibited Conduct. Amend RSA 357-C:3, III(o) to read as follows:

(o) Change the relevant market area set forth in the franchise agreement without good cause. For purposes of the subparagraph, good cause shall include, but not be limited to, changes in the dealer's registration pattern, demographics, customer convenience, and geographic barriers[~~;~~]. ***At least 60 days prior to the effective date of the revised relevant market area, the manufacturer or distributor shall provide the dealer whose relevant market area is subject to the proposed change, a reasonable and commercially acceptable copy of all information, data, evaluations, and methodology that the manufacturer or distributor considered, reviewed, or relied on or based its decision on, to propose the change to the dealer's relevant market area;***

130:8 Prohibited Conduct. Amend RSA 357-C:3, III(s)(3)(A) to read as follows:

(A) A designated family member or members including any of the following members of one or more dealer owners:

(i) The spouse.

(ii) A child.

(iii) A grandchild.

(iv) The spouse of a child or a grandchild.

(v) A sibling.

(vi) A parent.

(vii) Stepchildren.

(viii) Any adopted descendants.

(ix) Any lineal descendants.

130:9 New Subparagraphs; Prohibited Conduct. Amend RSA 357-C:3, III by inserting after subparagraph (t) the following new subparagraphs:

(u)(1) Allocate vehicles, to evaluate the performance of a motor vehicle franchise, or to offer to a dealer any discount, incentive, bonus, program, allowance or credit (collectively "incentives"), using sales effective measurements that the manufacturer knows or reasonably should know includes exported vehicles, after being provided with notice and the opportunity to conduct an investigation as provided in subparagraph (u)(3). "Sales effective measurement" means a system that measures how effective a franchisee is at selling vehicles by comparing vehicle sales by that franchisee in the territory or geographic region assigned to the franchisee to vehicles sold in the same territory by other franchisees, or other similar methods of measurement. For the purposes of this section, "exported vehicles" are new vehicles that: (i) are titled in New Hampshire but not registered in New Hampshire or any other state; (ii) are titled and registered in New Hampshire but not issued a valid New Hampshire state inspection sticker; or (iii) are exported out of the country within 6 months of purchase.

(2) If a manufacturer uses sales effective measurements to allocate vehicles, evaluate a franchisee, or determine incentives, the manufacturer, upon the written request of one of its franchisees, shall, within 30 days, provide the vehicle identification numbers that the manufacturer possessed and used in the measurements during the time period requested by the dealer.

(3) If a manufacturer uses sales effective measurements to allocate vehicles, evaluate a franchisee, or determine incentives, a dealer may request that the manufacturer or distributor investigate a claim that exported vehicles are included in the measurements. To initiate the investigation, the dealer shall provide reasonable documentation that 8 or more exported vehicles were used in the measurements. Acceptable documentation shall include, but not be limited to, data from the division of motor vehicles and vehicle history reports from third party vendors. Within 30 days of the dealer's request, the manufacturer shall investigate the claim and adjust those measurements proportionately to exclude any exported vehicles and adjust the allocation, evaluation, and incentives. As part of the investigation, the manufacturer shall provide the dealer with any and all information, data, evaluations, methodology or other items, that the manufacturer or distributor considered, reviewed, or relied on, for the measurement. The manufacturer shall have the burden to prove that it has acted in accordance with the requirements of this subparagraph.

(v) Require adherence to a performance standard or standards which are not applied uniformly to other similarly situated dealers. In addition to any other requirements of law, the following shall apply:

(1) A performance standard, sales objective, or program for measuring dealer performance that may have a material effect on a dealer, including the dealer's right to payment under any incentive or reimbursement program, and

the application of the standard, sales objective or program by a manufacturer, distributor or factory branch, shall he fair, reasonable, equitable and based on accurate information.

(2) Prior to beginning any incentive or reimbursement program, the manufacturer shall provide in writing to each dealer of the same line-make that chooses to participate in the program the dealer's performance requirement or sales goal or objective, which shall include a detailed explanation of the methodology, criteria, and calculations used. The manufacturer shall provide each dealer with the performance requirement or sales goal or objective of all dealers participating in the program whose relevant market area includes territory within this state.

(3) A manufacturer shall allocate an adequate supply of vehicles, appropriate to the market, to its dealers by series, product line, and model to assist the dealer in achieving any performance standards established by the manufacturer and distributor.

(4) A dealer that claims that the application of a performance standard, sales objective, or program for measuring dealership performance does not meet the standards listed in subparagraph (1) may request a hearing before the motor vehicle industry board pursuant to RSA 357-C:12.

(5) The manufacturer or distributor has the burden of proving by a preponderance of the evidence that the performance standard, sales objective, or program for measuring dealership performance complies with this subparagraph.

(w)(1) Require a dealer to purchase goods or services from a vendor selected, identified, or designated by a manufacturer, factory branch, distributor, distributor branch, or one of its affiliates by agreement, program, incentive provision, or otherwise without making available to the

dealer the option to obtain the goods or services of substantially similar quality and overall design from a vendor chosen by the dealer and approved by the manufacturer, factory branch, distributor, or distributor branch; provided that such approval shall not be unreasonably withheld, and further provided that the dealer's option to select a vendor shall not be available if the manufacturer or distributor provides substantial reimbursement for the goods or services offered. Substantial reimbursement is equal to or greater than 65 percent of the cost, which shall not be greater than the cost of reasonably available similar goods and services in close proximity to the dealer's market.

(2) Fail to provide to a dealer, if the goods and services to be supplied to the dealer by a vendor selected, identified, or designated by the manufacturer, factory branch, distributor, or distributor branch are signs or other franchisor image or design elements or trade dress to be leased to the dealer, the right to purchase the signs or other franchisor image or design elements or trade dress of substantially similar quality from a vendor selected by the dealer; provided that the signs, images, design elements, or trade dress are approved by the manufacturer, factory branch, distributor, or distributor branch and that such approval shall not be unreasonably withheld. This section shall not be construed to allow a dealer to impair or eliminate the intellectual property rights of the manufacturer, factory branch, distributor, or distributor branch, nor to permit a dealer to erect or maintain signs that do not conform to the intellectual property usage guidelines of the manufacturer, factory branch, distributor, or distributor branch.

(x) Make any express or implied statement or representation directly or indirectly that the dealer is under any obligation whatsoever to offer to sell or sell any extended service contract or extended maintenance plan, gap policy, gap waiver, or other aftermarket product or service offered, sold, backed by, or sponsored by the manufacturer or

distributor or to sell, assign, or transfer any of the dealer's retail sales contracts or leases in this state on motor vehicles manufactured or sold by the manufacturer or distributor to a finance company or class of finance companies, leasing company or class of leasing companies, or other specified person, because of any relationship or affiliation between the manufacturer or distributor and the finance company or companies, leasing company or leasing companies, or the specified person or persons. Provided, however, that nothing in this subparagraph prohibits a manufacturer from requiring that a dealer disclose to a customer when the customer is about to purchase a product covered by this subparagraph that is not offered, sold, backed by, or sponsored by the manufacturer or distributor.

(y) Directly or indirectly condition the awarding of a franchise to a prospective franchisee, the addition of a line-make or franchise to an existing franchisee, the renewal of a franchise of an existing franchisee, the approval of the relocation of an existing franchisee's facility, or the approval of the sale or transfer of the ownership of a franchise on the willingness of a franchisee, proposed franchisee, or owner of an interest in the dealership facility to enter into a site control agreement or exclusive use agreement. For purposes of this subparagraph, the terms "site control agreement" and "exclusive use agreement" include any agreement that has the effect of either requiring that the franchisee establish or maintain exclusive dealership facilities or restricting the ability of the franchisee, or the ability of the franchisee's lessor in the event the dealership facility is being leased, to transfer, sell, lease, or change the use of the dealership premises, whether by sublease, lease, collateral pledge of lease, option to purchase, option to lease, or other similar agreement, regardless of the parties to such agreement. Any provision contained in any agreement that is inconsistent with the provisions of this subparagraph shall be voidable at the election of the affected franchisee, prospective

franchisee, or owner of an interest in the dealership facility, provided this subparagraph shall not apply to a voluntary agreement where separate and valuable consideration has been offered and accepted, provided that the renewal of a franchise agreement or the manufacturer's waiver of a contractual or statutory right shall not by itself constitute separate and valuable consideration. Except as provided in this subparagraph, this chapter shall not apply to prospective franchisees.

(z) Notwithstanding the terms, provisions, or conditions of any agreement or franchise, require any motor vehicle dealer to floor plan any of the dealer's inventory or finance the acquisition, construction, or renovation of any of the dealer's property or facilities by or through any financial source or sources designated by the manufacturer, factory branch, distributor, or distributor branch, including any financial source or sources that is or are directly or indirectly owned, operated, or controlled by the manufacturer, factory branch, distributor, or distributor branch.

130:10 New Paragraph; Prohibited Conduct; Limitation on Alterations. Amend RSA 357-C:3 by inserting after paragraph IV the following new paragraph:

V.(a) Notwithstanding the terms of a franchise agreement or sales and service agreement or any other agreement, to require, coerce, or attempt to coerce any new motor vehicle dealer by program, policy, standard, or otherwise to:

(1) Change location of the dealership;

(2) Construct, renovate, or make any substantial changes, alterations, or remodeling to a motor vehicle dealer's sales or service facilities;

(3) Add to or replace a motor vehicle dealer's sales or service facilities; or

(4) Add to or replace or relocate purchased or leased signage or prohibit a dealer from substituting a sign owned by a dealer pursuant to RSA 357-C:3, III(w).

(b) The prohibitions in subparagraph (a) shall not apply if the manufacturer's or distributor's requirements are reasonable and justifiable in light of the current and reasonably foreseeable economic conditions, financial expectations, availability of additional vehicle allocation, and motor vehicle dealer's market for the sale and service of vehicles, or the alteration is reasonably required to effectively display and service a vehicle based on the technology of the vehicle. The manufacturer or distributor shall have the burden of proving that changes, alterations, remodeling, or replacement to a motor vehicle dealer's sales or service facilities or signage are reasonable and justifiable under this subparagraph.

(c) Any cost to obtain a variance or other approval from any governmental body in order to proceed under subparagraph (a) shall be paid by the dealer in the first instance. When subsequent efforts are required to obtain the variance or other approval, including any appeals, the manufacturer or distributor that is seeking the action listed in subparagraphs (a)(1) through (a)(4) shall pay, provided that such subsequent efforts were not required because of clerical error or negligent action or inaction on the part of the dealer.

(d) Except as necessary to comply with health or safety laws or to comply with technology requirements necessary to sell or service a vehicle, it is unreasonable and not justifiable for a manufacturer or distributor to require, coerce, or attempt to coerce any new motor vehicle dealer by program, policy, facility guide, standard or otherwise to change the location of the dealership or construct, replace, renovate or make any substantial changes, alterations, or remodeling to a motor vehicle dealer's sales or service facilities before the 15th anniversary of the date of issuance

of the certificate of occupancy or the manufacturer's approval, whichever is later, from:

(1) The date construction of the dealership at that location was completed if the construction was in substantial compliance with standards or plans provided by a manufacturer, distributor, or representative or through a subsidiary or agent of the manufacturer, distributor, or representative; or

(2) The date a prior change, alteration, or remodel of the dealership at that location was completed if the construction was in substantial compliance with standards or plans provided by a manufacturer, distributor, or representative or through a subsidiary or agent of the manufacturer, distributor, or representative.

(e) Notwithstanding the 15-year limitation on manufacturer-mandated changes in subparagraph (d), the limitation shall not be effective if the manufacturer or distributor offers substantial reimbursement for the requested changes, alterations, or remodeling of a dealer's sales or service facilities. Substantial reimbursement is equal to or greater than 65 percent of the cost, which shall not be greater than the cost of reasonably available similar goods and services in close proximity to the dealer's market.

(f) This paragraph shall not apply to a program that is in effect with one or more motor vehicle dealers in this state on the effective date of this subparagraph, nor to any renewal or modification of such a program.

130:11 New Section; Access to Documentation. Amend RSA 357-C by inserting after section 3 the following new section:

357-C:3-a Access to Documentation.

I. Once annually, a dealer may request to obtain a copy of (i) reports created in the regular course of business

about the dealer, (ii) written correspondence with the dealer, and (iii) written reports prepared by a representative of the manufacturer or distributor documenting or memorializing any contact with a dealer or any employee or agent of the dealer, collectively known as "the documentation." The documentation required to be produced shall be limited to documentation created in the 12 months preceding the dealer's request. The manufacturer or distributor shall provide the documentation to the dealer within 30 days of the dealer's written request. The manufacturer shall certify that the documentation it produces is complete as of the date of the request. The manufacturer or distributor may charge the dealer a reasonable per page fee for reproduction, provided that such fee shall not exceed the usual and customary fee charged by copy centers in the immediate vicinity of the location of the documentation. No other fees or charges shall be permitted.

II. Any documents or portions of documents that are required to be produced pursuant to this section, which are not produced by the manufacturer or distributor in response to a dealer's request and that the manufacturer or distributor did not make a written, good faith objection to producing shall be excluded and not admissible as evidence or used in any manner at any proceeding at the motor vehicle industry board or any other state agency or any court proceeding. This paragraph shall not apply to any documents that document, evidence, or demonstrate insolvency, or alleged criminal, unlawful, or fraudulent activity by the dealer. At any proceeding before the motor vehicle industry board, any state agency, or any court, the presiding hearing officer, judge, board, or agency, may admit documents otherwise inadmissible under this paragraph if it is found that the documents were withheld in good faith or by accident or mistake.

III. A complete copy of any written report of any nature prepared by a representative of the manufacturer or

distributor after any contact with a dealer or any employee or agent of the dealer shall be provided to the dealer within 60 days of the report's creation.

IV. Nothing in the section shall require a manufacturer to disclose privileged, confidential, proprietary, or private third party information or information about another dealer or dealers and this includes but is not limited to names, addresses, financial data, and any other information relating to other dealers that may otherwise be referenced in the supporting documentation, except for specific information which is used by the manufacturer to compare the requesting dealer's performance with other dealers.

130:12 Warranty Obligations. Amend RSA 357-C:5, II(a) and (b)(1) to read as follows:

(a) The franchisor shall specify in writing to each of its new motor vehicle dealers [~~licensed~~] in this state, the dealers' obligations for warranty service on its products, shall compensate the new motor vehicle dealer for warranty service required of the dealer by the manufacturer, and shall provide the dealer the schedule of compensation to be paid such dealer for parts, work and service in connection with warranty services, and the time allowance for the performance of such work and service. ***Warranty service on trucks and equipment, except for those sold by a single line equipment dealer, shall include the cost, including labor, to transport a motor vehicle under warranty in order to perform the warranty work and to return the motor vehicle to the customer, or, if transporting the trucks and equipment to the dealership is not mechanically or financially feasible, to travel to and return from the locations of the motor vehicle if the warranty repairs are performed at the location of the motor vehicle; provided that reimbursement for travel time shall not exceed 4 hours.***

(b)(1) In no event shall a schedule of compensation for parts, work, and service in connection with warranty services fail to include reasonable compensation for diagnostic work, as well as ***parts,*** repair service and labor ***under the warranty or maintenance plan, extended warranty, certified preowned warranty or a service contract, issued by the manufacturer or distributor or its common entity.*** Time allowances for the diagnosis and performance of warranty work and service shall be reasonable and adequate for the work to be performed. In no event shall any manufacturer, component manufacturer, or distributor pay its dealers an amount of money for warranty work that is less than that charged by the dealer to the retail customers of the dealer for non-warranty work of like kind. ***In accordance with RSA 382-A:2-329, the manufacturer shall reimburse the franchisee for any parts so provided at the retail rate customarily charged by that franchisee for the same parts when not provided in satisfaction of a warranty and computed under this subparagraph.*** No claim which has been approved and paid by the manufacturer or distributor may be charged back to the dealer unless it can be shown that the claim was false or fraudulent, that the repairs were not properly made or were unnecessary to correct the defective condition, or that the dealer failed to reasonably substantiate that the claim was in accordance with the written requirements of the manufacturer or distributor in effect at the time the claim arose. ***A manufacturer or distributor shall not deny a claim solely based on a dealer's incidental failure to comply with a specific claim processing requirement, or a clerical error, or other administrative technicality.***

(A) The obligations imposed on motor vehicle franchisors by this section shall apply to any parent, subsidiary, affiliate, or agent of the motor vehicle franchisor if a warranty or service or repair plan is issued

by that person instead of or in addition to one issued by the motor vehicle franchisor.

(B)(i) In determining the rate and price customarily charged by the motor vehicle dealer to the public for parts, the compensation may be an agreed percentage markup over the dealer's cost under a writing separate and distinct from the franchise agreement signed after the dealer's request, but if an agreement is not reached within 30 days after a dealer's written request to be compensated under this section, compensation for parts shall be calculated by utilizing the method described in this paragraph.

(ii) If the dealer and the manufacturer are unable to agree to a percentage markup as provided by subparagraph (i), the retail rate customarily charged by the dealer for parts that the manufacturer is obligated to pay pursuant to RSA 382-A:2329, shall be established by the dealer submitting to the manufacturer or distributor 100 sequential nonwarranty or customer-paid service repair orders or 90 consecutive days of nonwarranty, customer paid service repair orders, whichever is less, each of which includes parts that would normally be used in warranty repairs and covered by the manufacturer's warranty, covering repairs made not more than 180 days before the submission and declaring the average percentage markup. The retail rate so declared must be reasonable as compared to other same line-make dealers of similar size in the immediate geographic vicinity of the dealer or, if none exist, immediately outside the dealer's geographic relevant market area within this state. The declared retail rate shall go into effect 30 days following the date on which the dealer submitted to the manufacturer or distributor the required number of nonwarranty or customer-paid service repair orders (hereafter referred to as the "submission date") subject to audit of the submitted nonwarranty or customer-paid service repair orders by the manufacturer or

distributor and a rebuttal of the declared retail rate. If the manufacturer or distributor wishes to rebut the declared retail rate it must so inform the dealer not later than 30 days after the submission date and propose an adjustment of the average percentage markup based on the rebuttal not later than 60 days after the submission date. If the dealer does not agree with the proposed average percentage markup, the dealer may file a protest at the motor vehicle industry board not later than 90 days after the submission date. In the event a protest is filed, the manufacturer has the burden of proof to establish that the dealer's submission is unreasonable as compared to other same line-make dealers of similar size in the immediate geographic vicinity of the dealer or, if none exist, immediately outside the dealer's geographic relevant market area within this state. In the event a dealer prevails in a protest filed under this provision, the dealer's increased parts and/or labor reimbursement shall be provided retroactive to the date the submission would have been effective pursuant to the terms of this section but for the manufacturer's denial.

(iii) In calculating the retail rate customarily charged by the dealer for parts, the following work shall not be included in the calculation: routine maintenance not covered under any retail customer warranty, such as fluids, filters and belts not provided in the course of repairs; items that do not have an individual part number such as some nuts, bolts, fasteners and similar items; tires; vehicle reconditioning; parts covered by subparagraph (v); repairs for manufacturer special events and manufacturer discounted service campaigns; parts sold at wholesale or parts used in repairs of government agencies' repairs for which volume discounts have been negotiated by the manufacturer; promotional discounts on behalf of the manufacturer, internal billings, regardless of whether the billing is on an in-stock vehicle; and goodwill or policy adjustments.

(iv) A manufacturer or distributor shall not require a dealer to establish the retail rate customarily charged by the dealer for parts and labor by an unduly burdensome or time-consuming method or by requiring information that is unduly burdensome or time consuming to provide including, but not limited to, part-by-part or transaction-by-transaction calculations. A dealer shall not declare an average percentage markup or average labor rate more than once in a calendar year.* A *manufacturer or distributor may perform annual audits to verify that a dealer's effective rates have not decreased and if they have may reduce the warranty reimbursement rate prospectively. Such audits shall not be performed more than once per calendar year at any dealer. The audit performed by the manufacturer shall be in accordance with the method to calculate the retail rate customarily charged by the dealer for parts as set out in subparagraph (ii) above and subject to the limitations in subparagraph (iii). If the dealer does not agree with the proposed average percentage markup, the dealer may file a protest at the motor vehicle industry board not later than 90 days after the manufacturer states the intended new retail rate as the result of the manufacturer's audit. In the event a protest is filed, the manufacturer has the burden of proof to establish that the proposed retail rate was calculated accurately and in accordance with this subparagraph. The proposed retail rate shall not be effective until the motor vehicle industry board issues a final order approving the proposed rate. If as the result of the audit performed in accordance with subparagraph (ii) the calculation shows that the dealer's average percentage markup is greater than the average percentage markup currently being used for the dealer's retail rate reimbursement, the dealer's average percentage markup shall be increased to the extent of the result of the audit. Any rate that is adjusted as a result of an audit performed in accordance with this subparagraph shall not

be adjusted again until a period of 6 months from the effective date of the change has lapsed.

(v) If a motor vehicle franchisor or component manufacturer supplies a part or parts for use in a repair rendered under a warranty other than by sale of that part or parts to the motor vehicle franchisee, the motor vehicle franchisee shall be entitled to compensation equivalent to the motor vehicle franchisee's average percentage markup on the part or parts, as if the part or parts had been sold to the motor vehicle franchisee by the motor vehicle franchisor.

(1) The requirements of this subparagraph shall not apply to entire engine assemblies, entire **transmission** ***assemblies, in-floor heating systems, and rear-drive axles ("assemblies"). In the case of assemblies, the motor vehicle franchisor shall reimburse the motor vehicle franchisee in the amount of 30 percent of what the motor vehicle franchisee would have paid the motor vehicle franchisor for the assembly if the assembly had not been supplied by the franchisor other than by the sale of that assembly to the motor vehicle franchisee.***

(2) The requirements of this subparagraph shall not apply to household appliances, furnishings, and generators of a motor home ("household items"). In the case of household items valued under $600, the motor vehicle franchisor shall reimburse the motor vehicle franchisee in the amount of 30 percent of what the motor vehicle franchisee would have paid the motor vehicle franchisor for the household item if the household item had not been supplied by the franchisor other than by the sale of that assembly to the motor vehicle franchisee. For household items in excess of $600, the markup would be capped as if the part were $600. The motor vehicle franchisor shall also reimburse the franchisee for any freight costs incurred to return the removed parts.

(vi) A manufacturer or distributor may not otherwise recover its costs for reimbursing a franchisee for parts and labor pursuant to this section.

130:13 Warranty Obligations. Amend RSA 357-C:5, II(d)(2) and (3) to read as follows:

(2) A manufacturer, distributor, branch, or division shall retain the right to audit warranty claims for a period of [~~one year~~] ***9 months*** after the date on which the claim is paid and charge back any amounts paid on claims that are false or unsubstantiated.

(3) A manufacturer, distributor, branch, or division shall retain the right to audit all incentive and reimbursement programs for a period of [~~one year~~] ***9 months*** after the date on which the claim is paid or [~~one year~~] ***9 months*** from the end of a program that does not exceed one year, whichever is later, and charge back any amounts paid on claims that are false or unsubstantiated.

130:14 Limitations on Cancellations. Amend the introductory paragraph of RSA 357-C:7, I to read as follows:

I. Notwithstanding the terms, provisions, or conditions of any agreement or franchise, and notwithstanding the terms or provision to any waiver, no manufacturer, distributor, or branch or division thereof shall cancel, terminate, fail to renew, or refuse to continue any franchise relationship with a [~~licensed~~] new motor vehicle dealer unless:

130:15 Limitation on Cancellations, Terminations and Nonrenewals. Amend RSA 357-C:7, III(d) to read as follows:

(d) The fact that the new motor vehicle dealer sells or transfers ownership of the dealership or sells or transfers capital stock in the dealership to the new motor vehicle dealer's spouse, son, or daughter. The manufacturer,

distributor, or branch or division thereof shall give effect to such change in ownership unless***, if licensing is required by the state,*** the transfer of the new motor vehicle dealer's license is denied or the new owner is unable to license as the case may be; and

130:16 Limitation on Cancellations, Terminations and Nonrenewals. Amend RSA 357-C:7, VI(a) and (b) to read as follows:

(a) The dealer cost plus any charges by the manufacturer, distributor, or branch or division thereof for distribution, delivery, and taxes paid by the dealer, less all allowances paid to the dealer by the manufacturer, distributor, or representative, for new, unsold, undamaged and complete motor vehicles in the dealer's inventory that have original invoices bearing original dates within 24 months prior to the effective date of termination with less than 750 miles on the odometer, and insurance costs, and floor plan costs from the effective date of the termination to the date that the vehicles are removed from dealership or the date the floor plan finance company is paid, whichever occurs last. Vehicles with a gross vehicle weight rating over 14,000 shall be exempt from the 750 mile limitation. Motorcycles shall be subject to a 350 mile limitation. All vehicles shall have been acquired from the manufacturer or another same line make vehicle dealer in the ordinary course of business. ***Equipment shall be subject to a 36-month limitation. Payment for farm and utility tractors, forestry equipment, industrial, construction equipment, farm implements, farm machinery, yard and garden equipment, attachments, accessories and repair parts shall include all items attached to the original equipment by the dealer or the manufacturer other than items that are not related to the performance of the function the equipment is designed to provide.***

(b) The dealer cost of each new, unused, undamaged, and unsold part or accessory if such part or accessory is in the current parts catalog, was purchased from the manufacturer or distributor or from a subsidiary or affiliated company or authorized vendor, and is still in the original, resalable merchandising package and in unbroken lots, except that in the case of sheet metal, a comparable substitute for the original package may be used. ***Any part or accessory that is available to be purchased from the manufacturer on the date the notice of termination issued shall be considered to be included in the current parts catalog.***

130:17 Limitation on Establishing or Relocating Dealerships. Amend RSA 357-C:9, II(f) to read as follows:

(f) Growth or decline in population and new [~~car~~] ***motor vehicle*** registration in the relevant market area.

130:18 Repeal. RSA 347-A, relative to equipment dealers, is repealed.

130:19 Effective Date. This act shall take effect 90 days after its passage.

Approved: June 25, 2013

Effective Date: September 23, 2013

APPENDIX E

REVISED STATUTES ANNOTATED OF THE STATE OF NEW HAMPSHIRE

TITLE XXXI. TRADE AND COMMERCE (CH. 333 TO 359-O)

CHAPTER 357-C. REGULATION OF BUSINESS PRACTICES BETWEEN MOTOR VEHICLE MANUFACTURERS, DISTRIBUTORS AND DEALERS

N.H. REV. STAT § 357-C:1

357-C:1 DEFINITIONS

For the purpose of this chapter only:

I. "Motor vehicle" means every self-propelled vehicle manufactured and designed primarily for use and operation on the public highways and required to be registered and titled under the laws of New Hampshire. Motor vehicle shall include equipment if sold by a motor vehicle dealer primarily engaged in the business of retail sales of equipment. Except for RSA 357-C:3, I-b, and where otherwise specifically exempted from the provisions of this chapter, "motor vehicle" shall include off highway recreational vehicles and snowmobiles. "Equipment" means farm and utility tractors, forestry equipment, industrial equipment, construction equipment, farm implements, farm machinery, yard and garden equipment, attachments, accessories, and repair parts.

II. "Manufacturer" means any person who manufactures or assembles new motor vehicles or any partnership, firm, association, joint venture, corporation or trust which is controlled by the manufacturer. "Manufacturer" shall also mean a distributor, distributor branch, factory, factory branch, and franchisor.

III. "Factory branch" means a branch office maintained by a manufacturer for the purpose of selling or offering to sell vehicles to a distributor, wholesaler, or new motor vehicle dealer, or for directing or supervising, in whole or in part, factory or distributor representatives, and shall include any sales promotion organization which is engaged in promoting the sale of a particular make of new motor vehicles in this state to new motor vehicle dealers.

IV. "Distributor branch" means a branch office maintained by a distributor which sells or distributes new or used motor vehicles to motor vehicle dealers.

V. "Factory representative" means a representative employed by a manufacturer, distributor, or factory branch for the purpose of making or promoting the sale of its new motor vehicles or for supervising, servicing, instructing or contracting with its new motor vehicle dealers or prospective dealers.

VI. "Distributor representative" means a representative employed by a distributor branch or distributor.

VII. "Distributor" means any person who sells or distributes new or used motor vehicles to motor vehicle dealers or who maintains distributor representatives within this state.

VIII. (a) "Motor vehicle dealer" means any person engaged in the business of selling, offering to sell, soliciting or advertising the sale of new or used motor vehicles or possessing motor vehicles for the purpose of resale either on

his or her own account or on behalf of another, either as his or her primary business or incidental thereto. "Motor vehicle dealer" means a person granted the right to service motor vehicles or component parts manufactured or distributed by the manufacturer but does not include any person who has an agreement with a manufacturer or distributer to perform service only on fleet, government, or rental vehicles. However, "motor vehicle dealer" shall not include:

(1) Receivers, trustees, administrators, executors, guardians, or other persons appointed by or acting under judgment, decree or order of any court; or

(2) Public officers while performing their duties as such officers.

(b) "New motor vehicle dealer" means a motor vehicle dealer who holds a valid sales and service agreement, franchise or contract granted by the manufacturer or distributor for the sale, service, or both, of its new motor vehicles, but does not include any person who has an agreement with a manufacturer or distributer to perform service only on fleet, government, or rental vehicles.

(c) The term "motor vehicle dealer" shall not include a single line equipment dealer. "Single line equipment dealer" means a person, partnership, or corporation who is primarily engaged in the business of retail sales of farm and utility tractors, forestry equipment, industrial and construction equipment, farm implements, farm machinery, yard and garden equipment, attachments, accessories, and repair parts, and who:

(1) Has purchased 75 percent or more of the dealer's total new product inventory from a single supplier; and

(2) Has a total annual average sales volume for the previous 3 years in excess of $100,000,000 for the relevant market area for which the dealer is responsible.

IX. "Franchise" means one or more oral or written agreements under or by which:

(a) The franchisee is granted the right to sell new motor vehicles or component parts manufactured or distributed by the franchisor or the right to service motor vehicles or component parts manufactured or distributed by the manufacturer but does not include any person who has an agreement with a manufacturer or distributer to perform service only on fleet, government, or rental vehicles;

(b) The franchisee as an independent business is a component of the franchisor's distribution or service system;

(c) The franchisee is granted the right to be substantially associated with the franchisor's trademark, trade name or commercial symbol;

(d) The franchisee's business is substantially reliant for the conduct of its business on the franchisor for a continued supply or service of motor vehicles, parts, and accessories; or

(e) Any right, duty, or obligation granted or imposed under this chapter is affected.

X. "Franchisor" means a manufacturer or distributor who grants a franchise to a motor vehicle dealer.

XI. "Franchisee" means a motor vehicle dealer to whom a franchise is granted.

XII. "Sale" means the delivery, issuance, transfer, agreement for transfer, exchange, pledge, hypothecation, or mortgage in any form of motor vehicle or interest therein or of any related franchise; and any option, subscription or other contract, or solicitation in contemplation of a sale, offer or attempt to sell, whether spoken or written.

XIII. "Fraud" includes, in addition to its common law connotation, the misrepresentation, in any manner, of a

material fact; a promise or representation not made honestly and in good faith, and an intentional failure to disclose a material fact.

XIV. "Person" means a natural person, corporation, partnership, trust or other entity, and, in case of an entity, it shall include any other entity in which it has a majority interest or effectively controls as well as the individual officers, directors and other persons in active control of the activities of each such entity.

XV. "New motor vehicle" means a motor vehicle which is in the possession of the manufacturer or distributor, or has been sold only to the holders of a valid sales and service agreement, franchise or contract granted by the manufacturer or distributor for the sale of that make of new motor vehicle and which is in fact new and on which the original title, to the extent a title is required by the state of New Hampshire, has not been issued from the franchised dealer.

XVI. "Good faith" means honesty in fact and the observation of reasonable commercial standards of fair dealing in the trade as is defined and interpreted in RSA 382-A:1-201(b)(20).

XVII. "Established place of business" means a permanent, enclosed commercial building located within this state easily accessible and open to the public at all reasonable times and at which the business of a new motor vehicle dealer, including the display and repair of vehicles, may be lawfully carried on in accordance with the terms of all applicable building codes, zoning, and other land-use regulatory ordinances.

XVIII. "Designated family member" means the spouse, child, grandchild, parent, brother, sister, or lineal descendent, including all adopted or step descendents, of the owner of a new motor vehicle dealership who has been designated in writing to the manufacturer, and, in the case of the owner's

death, is entitled to inherit the ownership interest in the new motor vehicle dealership under the terms of the owner's will or under the rights of inheritance by intestate succession, or who, in the case of an incapacitated owner of a new motor vehicle dealership, has been appointed by a court as the legal representative of the new motor vehicle dealer's property. The manufacturer, distributor, factory branch or factory representative or importer may request, and the designated family member shall provide, upon request, personal and financial data that is reasonably necessary to determine whether the succession should be honored.

XIX. "Dealer organization" means a state or local trade association, the membership of which is comprised predominantly of motor vehicle dealers.

XX. "Coerce" means the failure to act in a fair and equitable manner in performing or complying with any terms or provisions of a franchise or agreement; provided, however, that recommendation, persuasion, urging or argument shall not be synonymous with "coerce" or lack of "good faith."

XXI. "Relevant market area" means any area within the town or city where the motor vehicle dealer maintains his place of business or the area, if any, set forth in a franchise or agreement, whichever is larger. Relevant market areas shall be determined in accordance with the principles of equity.

XXII. "Direct import vehicle" has the same meaning as that of RSA 259:19-a.

XXIII. "Assemble" means engaging in the fitting or adding of parts and/or accessories to new motor vehicles or the substitution of parts contributing to changes in the appearance, performance, or use of vehicles, other than that which is done by new motor vehicle dealers.

XXIV. "OHRV" means off highway recreational vehicle.

XXV. "Off highway recreational vehicle" means any mechanically propelled vehicle used for pleasure or recreational purposes running on rubber tires, tracks, or cushioned air and dependent on the ground or surface for travel, or other unimproved terrain whether covered by ice or snow or not, where the operator sits in or on the vehicle. All legally registered motorized vehicles when used for off highway recreational purposes shall fall within the meaning of this definition; provided that, when said OHRV is being used for transportation purposes only, it shall be deemed that said OHRV is not being used for recreational purposes. For purposes of this chapter OHRVs shall also include: "all terrain vehicle" as defined in RSA 215-A:1, I-b, and "trail bike" as defined in RSA 215-A:1, XIV. OHRVs shall not include snowmobiles as defined in paragraph XXVI and RSA 215-C:1.

XXVI. "Snowmobile" means any vehicle propelled by mechanical power that is designed to travel over ice or snow supported in part by skis, tracks, or cleats. Only vehicles that are no more than 54 inches in width and no more than 1200 pounds in weight shall be considered snowmobiles under this chapter. "Snowmobile" shall not include OHRVs as defined in paragraph XXV or RSA 215-A.

XXVII. "Line make" means motor vehicles that are offered for sale, lease, or distribution under a common name, trademark, service mark, or brand name of the franchisor or manufacturer of the motor vehicle.

XXVIII. "Component part" means an engine, power train, rear axle, or other part of a motor vehicle that is not warranted by the final manufacturer.

XXIX. "Component manufacturer" means a person who manufactures or assembles motor vehicle component parts that are directly warranted by the component manufacturer to the consumer.

XXX. "Chargeback" means a manufacturer induced return of warranty, incentive, or reimbursement payments to a manufacturer by a dealer. The term includes a manufacturer drawing or an announced intention to draw funds from an account of a dealer.

N.H. REV. STAT § 357-C:2

357-C:2 APPLICABILITY.

Any person who engages directly or indirectly in purposeful contacts within this state in connection with the offering or advertising for sale of, or has business dealings with respect to, a motor vehicle within the state shall be subject to the provisions of this chapter and the jurisdiction of the courts of this state.

N.H. REV. STAT § 357-C:3

357-C:3 PROHIBITED CONDUCT.

It shall be deemed an unfair method of competition and unfair and deceptive practice for any:

I. Manufacturer, factory branch, factory representative, distributor, distributor branch, distributor representative or motor vehicle dealer to engage in any action which is arbitrary, in bad faith, or unconscionable and which causes damage to any of such parties or to the public;

I-a. Person not a new motor vehicle dealer to represent that he is a new motor vehicle dealer, to advertise a vehicle for sale as a new motor vehicle, or to sell a vehicle as a new motor vehicle;

I-b. Distributor or motor vehicle dealer, in offering for sale a direct import vehicle other than an OHRV or snowmobile, not to disclose to the prospective buyer in writing the following:

(a) That the motor vehicle is a direct import vehicle;

(b) Whether modifications were performed on the vehicle to comply with federal or state law;

(c) The names and addresses of the persons who performed such modifications and the dates the modifications were made;

(d) A list and description of all such modifications;

(e) Whether and to what extent the manufacturer's original warranty applies to the vehicle; and,

(f) If such manufacturer's original warranty applies and whether and to what extent New Hampshire's New Motor Vehicle Arbitration law, RSA 357-D, applies to the vehicle.

II. Manufacturer; distributor; distributor branch or division; factory branch or division; or officer, agent or other representative of any such entity, to coerce or attempt to coerce, any motor vehicle dealer to:

(a) Order or accept delivery of any motor vehicle or vehicles, appliances, equipment, parts or accessories therefor, or any other commodity not required by law, which such motor vehicle dealer has not voluntarily ordered, or order or accept delivery of any motor vehicle with special features, appliances, accessories or equipment not included in the list price of such motor vehicles as publicly advertised by their manufacturer; except that this subparagraph shall not modify or supersede any terms or provisions of a franchise requiring new motor vehicle dealers to market a representative line of those motor vehicles which the manufacturer or distributor is publicly advertising;

(b) Order for any person any parts, accessories, equipment, machinery, tools, appliances, or any commodity whatsoever;

(c) Refrain from participation in the management of, investment in, or the acquisition of any other line of new motor vehicle or related products;

(d) Change the location of the new motor vehicle dealership or, during the course of the agreement, make any substantial alterations to the dealership premises when to do so would be unreasonable;

(e) Pay or assume, directly or indirectly, any part of the cost of any advertising initiated by the manufacturer or distributor, unless voluntarily agreed to by such dealer, except such signs, brochures and promotional literature as are

reasonably required by the manufacturers at each dealer's place of business; or

(f) Pay or assume, directly or indirectly, any part of the cost of any refund, rebate, discount, or other financial adjustment made by or lawfully imposed upon the manufacturer or distributor to, or in favor of, any customer of a motor vehicle dealer or other consumer, unless voluntarily agreed to by such dealer.

III. Manufacturer; distributor; distributor branch or division; factory branch or division; or any agent thereof to:

(a) Refuse to deliver in reasonable quantities, and within a reasonable time after receipt of dealer's order, to any motor vehicle dealer having a franchise or contractual arrangement for the retail sale of new motor vehicles sold or distributed by such manufacturer, distributor, distributor branch or division, or factory branch or division, any motor vehicles covered by such franchise or contract and specifically advertised by such manufacturer, distributor, distributor branch or division, or factory branch or division to be available for immediate delivery; provided, however, that the failure to deliver any motor vehicle shall not be considered a violation of this subparagraph if such failure is due to an act of God, work stoppage or delay due to strike or labor difficulty, shortage of materials, the seasonal nature of the production and ordering of the new motor vehicles, freight embargo, or other cause over which the manufacturer, distributor, or any agent thereof, shall have no control;

(b) Coerce, or attempt to coerce, any motor vehicle dealer to enter into any agreement with such manufacturer, distributor, distributor branch or division, factory branch or division, or any agent thereof, or do any other act prejudicial to the dealer by threatening to cancel any franchise or any contractual agreement existing between such manufacturer, distributor, distributor branch or division, or factory branch

or division, and the dealer provided, however, that notice in good faith to any motor vehicle dealer of that dealer's violation of any terms or provisions of such franchise or contractual agreement shall not constitute a violation of this chapter;

(c) Terminate, cancel, or fail to renew the franchise or selling agreement of any such dealer without good cause;

(d) Resort to or use any false or misleading advertisement in connection with his business as manufacturer, distributor, distributor branch or division, factory branch or division, or agent thereof;

(e) Offer to sell or to sell any new motor vehicle at a lower actual price than the actual price offered to any other motor vehicle dealer for the same model vehicle similarly equipped or utilize any device including, but not limited to, sales promotion plans or programs which result in a lesser actual price. However, the provisions of this subparagraph shall not apply to sales to a motor vehicle dealer for resale to any unit of government; to sales made directly to a unit of government; nor to sales to a motor vehicle dealer of any motor vehicle ultimately sold, donated or used by such dealer in a driver education program. The provisions of this subparagraph shall not apply so long as a manufacturer, distributor, or any agent thereof, offers to sell or sells new motor vehicles to all motor vehicle dealers at an equal price;

(f) Offer, sell, or lease any new motor vehicle to any person, except a distributor, at a lower actual price than the actual price offered and charged a motor vehicle dealer for the same model vehicle similarly equipped or utilize any device which results in such lesser actual price;

(g) Offer or sell parts or accessories to any new motor vehicle dealer for use in his own business for the purpose of replacing or repairing the same or comparable part or accessory at a lower actual price than the actual price charged

to any other new motor vehicle dealer for similar parts or accessories for use in his own business; provided, however, that, where motor vehicle dealers operate as distributors of parts and accessories to retail outlets, nothing in this subparagraph shall be construed to prevent a manufacturer, distributor, or any agent thereof, from selling to a motor vehicle dealer who operates as a distributor of parts and accessories such parts and accessories as may be ordered by such motor vehicle dealer for resale to retail outlets at a lower price than the actual price charged a motor vehicle dealer who does not operate or serve as a distributor of parts and accessories;

(h) Prevent or attempt to prevent any motor vehicle dealer from changing the capital structure of his dealership or the means by which he finances the operation of his dealership, provided the dealer at all times meets any reasonable capital standards agreed to between the dealership and the manufacturer or distributor and that such change by the dealer does not result in a change in the executive management control of the dealership;

(i) Prevent or attempt to prevent any motor vehicle dealer or any officer, partner or stockholder of any motor vehicle dealer from transferring any part of the interest of any of them to any other person; provided, however, that no dealer, officer, partner or stockholder shall have the right to sell, transfer or assign the franchise or power of management or control without the consent of the manufacturer or distributor unless such consent is unreasonably withheld. Failure to respond within 60 days of receipt of a written request for consent to a sale, transfer or assignment shall be deemed consent to the request;

(j) Obtain any benefit from any other person with whom the motor vehicle dealer does business on account of or in relation to the transactions between the dealer and such other

person, unless such benefit is promptly accounted for and transmitted to the motor vehicle dealer;

(k) Compete with a motor vehicle dealer operating under an agreement or franchise from such manufacturer or distributor in the relevant market area; provided, however:

(1) If any manufacturer, distributor, distributor branch or division, or factory branch or division, either directly or indirectly, or through any subsidiary, affiliated entity, or person, owns, operates, or controls, in full or in part, a motor vehicle dealership in this state for the sale or service of motor vehicles in this state, the relevant market area shall be the area within the entire state of New Hampshire and, except for circumstances in which subparagraph (3) may apply, the New Hampshire motor vehicle industry board shall find good cause under RSA 357-C:9 before any such ownership, operation, or control shall be permitted. In addition to those factors listed in RSA 357-C:9, II, the board in such circumstances shall also consider in its determination of good cause whether the proposed dealership will create an unfair method of competition to other franchisees of the same manufacturer, distributor, distributor branch or division, factory branch or division, subsidiary, or affiliated entity;

(2) That a manufacturer or distributor shall not be deemed to be competing when operating a dealership either temporarily, for a reasonable period in any case not to exceed 2 years; provided that if a manufacturer or distributor shows good cause, the board may extend this time limit and extensions may be granted by the board for periods of up to 12 months; or unless the manufacturer or dealer through a bona fide relationship in which an independent person has made a significant investment subject to loss in the dealership and can reasonably expect to acquire full ownership of such dealership on reasonable terms and conditions;

(3) A manufacturer that has no more than 5 franchised new motor vehicle dealers doing business in this state and that directly or indirectly owns one or more of them shall not be deemed to be competing with any unaffiliated new motor vehicle dealer trading in the manufacturer's line make at a distance of 18 miles or greater provided that:

(A) All the new motor vehicle dealerships selling such manufacturer's motor vehicles trade exclusively in the manufacturer's line make;

(B) As of March 1, 2000, the manufacturer shall have directly or indirectly owned one or more new motor vehicle dealers in this state for a continuous period of at least one year; and

(C) Neither the manufacturer nor any entity in which the manufacturer has a majority ownership interest shall acquire, operate, or control any dealership that the manufacturer did not directly or indirectly own as of March 1, 2000; and

(4) A manufacturer or distributor that sells and services motor vehicles in New Hampshire and is licensed as a dealer in New Hampshire shall not be deemed to be competing with any dealer if no dealer or other franchisee sells and services the same line make in New Hampshire.

(l) Grant a competitive franchise in the relevant market area previously granted to another franchise other than in accordance with the provisions of this chapter;

(m) Require a motor vehicle dealer to assent to a release assignment, novation, waiver or estoppel which would relieve any person from liability imposed by this chapter;

(n) Impose unreasonable restrictions on the motor vehicle dealer or franchisee relative to transfer, sale, right to renew, termination, discipline, noncompetition covenants, site-contract, right of first refusal to purchase, option to purchase,

compliance with subjective standards, or assertion of legal or equitable rights;

(o) Change the relevant market area set forth in the franchise agreement without good cause. For purposes of the subparagraph, good cause shall include, but not be limited to, changes in the dealer's registration pattern, demographics, customer convenience, and geographic barriers. At least 60 days prior to the effective date of the revised relevant market area, the manufacturer or distributor shall provide the dealer whose relevant market area is subject to the proposed change, a reasonable and commercially acceptable copy of all information, data, evaluations, and methodology that the manufacturer or distributor considered, reviewed, or relied on or based its decision on, to propose the change to the dealer's relevant market area;

(p) Require a motor vehicle franchisee to agree to a term or condition in a franchise, or in any lease related to the operation of the franchise or agreement ancillary or collateral to a franchise, as a condition to the offer, grant, or renewal of the franchise, lease, or agreement, which:

(1) Requires the motor vehicle franchisee to waive trial by jury in actions involving the motor vehicle franchisor;

(2) Specifies the jurisdictions, venues, or tribunals in which disputes arising with respect to the franchise, lease, or agreement shall or shall not be submitted for resolution or otherwise prohibits a motor vehicle franchisee from bringing an action in a particular forum otherwise available under the law of this state;

(3) Requires that disputes between the motor vehicle franchisor and motor vehicle franchisee be submitted to arbitration or to any other binding alternate dispute resolution procedure; provided, however, that any franchise, lease, or agreement may authorize the submission of a dispute to arbitration or to binding alternate dispute resolution if the

motor vehicle franchisor and motor vehicle franchisee voluntarily agree to submit the dispute to arbitration or binding alternate dispute resolution at the time the dispute arises;

(4) Provides that in any administrative or judicial proceeding arising from any dispute with respect to the aforesaid agreements that the franchisor shall be entitled to recover its costs, reasonable attorney's fees and other expenses of litigation from the franchisee; or

(5) Grants the manufacturer an option to purchase the franchise, or real estate, or business assets of the franchisee;

(q) Fail or refuse to sell or offer to sell to all motor vehicle franchisees of a line make, all models manufactured for that line make, or requiring a dealer to pay any extra fee, execute a separate franchise agreement, purchase unreasonable advertising displays or other materials, or relocate, expand, improve, remodel, renovate, recondition, or alter the dealer's existing facilities, or provide exclusive facilities as a prerequisite to receiving a model or series of vehicles. However, a manufacturer may require reasonable improvements to the existing facility that are necessary to service special or unique features of a specific model or line. The failure to deliver any such motor vehicle shall not be considered a violation of this subparagraph if the failure is due to a lack of manufacturing capacity, a strike or labor difficulty, a shortage of materials, a freight embargo, or other cause over which the franchisor has no control;

(r) Provide any term or condition in any lease or other agreement ancillary or collateral to a franchise which term or condition directly or indirectly violates this title;

(s) In the event of a proposed sale or transfer of a new motor vehicle dealership involving the transfer or sale of all or substantially all of the ownership interest in, or all or substantially all of the assets of the dealership, where the

franchise agreement for the dealership contains a right of first refusal in favor of the manufacturer or distributor, then notwithstanding the terms of the franchise agreement, the manufacturer or distributor shall be permitted to exercise a right of first refusal to acquire the dealership's assets only if all of the following requirements are met:

(1) The manufacturer or distributor notifies the dealer in writing of its intent to exercise its right of first refusal within 45 days of receiving notice from the franchisee of the proposed sale or transfer.

(2) The exercise of the right of first refusal will result in the dealer and dealer's owners receiving the same or greater consideration as they have contracted to receive in connection with the proposed change of all or substantially all ownership or transfer of all or substantially all dealership assets. In that regard, the following shall apply:

(A) The manufacturer or distributor shall have the right to and shall assume the dealer's lease for, or acquire the real property on which the franchise is conducted, on the same terms as those on which the real property or lease was to be sold or transferred to the proposed new owner in connection with the sale of the franchise, unless otherwise agreed to by the dealer and manufacturer or distributor. The manufacturer or distributor shall have the right to assign the lease or to convey the real property.

(B) The manufacturer or distributor shall assume all of the duties, obligations, and liabilities contained in the agreements that were to be assumed by the proposed new owner and with respect to which the manufacturer or distributor exercised the right of first refusal, including the duty to honor all time deadlines in the underlying agreements, provided that the manufacturer or distributor has knowledge of such obligations at the time of the exercise of the right of first refusal. Failure by an assignee of the

manufacturer or distributor to discharge such obligations shall be deemed a failure by the manufacturer or distributor under this subparagraph.

(3) The proposed change of all or substantially all ownership or transfer of all or substantially all dealership assets does not involve the transfer of assets or the transfer or issuance of stock by the dealer or one or more dealer owners to any of the following:

(A) A designated family member or members including any of the following members of one or more dealer owners:

(i) The spouse.

(ii) A child.

(iii) A grandchild.

(iv) The spouse of a child or a grandchild.

(v) A sibling.

(vi) A parent.

(vii) Stepchildren.

(viii) Any adopted descendants.

(ix) Any lineal descendants.

(B) A manager:

(i) Employed by the dealer in the dealership during the previous 2 years; and

(ii) Who is otherwise qualified as a dealer operator.

(C) A partnership or corporation controlled by any of the family members described in subparagraph (A).

(D) A trust arrangement established or to be established:

(i) For the purpose of allowing the new vehicle dealer to continue to qualify as such under the manufacturer's or distributor's standards; or

(ii) To provide for the succession of the franchise agreement to designated family members or qualified management in the event of the death or incapacity of the dealer or its principal owner or owners.

(4) The manufacturer or distributor agrees in writing to pay all reasonable expenses, including reasonable attorney fees which do not exceed the usual, customary, and reasonable fees charged for similar work done for other clients, incurred by the proposed new owner and transferee prior to the manufacturer's or distributor's exercise of its right of first refusal in negotiating and implementing the contract for the proposed change of all or substantially all ownership or transfer of all or substantially all dealership assets. Notwithstanding the foregoing, no payment of such expenses and attorney fees shall be required if the dealer has not submitted or caused to be submitted an accounting of those expenses within 30 days of the dealer's receipt of the manufacturer's or distributor's written request for such an accounting. Such an accounting may be requested by a manufacturer or distributor before exercising its right of first refusal.

(5) The manufacturer or distributor shall pay any fees and expenses of the motor vehicle dealer arising on and after the date the manufacturer or distributor gives notice of the exercise of its right of first refusal, and incurred by the motor vehicle dealer as a result of alterations to documents, or additional appraisals, valuations, or financial analyses caused or required of the dealer by the manufacturer or distributor to consummate the contract for the sale of the dealership to the

manufacturer's or distributor's proposed transferee, that would not have been incurred but for the manufacturer's or distributor's exercise of its right of first refusal. These expenses and fees shall be paid by the manufacturer or distributor to the dealer and to the dealer's proposed purchaser or transferee on or before the closing date of the sale of the dealership to the manufacturer or distributor if the party entitled to reimbursement has submitted or caused to be submitted to the manufacturer or distributor, an accounting of these expenses and fees within 30 days after receipt of the manufacturer's or distributor's written request for the accounting;

(t) Require, coerce, or attempt to coerce any new motor vehicle dealer to purchase or order any new motor vehicle as a precondition to purchasing, ordering, or receiving any other new motor vehicle or vehicles. Nothing in this subparagraph shall prevent a manufacturer from requiring that a new motor vehicle dealer fairly represent and inventory the full line of new motor vehicles that are covered by the franchise agreement.

(u)(1) Allocate vehicles, to evaluate the performance of a motor vehicle franchise, or to offer to a dealer any discount, incentive, bonus, program, allowance or credit (collectively "incentives"), using sales effective measurements that the manufacturer knows or reasonably should know includes exported vehicles, after being provided with notice and the opportunity to conduct an investigation as provided in subparagraph (u)(3). "Sales effective measurement" means a system that measures how effective a franchisee is at selling vehicles by comparing vehicle sales by that franchisee in the territory or geographic region assigned to the franchisee to vehicles sold in the same territory by other franchisees, or other similar methods of measurement. For the purposes of this section, "exported vehicles" are new vehicles that: (i) are titled in New Hampshire but not registered in New Hampshire or any other state; (ii) are titled and registered in

New Hampshire but not issued a valid New Hampshire state inspection sticker; or (iii) are exported out of the country within 6 months of purchase.

(2) If a manufacturer uses sales effective measurements to allocate vehicles, evaluate a franchisee, or determine incentives, the manufacturer, upon the written request of one of its franchisees, shall, within 30 days, provide the vehicle identification numbers that the manufacturer possessed and used in the measurements during the time period requested by the dealer.

(3) If a manufacturer uses sales effective measurements to allocate vehicles, evaluate a franchisee, or determine incentives, a dealer may request that the manufacturer or distributor investigate a claim that exported vehicles are included in the measurements. To initiate the investigation, the dealer shall provide reasonable documentation that 8 or more exported vehicles were used in the measurements. Acceptable documentation shall include, but not be limited to, data from the division of motor vehicles and vehicle history reports from third party vendors. Within 30 days of the dealer's request, the manufacturer shall investigate the claim and adjust those measurements proportionately to exclude any exported vehicles and adjust the allocation, evaluation, and incentives. As part of the investigation, the manufacturer shall provide the dealer with any and all information, data, evaluations, methodology or other items, that the manufacturer or distributor considered, reviewed, or relied on, for the measurement. The manufacturer shall have the burden to prove that it has acted in accordance with the requirements of this subparagraph.

(v) Require adherence to a performance standard or standards which are not applied uniformly to other similarly situated dealers. In addition to any other requirements of law, he following shall apply:

(1) A performance standard, sales objective, or program for measuring dealer performance that may have a material effect on a dealer, including the dealer's right to payment under any incentive or reimbursement program, and the application of the standard, sales objective or program by a manufacturer, distributor or factory branch, shall be fair, reasonable, equitable and based on accurate information.

(2) Prior to beginning any incentive or reimbursement program, the manufacturer shall provide in writing to each dealer of the same line-make that chooses to participate in the program the dealer's performance requirement or sales goal or objective, which shall include a detailed explanation of the methodology, criteria, and calculations used. The manufacturer shall provide each dealer with the performance requirement or sales goal or objective of all dealers participating in the program whose relevant market area includes territory within this state.

(3) A manufacturer shall allocate an adequate supply of vehicles, appropriate to the market, to its dealers by series, product line, and model to assist the dealer in achieving any performance standards established by the manufacturer and distributor.

(4) A dealer that claims that the application of a performance standard, sales objective, or program for measuring dealership performance does not meet the standards listed in subparagraph (1) may request a hearing before the motor vehicle industry board pursuant to RSA 357-C:12.

(5) The manufacturer or distributor has the burden of proving by a preponderance of the evidence that the performance standard, sales objective, or program for measuring dealership performance complies with this subparagraph.

(w)(1) Require a dealer to purchase goods or services from a vendor selected, identified, or designated by a manufacturer, factory branch, distributor, distributor branch, or one of its affiliates by agreement, program, incentive provision, or otherwise without making available to the dealer the option to obtain the goods or services of substantially similar quality and overall design from a vendor chosen by the dealer and approved by the manufacturer, factory branch, distributor, or distributor branch; provided that such approval shall not be unreasonably withheld, and further provided that the dealer's option to select a vendor shall not be available if the manufacturer or distributor provides substantial reimbursement for the goods or services offered. Substantial reimbursement is equal to or greater than 65 percent of the cost, which shall not be greater than the cost of reasonably available similar goods and services in close proximity to the dealer's market.

(2) Fail to provide to a dealer, if the goods and services to be supplied to the dealer by a vendor selected, identified, or designated by the manufacturer, factory branch, distributor, or distributor branch are signs or other franchisor image or design elements or trade dress to be leased to the dealer, the right to purchase the signs or other franchisor image or design elements or trade dress of substantially similar quality from a vendor selected by the dealer; provided that the signs, images, design elements, or trade dress are approved by the manufacturer, factory branch, distributor, or distributor branch and that such approval shall not be unreasonably withheld. This section shall not be construed to allow a dealer to impair or eliminate the intellectual property rights of the manufacturer, factory branch, distributor, or distributor branch, nor to permit a dealer to erect or maintain signs that do not conform to the intellectual property usage guidelines of the manufacturer, factory branch, distributor, or distributor branch.

(x) Make any express or implied statement or representation directly or indirectly that the dealer is under any obligation whatsoever to offer to sell or sell any extended service contract or extended maintenance plan, gap policy, gap waiver, or other aftermarket product or service offered, sold, backed by, or sponsored by the manufacturer or distributor or to sell, assign, or transfer any of the dealer's retail sales contracts or leases in this state on motor vehicles manufactured or sold by the manufacturer or distributor to a finance company or class of finance companies, leasing company or class of leasing companies, or other specified person, because of any relationship or affiliation between the manufacturer or distributor and the finance company or companies, leasing company or leasing companies, or the specified person or persons. Provided, however, that nothing in this subparagraph prohibits a manufacturer from requiring that a dealer disclose to a customer when the customer is about to purchase a product covered by this subparagraph that is not offered, sold, backed by, or sponsored by the manufacturer or distributor.

(y) Directly or indirectly condition the awarding of a franchise to a prospective franchisee, the addition of a line-make or franchise to an existing franchisee, the renewal of a franchise of an existing franchisee, the approval of the relocation of an existing franchisee's facility, or the approval of the sale or transfer of the ownership of a franchise on the willingness of a franchisee, proposed franchisee, or owner of an interest in the dealership facility to enter into a site control agreement or exclusive use agreement. For purposes of this subparagraph, the terms "site control agreement" and "exclusive use agreement" include any agreement that has the effect of either requiring that the franchisee establish or maintain exclusive dealership facilities or restricting the ability of the franchisee, or the ability of the franchisee's lessor in the event the dealership facility is being leased, to transfer, sell, lease, or change the use of the dealership

premises, whether by sublease, lease, collateral pledge of lease, option to purchase, option to lease, or other similar agreement, regardless of the parties to such agreement. Any provision contained in any agreement that is inconsistent with the provisions of this subparagraph shall be voidable at the election of the affected franchisee, prospective franchisee, or owner of an interest in the dealership facility, provided this subparagraph shall not apply to a voluntary agreement where separate and valuable consideration has been offered and accepted, provided that the renewal of a franchise agreement or the manufacturer's waiver of a contractual or statutory right shall not by itself constitute separate and valuable consideration. Except as provided in this subparagraph, this chapter shall not apply to prospective franchisees.

(z) Notwithstanding the terms, provisions, or conditions of any agreement or franchise, require any motor vehicle dealer to floor plan any of the dealer's inventory or finance the acquisition, construction, or renovation of any of the dealer's property or facilities by or through any financial source or sources designated by the manufacturer, factory branch, distributor, or distributor branch, including any financial source or sources that is or are directly or indirectly owned, operated, or controlled by the manufacturer, factory branch, distributor, or distributor branch.

IV. It shall be deemed a violation for a motor vehicle dealer to require a purchaser of a new motor vehicle, as a condition of sale and delivery, to also purchase special features, appliances, equipment, parts or accessories not desired or requested by the purchaser; provided, however, that this paragraph shall not apply to special features, appliances, equipment, parts or accessories which are already installed on the car when received by the dealer and; provided further, that the motor vehicle dealer, prior to the consummation of the purchase, reveals to the purchaser the substance of this paragraph.

V. (a) Notwithstanding the terms of a franchise agreement or sales and service agreement or any other agreement, to require, coerce, or attempt to coerce any new motor vehicle dealer by program, policy, standard, or otherwise to:

(1) Change location of the dealership;

(2) Construct, renovate, or make any substantial changes, alterations, or remodeling to a motor vehicle dealer's sales or service facilities;

(3) Add to or replace a motor vehicle dealer's sales or service facilities; or

(4) Add to or replace or relocate purchased or leased signage or prohibit a dealer from substituting a sign owned by a dealer pursuant to RSA 357-C:3, III(w).

(b) The prohibitions in subparagraph (a) shall not apply if the manufacturer's or distributor's requirements are reasonable and justifiable in light of the current and reasonably foreseeable economic conditions, financial expectations, availability of additional vehicle allocation, and motor vehicle dealer's market for the sale and service of vehicles, or the alteration is reasonably required to effectively display and service a vehicle based on the technology of the vehicle. The manufacturer or distributor shall have the burden of proving that changes, alterations, remodeling, or replacement to a motor vehicle dealer's sales or service facilities or signage are reasonable and justifiable under this subparagraph.

(c) Any cost to obtain a variance or other approval from any governmental body in order to proceed under subparagraph (a) shall be paid by the dealer in the first instance. When subsequent efforts are required to obtain the variance or other approval, including any appeals, the manufacturer or distributor that is seeking the action listed in subparagraphs (a)(1) through (a)(4) shall pay, provided that

such subsequent efforts were not required because of clerical error or negligent action or inaction on the part of the dealer.

(d) Except as necessary to comply with health or safety laws or to comply with technology requirements necessary to sell or service a vehicle, it is unreasonable and not justifiable for a manufacturer or distributor to require, coerce, or attempt to coerce any new motor vehicle dealer by program, policy, facility guide, standard or otherwise to change the location of the dealership or construct, replace, renovate or make any substantial changes, alterations, or remodeling to a motor vehicle dealer's sales or service facilities before the 15th anniversary of the date of issuance of the certificate of occupancy or the manufacturer's approval, whichever is later, from:

(1) The date construction of the dealership at that location was completed if the construction was in substantial compliance with standards or plans provided by a manufacturer, distributor, or representative or through a subsidiary or agent of the manufacturer, distributor, or representative; or

(2) The date a prior change, alteration, or remodel of the dealership at that location was completed if the construction was in substantial compliance with standards or plans provided by a manufacturer, distributor, or representative or through a subsidiary or agent of the manufacturer, distributor, or representative.

(e) Notwithstanding the 15-year limitation on manufacturer-mandated changes in subparagraph (d), the limitation shall not be effective if the manufacturer or distributor offers substantial reimbursement for the requested changes, alterations, or remodeling of a dealer's sales or service facilities. Substantial reimbursement is equal to or greater than 65 percent of the cost, which shall not be greater

than the cost of reasonably available similar goods and services in close proximity to the dealer's market.

(f) This paragraph shall not apply to a program that is in effect with one or more motor vehicle dealers in this state on the effective date of this subparagraph, nor to any renewal or modification of such a program.

N.H. REV. STAT § 357-C:3-a

357-C:3-a ACCESS TO DOCUMENTATION.

I. Once annually, a dealer may request to obtain a copy of (i) reports created in the regular course of business about the dealer, (ii) written correspondence with the dealer, and (iii) written reports prepared by a representative of the manufacturer or distributor documenting or memorializing any contact with a dealer or any employee or agent of the dealer, collectively known as "the documentation." The documentation required to be produced shall be limited to documentation created in the 12 months preceding the dealer's request. The manufacturer or distributor shall provide the documentation to the dealer within 30 days of the dealer's written request. The manufacturer shall certify that the documentation it produces is complete as of the date of the request. The manufacturer or distributor may charge the dealer a reasonable per page fee for reproduction, provided that such fee shall not exceed the usual and customary fee charged by copy centers in the immediate vicinity of the location of the documentation. No other fees or charges shall be permitted.

II. Any documents or portions of documents that are required to be produced pursuant to this section, which are not produced by the manufacturer or distributor in response to a dealer's request and that the manufacturer or distributor did not make a written, good faith objection to producing shall be excluded and not admissible as evidence or used in any manner at any proceeding at the motor vehicle industry board or any other state agency or any court proceeding. This paragraph shall not apply to any documents that document, evidence, or demonstrate insolvency, or alleged criminal, unlawful, or fraudulent activity by the dealer. At

any proceeding before the motor vehicle industry board, any state agency, or any court, the presiding hearing officer, judge, board, or agency, may admit documents otherwise inadmissible under this paragraph if it is found that the documents were withheld in good faith or by accident or mistake.

III. A complete copy of any written report of any nature prepared by a representative of the manufacturer or distributor after any contact with a dealer or any employee or agent of the dealer shall be provided to the dealer within 60 days of the report's creation.

IV. Nothing in the section shall require a manufacturer to disclose privileged, confidential, proprietary, or private third party information or information about another dealer or dealers and this includes but is not limited to names, addresses, financial data, and any other information relating to other dealers that may otherwise be referenced in the supporting documentation, except for specific information which is used by the manufacturer to compare the requesting dealer's performance with other dealers.

N.H. REV. STAT. § 357-C:4

357-C:4 DELIVERY AND PREPARATION OBLIGATIONS.

Every manufacturer shall specify to the dealer, the delivery and preparation obligations of its motor vehicle dealers prior to delivery of new motor vehicles to retail buyers. A copy of the delivery and preparation obligations of its motor vehicle dealers and a schedule of the compensation to be paid by it to its motor vehicle dealers for the work and services they shall be required to perform in connection with such delivery and preparation obligations shall be filed with the New Hampshire motor vehicle industry board by every motor vehicle manufacturer. The compensation as set forth on such schedule shall be reasonable in the same manner as provided in RSA 357-C:5, II(b). No dealer shall charge any purchaser for work or services paid for by the manufacturer.

N.H. REV. STAT. § 357-C:5

357-C:5 WARRANTY OBLIGATIONS, TRANSPORTATION DAMAGE AND INDEMNIFICATION.

I. Every manufacturer, distributor, or branch or division thereof shall fulfill the terms of any express or implied warranty it makes concerning the sale of a new motor vehicle to the public or ultimate purchaser of the line make which is the subject of a contract or franchise agreement. If it is determined by the court in an action at law that the manufacturer has violated its express or implied warranty, the court shall add to any award or relief granted an additional award for reasonable attorney's fees and other necessary expenses for maintaining the litigation.

II. If any franchisor shall require or permit franchisees to perform services or provide parts in satisfaction of a warranty issued by the franchisor:

(a) The franchisor shall specify in writing to each of its new motor vehicle dealers in this state, the dealers' obligations for warranty service on its products, shall compensate the new motor vehicle dealer for warranty service required of the dealer by the manufacturer, and shall provide the dealer the schedule of compensation to be paid such dealer for parts, work and service in connection with warranty services, and the time allowance for the performance of such work and service. Warranty service on trucks and equipment, except for those sold by a single line equipment dealer, shall include the cost, including labor, to transport a motor vehicle under warranty in order to perform the warranty work and to return the motor vehicle to the customer, or, if transporting the trucks and equipment to the dealership is not mechanically or financially feasible, to

travel to and return from the locations of the motor vehicle if the warranty repairs are performed at the location of the motor vehicle; provided that reimbursement for travel time shall not exceed 4 hours.

(b)(1) In no event shall a schedule of compensation for parts, work, and service in connection with warranty services fail to include reasonable compensation for diagnostic work, as well as parts, repair service and labor under the warranty or maintenance plan, extended warranty, certified preowned warranty or a service contract, issued by the manufacturer or distributor or its common entity. Time allowances for the diagnosis and performance of warranty work and service shall be reasonable and adequate for the work to be performed. In no event shall any manufacturer, component manufacturer, or distributor pay its dealers an amount of money for warranty work that is less than that charged by the dealer to the retail customers of the dealer for non-warranty work of like kind. In accordance with RSA 382-A:2-329, the manufacturer shall reimburse the franchisee for any parts so provided at the retail rate customarily charged by that franchisee for the same parts when not provided in satisfaction of a warranty and computed under this subparagraph. No claim which has been approved and paid by the manufacturer or distributor may be charged back to the dealer unless it can be shown that the claim was false or fraudulent, that the repairs were not properly made or were unnecessary to correct the defective condition, or that the dealer failed to reasonably substantiate that the claim was in accordance with the written requirements of the manufacturer or distributor in effect at the time the claim arose. A manufacturer or distributor shall not deny a claim solely based on a dealer's incidental failure to comply with a specific claim processing requirement, or a clerical error, or other administrative technicality.

(A) The obligations imposed on motor vehicle franchisors by this section shall apply to any parent,

subsidiary, affiliate, or agent of the motor vehicle franchisor if a warranty or service or repair plan is issued by that person instead of or in addition to one issued by the motor vehicle franchisor.

(B)(i) In determining the rate and price customarily charged by the motor vehicle dealer to the public for parts, the compensation may be an agreed percentage markup over the dealer's cost under a writing separate and distinct from the franchise agreement signed after the dealer's request, but if an agreement is not reached within 30 days after a dealer's written request to be compensated under this section, compensation for parts shall be calculated by utilizing the method described in this paragraph.

(ii) If the dealer and the manufacturer are unable to agree to a percentage markup as provided by subparagraph (i), the retail rate customarily charged by the dealer for parts that the manufacturer is obligated to pay pursuant to RSA 382-A:2-329, shall be established by the dealer submitting to the manufacturer or distributor 100 sequential nonwarranty or customer-paid service repair orders or 90 consecutive days of nonwarranty, customer-paid service repair orders, whichever is less, each of which includes parts that would normally be used in warranty repairs and covered by the manufacturer's warranty, covering repairs made not more than 180 days before the submission and declaring the average percentage markup. The retail rate so declared must be reasonable as compared to other same line-make dealers of similar size in the immediate geographic vicinity of the dealer or, if none exist, immediately outside the dealer's geographic relevant market area within this state. The declared retail rate shall go into effect 30 days following the date on which the dealer submitted to the manufacturer or distributor the required number of nonwarranty or customer-paid service repair orders (hereafter referred to as the "submission date") subject to audit of the submitted nonwarranty or customer-paid service repair orders by the

manufacturer or distributor and a rebuttal of the declared retail rate. If the manufacturer or distributor wishes to rebut the declared retail rate it must so inform the dealer not later than 30 days after the submission date and propose an adjustment of the average percentage markup based on the rebuttal not later than 60 days after the submission date. If the dealer does not agree with the proposed average percentage markup, the dealer may file a protest at the motor vehicle industry board not later than 90 days after the submission date. In the event a protest is filed, the manufacturer has the burden of proof to establish that the dealer's submission is unreasonable as compared to other same line-make dealers of similar size in the immediate geographic vicinity of the dealer or, if none exist, immediately outside the dealer's geographic relevant market area within this state. In the event a dealer prevails in a protest filed under this provision, the dealer's increased parts and/or labor reimbursement shall be provided retroactive to the date the submission would have been effective pursuant to the terms of this section but for the manufacturer's denial.

(iii) In calculating the retail rate customarily charged by the dealer for parts, the following work shall not be included in the calculation: routine maintenance not covered under any retail customer warranty, such as fluids, filters and belts not provided in the course of repairs; items that do not have an individual part number such as some nuts, bolts, fasteners and similar items; tires; vehicle reconditioning; parts covered by subparagraph (v); repairs for manufacturer special events and manufacturer discounted service campaigns; parts sold at wholesale or parts used in repairs of government agencies' repairs for which volume discounts have been negotiated by the manufacturer; promotional discounts on behalf of the manufacturer, internal billings, regardless of whether the billing is on an in-stock vehicle; and goodwill or policy adjustments.

(iv) A manufacturer or distributor shall not require a dealer to establish the retail rate customarily charged by the dealer for parts and labor by an unduly burdensome or time-consuming method or by requiring information that is unduly burdensome or time consuming to provide including, but not limited to, part-by-part or transaction-by-transaction calculations. A dealer shall not declare an average percentage markup or average labor rate more than once in a calendar year. A manufacturer or distributor may perform annual audits to verify that a dealer's effective rates have not decreased and if they have may reduce the warranty reimbursement rate prospectively. Such audits shall not be performed more than once per calendar year at any dealer. The audit performed by the manufacturer shall be in accordance with the method to calculate the retail rate customarily charged by the dealer for parts as set out in subparagraph (ii) above and subject to the limitations in subparagraph (iii). If the dealer does not agree with the proposed average percentage markup, the dealer may file a protest at the motor vehicle industry board not later than 90 days after the manufacturer states the intended new retail rate as the result of the manufacturer's audit. In the event a protest is filed, the manufacturer has the burden of proof to establish that the proposed retail rate was calculated accurately and in accordance with this subparagraph. The proposed retail rate shall not be effective until the motor vehicle industry board issues a final order approving the proposed rate. If as the result of the audit performed in accordance with subparagraph (ii) the calculation shows that the dealer's average percentage markup is greater than the average percentage markup currently being used for the dealer's retail rate reimbursement, the dealer's average percentage markup shall be increased to the extent of the result of the audit. Any rate that is adjusted as a result of an audit performed in accordance with this subparagraph shall not be adjusted again until a period of 6 months from the effective date of the change has lapsed.

(v) If a motor vehicle franchisor or component manufacturer supplies a part or parts for use in a repair rendered under a warranty other than by sale of that part or parts to the motor vehicle franchisee, the motor vehicle franchisee shall be entitled to compensation equivalent to the motor vehicle franchisee's average percentage markup on the part or parts, as if the part or parts had been sold to the motor vehicle franchisee by the motor vehicle franchisor.

(1) The requirements of this subparagraph shall not apply to entire engine assemblies, entire transmission assemblies, in-floor heating systems, and rear-drive axles ("assemblies"). In the case of assemblies, the motor vehicle franchisor shall reimburse the motor vehicle franchisee in the amount of 30 percent of what the motor vehicle franchisee would have paid the motor vehicle franchisor for the assembly if the assembly had not been supplied by the franchisor other than by the sale of that assembly to the motor vehicle franchisee.

(2) The requirements of this subparagraph shall not apply to household appliances, furnishings, and generators of a motor home ("household items"). In the case of household items valued under $600, the motor vehicle franchisor shall reimburse the motor vehicle franchisee in the amount of 30 percent of what the motor vehicle franchisee would have paid the motor vehicle franchisor for the household item if the household item had not been supplied by the franchisor other than by the sale of that assembly to the motor vehicle franchisee. For household items in excess of $600, the markup would be capped as if the part were $600. The motor vehicle franchisor shall also reimburse the franchisee for any freight costs incurred to return the removed parts.

(vi) A manufacturer or distributor may not otherwise recover its costs for reimbursing a franchisee for parts and labor pursuant to this section.

(2) In no event shall a manufacturer or component manufacturer fail to pay a dealer reasonable compensation for parts or components, including assemblies, used in warranty or recall repairs.

(3) The wholesale price on which a dealer's markup reimbursement is based for any parts used in a recall, service campaign, or other similar program, shall not be less than the highest wholesale price listed in the manufacturer's or distributor's wholesale price catalogue within 6 months prior to the start of the recall, service campaign, or other similar program. If the manufacturer or distributor does not have a wholesale price catalogue, or if the part is not listed in a wholesale price catalogue, the wholesale price on which a dealer's markup reimbursement is based in a recall, service campaign, or other similar program shall be the average price charged to dealers of similar line makes in the state for the part during 6 months prior to the start of the recall, service campaign, or other similar program. In no event shall a dealer receive less than the dealer's actual cost for that part, plus the markup as calculated pursuant to this subparagraph.

(c) No new motor vehicle manufacturer shall fail to perform any warranty obligations, including tires, whether or not such tires placed on the new motor vehicle by the manufacturer are excluded under the motor vehicle manufacturer's warranty; fail to include in written notices of factory recalls to new motor vehicle owners and dealers the expected date by which necessary parts and equipment will be available to dealers for the correction of such defects; or fail to compensate any of the new motor vehicle dealers in this state for repairs effected by such recall.

(d)(1) All claims made by new motor vehicle dealers pursuant to this section for labor and parts shall be paid within 30 days following their approval. All such claims shall be either approved and paid or disapproved within 30 days after their receipt, and any claim not specifically

disapproved in writing within such period shall be deemed approved. Notice of rejection of any claim shall be accompanied by a specific statement of the grounds on which the rejection is based.

(2) A manufacturer, distributor, branch, or division shall retain the right to audit warranty claims for a period of 9 months after the date on which the claim is paid and charge back any amounts paid on claims that are false or unsubstantiated.

(3) A manufacturer, distributor, branch, or division shall retain the right to audit all incentive and reimbursement programs for a period of 9 months after the date on which the claim is paid or 9 months from the end of a program that does not exceed one year, whichever is later, and charge back any amounts paid on claims that are false or unsubstantiated.

(4) Any new motor vehicle dealer who is audited by a manufacturer, distributor, branch, or division shall have the right to be present or represented by counsel or other designated representative.

(5) Any chargeback resulting from any audit shall not be made until a final order is issued by the New Hampshire motor vehicle industry board if a protest to the proposed chargeback is filed within 30 days of the notification of the final amount claimed by the manufacturer, distributor, branch, or division to be due after exhausting any procedure established by the manufacturer, distributor, branch, or division to contest the chargeback, other than arbitration. If the chargeback is affirmed by a final order of the board, the dealer shall be liable for interest on the amount set forth in the order at a rate of the prime rate effective on the date of the order plus one percent per annum from the date of the filing of the protest. In the absence of fraud, the board may order, based on the equities and circumstances of the parties, that the chargeback plus applicable interest be paid in

installments not exceeding 12 months. If the board finds that a warranty chargeback is the result of a fraudulent warranty claim, no installment payments shall be allowed by the board.

(6) A manufacturer, distributor, branch, or division shall retain the right to charge back a fraudulent warranty claim, subject to any limitation period established in the franchise agreement but in no event longer than the limitation period provided in RSA 508:4, I. The applicable limitation period shall commence on the date a fraudulent warranty claim is paid.

(7) If the franchise agreement between a manufacturer, distributor, branch, or division is terminated for any reason, any audit pursuant to this section shall be completed no later than 30 days after the effective date of the termination.

(8) Notwithstanding the terms of any franchise or agreement, a manufacturer, distributor, branch, or division shall not take or threaten to take any adverse action against a motor vehicle dealer, including charge backs, reducing vehicle allocations, or terminating or threatening to terminate a franchise or agreement because the dealer sold or leased a motor vehicle to a customer who exported the vehicle to a foreign country, unless the motor vehicle dealer knew or reasonably should have known that the customer intended to export the vehicle. There shall be a presumption that the motor vehicle dealer did not know or could not have reasonably known if the vehicle is titled or registered in any state in this country.

(e) The franchisor shall not in any way restrict the nature or extent of services to be rendered or parts to be provided so that such restriction prevents the franchisee from satisfying a warranty in a workmanlike manner with all required or necessary parts.

III. (a) Notwithstanding the terms, provisions, or conditions of any agreement or franchise, a new motor vehicle dealer shall be solely liable for damages to new motor vehicles after acceptance from the carrier and before delivery to the ultimate purchaser.

(b) Notwithstanding the terms, provisions, or conditions of any agreement or franchise, a manufacturer shall be liable for all damages to motor vehicles before delivery to a carrier or transporter.

(c) A new motor vehicle dealer shall be liable for damages to new motor vehicles after delivery to the carrier only if the dealer selects the method of transportation, mode of transportation, and the carrier; in all other instances, the manufacturer shall be liable for carrier-related new motor vehicle damage.

(d) On any new motor vehicle, any uncorrected damage or any corrected damage exceeding 6 percent of the manufacturer's suggested retail price, as defined in 15 U.S.C.A. sections 1231-33, as measured by retail repair costs, shall be disclosed in writing by the manufacturer or distributor to the dealer and shall be disclosed in writing by the dealer to the ultimate purchaser prior to delivery. Damage to glass, tires, and bumpers shall be excluded from the calculation required in this subparagraph when replaced by identical manufacturer's original equipment.

(e) Repaired damage to a customer-ordered new motor vehicle less than the amount requiring disclosure in subparagraph (d) shall not constitute grounds for revocation of the customer order. The customer's right of revocation shall cease upon his acceptance of delivery of the vehicle, provided disclosure is made prior to delivery.

(f) If damage to a vehicle exceeds the amount requiring disclosure in subparagraph (d) at either the time the new motor vehicle is accepted by the new motor vehicle dealer, or

whenever the risk of loss is shifted to the dealer, whichever occurs first, then the dealer may reject the vehicle within a reasonable time.

(g) If a new motor vehicle dealer determines the method of transportation, as defined in subparagraph (c), then the risk of loss during transit shall pass to the dealer upon delivery of the vehicle to the carrier. In every other instance, the risk of loss shall remain with the manufacturer until such time as the new motor vehicle dealer accepts the vehicle from the carrier.

IV. (a) A franchisor shall indemnify its franchisees from any and all reasonable claims, losses, damages, and costs, including attorney's fees resulting from or related to complaints, claims or suits against the franchisee by third parties, including but not limited to those based upon strict liability, negligence, misrepresentation, warranty and revocation of acceptance or rescission, where an action alleges fault due to: (1) the manufacture, assembly, or design of the vehicle, parts, or accessories, or the selection or combination of parts or components; (2) service systems, procedures or methods required, recommended or suggested to the franchisee by the franchisor; or (3) damage to the vehicle in transit to the franchisee where the carrier is designated by the manufacturer.

(b) The franchisor shall not be liable to the franchisee by virtue of this section for any claims, losses, costs or damages arising as a result of negligence or willful malfeasance by the franchisee in its performance of delivery, preparation, or warranty obligations required by the franchisor, or other services performed; provided, however, that the franchisor shall be liable for damages arising from or in connection with any services rendered by a franchisee in accordance with any service, system, procedure or method suggested or required by the franchisor.

(c) In any action where there are both allegations for which the franchisor is required to indemnify the franchisee and claims of negligence in the performance of services by the franchisee, the percentage of fault of each shall be determined and the franchisor's duty to indemnify the franchisee against all damages and expenses, including attorney's fees, shall be limited to that percentage of fault found to be of the type set forth in subparagraph (a).

N.H. REV. STAT. § 357-C:6

357-C:6 AGREEMENTS GOVERNED.

I. All written or oral agreements of any type between a manufacturer or distributor and a motor vehicle dealer shall be subject to the provisions of this chapter, and provisions of such agreements which are inconsistent with this chapter shall be void as against public policy and unenforceable in the courts or the motor vehicle industry board of this state.

II. Before any new selling agreement or amendment to an agreement involving a motor vehicle dealer and such party becomes effective, the manufacturer, distributor, distributor branch or division, factory branch or division, or agent thereof shall, 90 days prior to the effective date thereof, forward a copy of such agreement or amendment to the New Hampshire motor vehicle industry board and to the dealer.

III. Every new selling agreement or amendment made to such agreement between a motor vehicle dealer and a manufacturer or distributor shall include, and if omitted, shall be presumed to include, the following language: "If any provision herein contravenes the valid laws or regulations of the state of New Hampshire, such provision shall be deemed to be modified to conform to such laws or regulations; or if any provision herein, including arbitration provisions, denies or purports to deny access to the procedures, forums, or remedies provided for by such laws or regulations, such provisions shall be void and unenforceable; and all other terms and provisions of this agreement shall remain in full force and effect."

N.H. REV. STAT. § 357-C:6-a

357-C:6-a PROHIBITED CONTRACTUAL REQUIREMENTS IMPOSED BY MANUFACTURER, DISTRIBUTOR, OR CAPTIVE FINANCE SOURCE.

I. In this section, "captive finance source" means any financial source that provides automotive-related loans or purchases retail installment contracts or lease contracts for motor vehicles in New Hampshire and is, directly or indirectly, owned, operated, or controlled by such manufacturer, factory branch, distributor, or distributor branch.

II. It shall be unlawful for any manufacturer, factory branch, captive finance source, distributor, or distributor branch, or any field representative, officer, agent, or any representative of them, notwithstanding the terms, provisions, or conditions of any agreement or franchise, to require any of its franchised dealers located in this state to agree to any terms, conditions, or requirements in subparagraphs (a)-(h) in order for any such dealer to sell to any captive finance source any retail installment contract, loan, or lease of any motor vehicles purchased or leased by any of the dealer's customers, or to be able to participate in, or otherwise, directly or indirectly, obtain the benefits of any consumer transaction incentive program payable to the consumer or the dealer and offered by or through any captive finance source:

(a) Require a dealer to grant such captive finance source a power of attorney to do anything on behalf of the dealer other than sign the dealer's name on any check, draft, or other instrument received in payment or proceeds under any contract for the sale or lease of a motor vehicle that is made

payable to the dealer but which is properly payable to the captive finance source, is for the purpose of correcting an error in a customer's finance application or title processing document, or is for the purpose of processing regular titling of the vehicle.

(b) Require a dealer to warrant or guarantee the accuracy and completeness of any personal, financial, or credit information provided by the customer on the credit application and/or in the course of applying for credit other than to require that the dealer make reasonable inquiry regarding the accuracy and completeness of such information and represent that such information is true and correct to the best of the dealer's knowledge.

(c) Require a dealer to repurchase, pay off, or guaranty any contract for the sale or lease of a motor vehicle or to require a dealer to indemnify, defend, or hold harmless the captive finance source for settlements, judgments, damages, litigation expenses, or other costs or expenses incurred by such captive finance source unless the obligation to repurchase, pay off, guaranty, indemnify, or hold harmless resulted directly from (i) the subject dealer's material breach of the terms of a written agreement with the captive finance source or the terms for the purchase of an individual contract for sale or lease that the captive finance source communicates to the dealer before each such purchase, except to the extent the breached terms are otherwise prohibited under subparagraphs (a)-(h), or (ii) the subject dealer's violation of applicable law. However, for purposes of this section, the dealer may contractually obligate itself to warrant the accuracy of the information provided in the finance contract, but such warranty may only be enforced if the captive finance source gives the dealer a reasonable opportunity to cure or correct any errors in the finance contract where cure or correction is possible. For purposes of this section, any allegation by a third party that would constitute a breach of the terms of a written agreement

between the dealer and a captive finance source shall be considered a material breach.

(d) Notwithstanding the terms of any contract or agreement, treat a dealer's breach of an agreement between the dealer and a captive finance source with respect to the captive finance source's purchase of individual contracts for the sale or lease of a motor vehicle as a breach of such agreement with respect to purchase of other such contracts, nor shall such a breach in and of itself, constitute a breach of any other agreement between the dealer and the captive finance source, or between the dealer and any affiliate of such captive finance source.

(e) Require a dealer to waive any defenses that may be available to it under its agreements with the captive finance source or under any applicable laws.

(f) Require a dealer to settle or contribute any of its own funds or financial resources toward the settlement of any multiparty or class action litigation without obtaining the dealer's voluntary and written consent subsequent to the filing of such litigation.

(g) Require a dealer to contribute to any reserve or contingency account established or maintained by the captive finance source, for the financing of the sale or lease of any motor vehicles purchased or leased by any of the dealer's customers, in any amount or on any basis other than the reasonable expected amount of future finance reserve chargebacks to the dealer's account. This section shall not apply to or limit:

(1) Reasonable amounts reserved and maintained related to the sale or financing of any products ancillary to the sale, lease, or financing of the motor vehicle itself;

(2) A delay or reduction in the payment of dealer's portion of the finance income pursuant to an agreement

between the dealer and a captive finance source under which the dealer agrees to such delay or reduction in exchange for the limitation, reduction, or elimination of the dealer's responsibility for finance reserve chargebacks; or

(3) A chargeback to a dealer, or offset of any amounts otherwise payable to a dealer by the captive finance source, for any indebtedness properly owing from a dealer to the captive finance source as part of a specific program covered by this section, the terms of which have been agreed to by the dealer in advance, except to the extent such chargeback would otherwise be prohibited by this section.

(h) Require a dealer to repossess or otherwise gain possession of a motor vehicle at the request of or on behalf of the captive finance source. This section shall not apply to any requirements contained in any agreement between the dealer and the captive finance source wherein the dealer agrees to receive and process vehicles that are voluntarily returned by the customer or returned to the lessor at the end of the lease term.

III. Any clause or provision in any franchise or agreement between a dealer and a manufacturer, factory branch, distributor, or distributor branch, or between a dealer and any captive finance source, that is in violation of or that is inconsistent with any of the provisions of this section shall be deemed null and void and without force and effect to the extent it violates this section.

IV. Any captive finance source who engages directly or indirectly in purposeful contacts within this state in connection with the offering or advertising the availability of financing for the sale or lease of motor vehicles within this state, or who has business dealings within this state, shall be subject to the provisions of this section and shall be subject to the jurisdiction of the courts of this state.

V. The applicability of this section shall not be affected by a choice of law clause in any agreement, waiver, novation, or any other written instrument.

VI. It shall be unlawful for a captive finance source to use any subsidiary corporation, affiliated corporation, or any other controlled corporation, partnership, association, or person to accomplish what would otherwise be illegal conduct under this section on the part of the captive finance source.

N.H. REV. STAT. § 357-C:7

357-C:7 LIMITATIONS ON CANCELLATIONS, TERMINATIONS AND NONRENEWALS.

I. Notwithstanding the terms, provisions, or conditions of any agreement or franchise, and notwithstanding the terms or provision to any waiver, no manufacturer, distributor, or branch or division thereof shall cancel, terminate, fail to renew, or refuse to continue any franchise relationship with a new motor vehicle dealer unless:

(a) The manufacturer, distributor, or branch or division thereof has satisfied the notice requirement of paragraph V;

(b) The manufacturer, distributor, or branch or division thereof has acted in good faith;

(c) The manufacturer, distributor, or branch or division thereof has good cause for the cancellation, termination, nonrenewal, or noncontinuance; and

(d)(1) The New Hampshire motor vehicle industry board finds after a hearing and after ruling on any motion to reconsider that is timely filed in accordance with RSA 357-C:12, VII, that there is good cause for cancellation, termination, failure to renew, or refusal to continue any franchise relationship. The new motor vehicle dealer may file a protest with the board within 45 days after receiving the 90-day notice. A copy of the protest shall be served by the new motor vehicle dealer on the manufacturer, distributor, or branch or division thereof. When a protest is filed under this section, the franchise agreement shall remain in full force and effect and the franchisee shall retain all rights and remedies pursuant to the terms and conditions of such franchise agreement, including, but not limited to, the right to sell or

transfer such franchisee's ownership interest prior to a final determination by the board and any appeal; or

(2) The manufacturer, distributor, or branch or division thereof has received the written consent of the new motor vehicle dealer; or

(3) The appropriate period for filing a protest has expired.

II. Notwithstanding the terms, provisions, or conditions of any agreement or franchise or the terms or provisions of any waiver, good cause shall exist for the purposes of a termination, cancellation, nonrenewal, or noncontinuance when:

(a) There is a failure by the new motor vehicle dealer to comply with a provision of the franchise, which provisions is both reasonable and of material significance to the franchise relationship; provided that compliance on the part of the new motor vehicle dealer is reasonably possible; and that the manufacturer, distributor, or branch or division thereof first acquired actual or constructive knowledge of such failure not more than 180 days prior to the date on which notification is given pursuant to paragraph V.

(b) If the failure by the new motor vehicle dealer, in subparagraph (a), relates to his or her performance in sales or service, then good cause, as used in subparagraph I(c), shall be defined as the failure of the new motor vehicle dealer to effectively carry out the performance provisions of the franchise if:

(1) The new motor vehicle dealer was apprised by the manufacturer, distributor, or branch or division thereof in writing of such failure, the notification stated that notice was provided of failure of performance pursuant to this law, and the new motor vehicle dealer was afforded a reasonable

opportunity to exert good faith efforts to correct his or her failures;

(2)(A) Except with regard to OHRV and snowmobile dealers, such failure thereafter continued within the period which began not more than 180 days before the date notification of termination, cancellation, or nonrenewal was given pursuant to paragraph V; and

(B) With regard to OHRV and snowmobile dealers, such failure thereafter continued within the period which began not more than 365 days before the date notification of termination, cancellation, or nonrenewal was given pursuant to paragraph V; and

(3) The new motor vehicle dealer has not substantially complied with reasonable performance criteria established by the manufacturer, distributor, or branch or division thereof and communicated to the dealer. Among those factors determining performance criteria shall be the relevancy of the sales of the manufacturer, distributor, or branch or division thereof within the state and the particular market area.

(c) For the purposes of this paragraph, good cause for terminating, canceling, or failing to renew a franchise shall be limited to failure by the franchisee to substantially comply with those requirements imposed upon the franchisee by the franchise, as set forth in subparagraphs II(a) and (b).

III. Notwithstanding the terms, provisions, or conditions of any agreement or franchise or the terms or provisions of any waiver, the following shall be construed as examples of what do not constitute good cause for the termination, cancellation, nonrenewal, or noncontinuance of a franchise:

(a) The change of ownership of the new motor vehicle dealer's dealership, excluding any change in ownership which would have the effect of the sale of the franchise

without the reasonable consent of the manufacturer, distributor, or branch or division thereof;

(b) The fact that the new motor vehicle dealer refused to purchase or accept delivery of any new motor vehicle parts, accessories, or any other commodity or services not ordered by the new motor vehicle dealer;

(c) The fact that the new motor vehicle dealer owns, has an investment in, participates in the management of, or holds a license for the sale of another make or line of new motor vehicle, or that the new motor vehicle dealer has established another make or line of new motor vehicle in the same dealership facilities as those of the manufacturer, distributor, or branch or division thereof; provided that the new motor vehicle dealer maintains a reasonable line of credit for each make or line of new motor vehicle, and that the new motor vehicle dealer remains in substantial compliance with any reasonable facilities' requirements of the manufacturer, distributor, or branch or division thereof;

(d) The fact that the new motor vehicle dealer sells or transfers ownership of the dealership or sells or transfers capital stock in the dealership to the new motor vehicle dealer's spouse, son, or daughter. The manufacturer, distributor, or branch or division thereof shall give effect to such change in ownership unless, if licensing is required by the state, the transfer of the new motor vehicle dealer's license is denied or the new owner is unable to license as the case may be; and

(e) The fact that the new motor vehicle dealer's dealership does not substantially meet the reasonable capitalization requirements of the manufacturer, distributor, branch, or division.

IV. The manufacturer, distributor, or branch or division thereof shall bear the burden of proof for showing that it has acted in good faith, that all notice requirements have been

satisfied, and that there was good cause for the franchise termination, cancellation, nonrenewal or noncontinuance.

V. (a) Notwithstanding the terms, provisions, or conditions of any agreement or franchise or the terms or provisions of any waiver, prior to the termination, cancellation, or nonrenewal of any franchise, the manufacturer, distributor, or branch or division thereof shall furnish notification of such action to the new motor vehicle dealer and the board in the manner described in subparagraph (b) not less than 90 days prior to the effective date of such termination, cancellation, or nonrenewal, except that the notice required of a controlled financing company of a manufacturer, distributor, or branch or division thereof shall be that period set forth in its contract with the dealer.

(b) Notification under this paragraph shall be in writing; shall be by certified mail, or personally delivered to the new motor vehicle dealer; and shall contain:

(1) A statement of intention to terminate the franchise, cancel the franchise, or not to renew the franchise; and

(2) A statement of the reasons for the termination, cancellation, or nonrenewal; and

(3) The date on which such termination, cancellation, or nonrenewal takes effect.

(c) Not less than 180 days prior to the effective date of such termination, cancellation, or nonrenewal which occurs as a result of:

(1) Any change in ownership, operation, or control of all or any part of the business of the manufacturer, whether by sale or transfer of assets, corporate stock or other equity interest, assignment, merger, consolidation, combination, joint venture, redemption, operation of law or otherwise;

(2) The termination, suspension, or cessation of a part or all of the business operations of the manufacturer; or

(3) Discontinuance of the sale of the product line make or a change in distribution system by the manufacturer whether through a change in distributors or the manufacturer's decision to cease conducting business through a distributor altogether.

VI. Within 90 days of the termination, cancellation, or nonrenewal of a motor vehicle franchise as provided for in this section, or the termination, cancellation, or nonrenewal of a motor vehicle franchise by the motor vehicle franchisee, the motor vehicle franchisor shall pay to the motor vehicle dealer:

(a) The dealer cost plus any charges by the manufacturer, distributor, or branch or division thereof for distribution, delivery, and taxes paid by the dealer, less all allowances paid to the dealer by the manufacturer, distributor, or representative, for new, unsold, undamaged and complete motor vehicles in the dealer's inventory that have original invoices bearing original dates within 24 months prior to the effective date of termination with less than 750 miles on the odometer, and insurance costs, and floor plan costs from the effective date of the termination to the date that the vehicles are removed from dealership or the date the floor plan finance company is paid, whichever occurs last. Vehicles with a gross vehicle weight rating over 14,000 shall be exempt from the 750 mile limitation. Motorcycles shall be subject to a 350 mile limitation. All vehicles shall have been acquired from the manufacturer or another same line make vehicle dealer in the ordinary course of business. Equipment shall be subject to a 36-month limitation. Payment for farm and utility tractors, forestry equipment, industrial, construction equipment, farm implements, farm machinery, yard and garden equipment, attachments, accessories and repair parts shall include all items attached to the original

equipment by the dealer or the manufacturer other than items that are not related to the performance of the function the equipment is designed to provide.

(b) The dealer cost of each new, unused, undamaged, and unsold part or accessory if such part or accessory is in the current parts catalog, was purchased from the manufacturer or distributor or from a subsidiary or affiliated company or authorized vendor, and is still in the original, resalable merchandising package and in unbroken lots, except that in the case of sheet metal, a comparable substitute for the original package may be used. Any part or accessory that is available to be purchased from the manufacturer on the date the notice of termination issued shall be considered to be included in the current parts catalog.

(c) The fair market value of each undamaged sign owned by the dealer which bears a trademark, trade name, or commercial symbol used or claimed by the manufacturer, distributor, or branch or division thereof if such sign was purchased from or at the request of the manufacturer, distributor, or branch or division thereof.

(d) At the dealer's option, the fair market value of all special tools and automotive service equipment owned by the dealer which were recommended in writing and designated as special tools and equipment by the manufacturer, distributor, or branch or division thereof and purchased from or at the request of the manufacturer or distributor, if the tools and equipment are in usable and good condition, normal wear and tear excepted.

(e) The cost of transporting, handling, packing, and loading of motor vehicles, parts, signs, tools, and special equipment subject to repurchase by the manufacturer, distributor, or branch or division thereof.

(f) The amount remaining to be paid on any equipment or service contracts required by or leased from the manufacturer or a subsidiary or company affiliated with the manufacturer.

(g) If the dealer leases the dealership facilities, then the manufacturer, distributor, or branch or division thereof shall be liable for 2 year's payment of the gross rent or the remainder of the term of the lease, whichever is less. If the dealership facilities are not leased, then the manufacturer, distributor, or branch or division thereof shall be liable for the equivalent of 2 years payment of gross rent. This subparagraph shall only apply when the termination, cancellation, or nonrenewed line was pursuant to RSA 357-C:7, V(c)(3) or was with good cause, other than good cause related to a conviction and imprisonment for a felony involving moral turpitude that is substantially related to the qualifications, function, or duties of a franchisee. Gross rent is the monthly rent plus the monthly cost of insurance and taxes. Such reasonable rent shall be paid only to the extent that the dealership premises are recognized in the franchise and only if they are: (i) used solely for performance in accordance with the franchise, and (ii) not substantially in excess of those facilities recommended by the manufacturer or distributor. If the facility is used for the operations of more than one franchise, the gross rent compensation shall be adjusted based on the planning volume and facility requirements of the manufacturers, distributors, or branch or division thereof.

This paragraph shall not apply to a termination, cancellation, or nonrenewal due to a sale of the assets or stock of the motor vehicle dealership.

VII. (a)(1) In addition to the other payments set forth in this section, if a termination, cancellation, or nonrenewal is premised upon any of the occurrences set forth in subparagraph V(c), then the manufacturer shall be liable to

the dealer for an amount at least equivalent to the fair market value of the motor vehicle franchise on:

(A) The date immediately preceding the date the franchisor announces the action which results in termination, cancellation, or nonrenewal; or

(B) The day 12 months prior to the date on which the notice of termination, cancellation, or nonrenewal is issued, whichever amount is higher.

(2) Payment is due within 90 days of the effective date of the termination, cancellation, or nonrenewal.

(b) The manufacturer shall authorize the franchisee, or upon the franchisee's termination another authorized franchise dealership of the manufacturer in the area, to continue servicing and supplying parts, including service and parts pursuant to a warranty issued by the franchisor, for any goods or services marketed by the franchisee pursuant to the motor vehicle franchise for a period of not less than 5 years from the effective date of the termination, cancellation, or nonrenewal and shall continue to reimburse the franchisee for warranty parts and service in an amount and on terms no less favorable than those in effect prior to the termination, cancellation, or nonrenewal and in accordance with paragraph V.

(c) At the dealers option, the manufacturer may avoid paying fair market value of the motor vehicle franchise to the dealer under this subparagraph if the franchisor, or another motor vehicle franchisor pursuant to an agreement with the franchisor, offers the franchisee a replacement motor vehicle franchise with terms substantially similar to that offered to other same line make dealers.

VIII. Within 90 days of a termination or nonrenewal, with good cause and in good faith, the manufacturer or distributor of any franchise, or any branch or division thereof, and

notwithstanding any terms therein to the contrary, the manufacturer, distributor, or branch or division thereof shall pay to the new motor vehicle dealer the amount remaining to be paid on any leases of computer hardware or software that is used to manage and report data to the manufacturer or distributor for financial reporting requirements and the amount remaining to be paid on any manufacturer or distributor required equipment leases or service contracts, including but not limited to computer hardware and software leases.

IX. The payments required by paragraphs VI, VII, and VIII, and any other money owed the franchisee, shall be made within 90 days of the effective date of the termination. The manufacturer shall pay the franchisee an additional 5 percent per month of the amount due for any payment not made within 90 days of the effective date of the termination.

N.H. REV. STAT. § 357-C:8

357-C:8 SURVIVORSHIP.

I. Any designated family member of a deceased or incapacitated new motor vehicle dealer may succeed the dealer in the ownership or operation of the dealership under the existing franchise or distribution agreement provided the designated family member gives the manufacturer, distributor, factory branch or factory representative or importer of new motor vehicles written notice of his intention to succeed to the dealership within 120 days of the dealer's death or incapacity, and unless there exists good cause for refusal to honor such succession on the part of the manufacturer, factory branch, factory representative, distributor or importer. The manufacturer, distributor, factory branch or factory representative or importer may request, and the designated family member shall provide, upon request, personal and financial data that is reasonably necessary to determine whether the succession should be honored.

II. If a manufacturer, distributor, factory branch, or factory representative or importer believes that good cause exists for refusing to honor the succession to the ownership and operation of a dealership by a family member of a deceased or incapacitated new motor vehicle dealer under the existing franchise agreement, the manufacturer, distributor, factory branch, or factory representative or importer may, within 30 days of receipt of notice of the designated family member's intent to succeed the dealer in the ownership and operation of the dealership, serve notice upon the designated family member of its refusal to honor the succession and of its intent to discontinue the existing franchise agreement with the dealership no sooner than 90 days from the date such notice

is served. The required notice shall state the specific grounds for refusal to honor the succession. If notice of refusal and discontinuance is not timely served upon the family member, the franchise agreement shall continue in effect subject to termination only as otherwise permitted by this chapter.

III. This chapter shall not preclude a new motor vehicle dealer from designating any person as his successor by written instrument filed with the manufacturer, distributor, factory branch, factory representative or importer.

N.H. REV. STAT. § 357-C:9

357-C:9 LIMITATIONS ON ESTABLISHING OR RELOCATING DEALERSHIPS.

I. In the event that a manufacturer, distributor, or branch or division thereof seeks to enter into a franchise establishing an additional new motor vehicle dealership or relocating an existing new motor vehicle dealership within a relevant market area where the same line make is then represented, the manufacturer, distributor, or branch or division thereof shall first give written notice to the New Hampshire motor vehicle industry board and each new motor vehicle dealer of such line make in the relevant market area of the intention to establish an additional dealership or to relocate an existing dealership within that market area. Within 45 days of receiving such notice or within 45 days after the end of any appeal procedure provided by the manufacturer, distributor, or branch or division thereof, any such new motor vehicle dealership may file a protest with the New Hampshire motor vehicle industry board to the establishing or relocating of the new motor vehicle dealership. A copy shall be served on the manufacturer, distributor, or branch or division thereof within the 45-day period. When such protest is filed, the manufacturer, distributor, or branch or division thereof may not establish or relocate the proposed new motor vehicle dealership until the board has held a hearing, nor thereafter if the board determines that there is good cause for not permitting such new motor vehicle dealership. For purposes of this paragraph, the reopening in a relevant market area of a new motor vehicle dealership that has not been in operation for one year or more shall be deemed the establishment of an additional new motor vehicle dealership.

II. In determining whether good cause has been established for not entering into or relocating an additional franchise for the same line make, the board shall consider the existing circumstances, including, but not limited to:

(a) The permanency of the investment;

(b) Any effect on the retail new motor vehicle business and the consuming public in the relevant market area;

(c) Whether it is injurious or beneficial to the public welfare for an additional new motor vehicle dealership to be established;

(d) Whether the new motor vehicle dealers of the same line make in that relevant market area are providing adequate competition and convenient consumer care for the motor vehicles of the line make in the market area which shall include the adequacy of motor vehicle sales and service facilities, equipment, supply of motor vehicle parts, and qualified service personnel;

(e) Whether the establishment of an additional new motor vehicle dealership would increase competition, and therefore be in the public interest; and

(f) Growth or decline in population and new motor vehicle registration in the relevant market area.

III. At any hearing conducted by the New Hampshire motor vehicle industry board under this section, the manufacturer, distributor, or branch or division thereof seeking to establish an additional new motor vehicle dealership or relocate an existing new motor vehicle dealership shall have the burden of proof in establishing that good cause exists and that it acted in good faith.

IV. In the event that a manufacturer, distributor, or branch or division is seeking to establish a new dealership rather than relocating an existing dealership, in addition to the

definition of market area in RSA 357-C:1, XXI, in no case shall a franchisee's relevant market area be less than the area within a radius of 15 miles from any boundary of the dealership.

N.H. REV. STAT. § 357-C:10

357-C:10 FRANCHISEE'S RIGHT TO ASSOCIATE.

Any franchisee shall have the right of free association with other franchisees for any lawful purpose.

N.H. REV. STAT. § 357-C:11

357-C:11 DISCOUNTS AND OTHER INDUCEMENTS.

In connection with a sale of any motor vehicle to the state or to any political subdivision thereof, no manufacturer or distributor shall offer any discounts, refunds or other similar inducement to any dealer without making the same offer to all other dealers of the same line make within the relevant market area.

N.H. REV. STAT. § 357-C:11-a

357-C:11-a SALE OF NEW MOTOR VEHICLES MANUFACTURED TO CALIFORNIA EMISSION STANDARDS.

No person shall refuse or refrain from selling, delivering or distributing any new motor vehicle manufactured to the emissions standards required by the California air resources board.

N.H. REV. STAT. § 357-C:12

357-C:12 ENFORCEMENT; NEW HAMPSHIRE MOTOR VEHICLE INDUSTRY BOARD; FUND ESTABLISHED.

I. (a) There is established a New Hampshire motor vehicle industry board for the purpose of enforcing the provisions of this chapter. The board shall consist of the commissioner of the department of safety or designee who shall serve as the board's chairperson and 6 members appointed by the governor and council. Four members of the board shall constitute a quorum. No member of the board shall:

(1) Have an ownership interest in or be employed by a manufacturer, factory branch, distributor, or distributor branch.

(2) Have an ownership interest in or be a motor vehicle dealer or an employee of a motor vehicle dealer.

(3) Be employed by an association of motor vehicle dealers, manufacturers, or distributors.

(b) The board shall be administratively attached to the department of safety.

(c) The board shall adopt rules, pursuant to RSA 541-A, to implement the provisions of this chapter.

(d) Appointments shall be for terms of 4 years. Vacancies shall be filled by appointment by the governor and council for the unexpired term. The members shall be at-large members, and insofar as practical, should reflect fair and equitable statewide representation.

(e) Appointed members of the board may be paid a $50 per diem for each day actually engaged in the performance of

their duties and may be reimbursed their actual and necessary expenses incurred in carrying out their duties as may be authorized by the governor and council.

II. Except for civil actions filed in superior court pursuant to paragraph IX of this section, the board shall have the following exclusive powers:

(a) Any person may file a written protest with the board complaining of conduct governed by and violative of this chapter. The board shall hold a public hearing in accordance with the rules adopted by the board pursuant to RSA 541-A.

(b) The board shall issue written decisions and may issue orders to any person in violation of this chapter.

III. The parties to protests filed pursuant to RSA 357-C:7, RSA 357-C:8, and RSA 357-C:9 shall be permitted to conduct and use the same discovery procedures as are provided in civil actions in the superior court.

IV. The board shall be empowered to determine the location of hearings, appoint persons to serve at the deposition of out-of-state witnesses, administer oaths, and authorize stenographic or recorded transcripts of proceedings before it. Prior to the hearing on any protest, but no later than 45 days after the filing of the protest, the board shall require the parties to the proceeding to attend a prehearing conference where the chairperson or designee shall have the parties address the possibility of settlement. If the matter is not resolved through the conference, the matter shall be placed on the board's calendar for hearings. Conference discussions shall remain confidential and shall not be disclosed or used as an admission in any subsequent hearing.

V. Compliance with the discovery procedures authorized by paragraph III may be enforced by application to the board. Obedience to subpoenas issued to compel witnesses or

documents may be enforced by application to the superior court in the county where the hearing is to take place.

VI. Any party to any proceeding under this chapter who recklessly or knowingly fails, neglects, or refuses to comply with an order issued by the board shall be fined a civil penalty not to exceed $10,000. Each day of noncompliance shall be considered a separate violation of such order.

VII. Within 20 days after any order or decision of the board, any party to the proceeding may apply for a rehearing with respect to any matter determined in the proceeding, or covered or included in the order or decision. The application for rehearing shall set forth fully every ground upon which it is claimed that the decision or order complained of is unlawful or unreasonable. No appeal from any order or decision of the board shall be taken unless the appellant makes an application for rehearing as provided in this paragraph, and when such application for rehearing has been made, no ground not set forth in the application shall be urged, relied on, or given any consideration by a court unless the court for good cause shown allows the appellant to specify additional grounds. Any party to the proceeding may appeal the final order, including all interlocutory orders or decisions, to the superior court within 30 days after the date the board rules on the application for reconsideration of the final order or decision. All findings of the board upon all questions of fact properly before the court shall be prima facie lawful and reasonable. The order or decision appealed from shall not be set aside or vacated except for errors of law. No additional evidence shall be heard or taken by the superior court on appeals from the board.

VIII. (a) The New Hampshire motor vehicle industry board fund is established as a special fund in the state treasury. The fund shall be revolving, continually appropriated and nonlapsing. Except as otherwise provided in this chapter, all fees and civil penalties collected as provided in this chapter

shall be paid into the state treasury immediately upon collection and credited to the motor vehicle industry board fund.

(b) To fund the New Hampshire motor vehicle industry board fund and to pay the start-up expenses of administration and enforcement of this chapter, the board shall impose an initial start-up fee upon each new motor vehicle dealer of $100 for each vehicle make represented by that dealer, and an initial start-up fee of $1,000 for each manufacturer which sells or distributes new motor vehicles within the state. However, in no case shall the initial start-up fee imposed upon any new motor vehicle dealer exceed $500 per year. Upon the filing of a protest under this chapter, the protesting party shall pay into the fund a fee of $1,500.

(c) The commissioner of safety may draw upon the fund, established in subparagraph (a), to pay the expenses of administration and enforcement of this chapter.

(d) The board shall establish all fees, in addition to the initial start-up fees, required under this chapter in accordance with RSA 357-C:12, I(c).

(e) The commissioner of safety shall have the authority to impose an additional operational fee upon any motor vehicle dealer or manufacturer which sells or distributes new motor vehicles within the state in addition to the initial start-up fee imposed pursuant to this section, if the commissioner determines that the imposition of such fee is necessary to fund the ongoing operations of the board. However, in no case shall the additional operational fee imposed exceed $500 per year for any motor vehicle dealer and $1000 per year for any manufacturer.

IX. Notwithstanding the terms, provisions, or conditions of any agreement or franchise or the terms or provisions of any waiver, any person whose business or property is injured by a violation of this chapter, or any person so injured because

such person refuses to accede to a proposal for an arrangement which, if consummated, would be in violation of this chapter, may bring a civil action in the superior court to recover the actual damages sustained by such person together with the costs of the suit, including a reasonable attorney's fee.

X. In cases where the board finds that a violation of this chapter has occurred or there has been a failure to show good cause under RSA 357-C:7 or RSA 357-C:9, the superior court, upon petition, shall determine reasonable attorney's fees and costs and award them to the prevailing party.

N.H. REV. STAT. § 357-C:12-a

357-C:12-a FRANCHISOR AND FRANCHISEE REGISTRATION.

Each franchisor and franchisee shall register annually with the New Hampshire motor vehicle industry board pursuant to rules adopted by the board in accordance with RSA 541-A.

N.H. REV. STAT. § 357-C:13

357-C:13 STATUTE OF LIMITATIONS.

Actions arising out of any provision of this chapter shall be commenced within 4 years of the date the cause of action accrues; provided, however, that if a person conceals the cause of action from the knowledge of the person entitled to bring it, the period prior to the discovery of his cause of action by the person so entitled shall be excluded in determining the time limited for commencement of the action. If a cause of action accrues during the pendency of any civil, criminal, or administrative proceeding against a person brought by the United States, or any of its agencies, under the antitrust laws, the Federal Trade Commission Act, any other federal act, or the laws of the state related to antitrust laws or to franchising, such actions may be commenced within one year after the final disposition of such civil, criminal, or administrative proceeding.

N.H. REV. STAT. § 357-C:14

357-C:14 CONSTRUCTION.

In construing the provisions of this chapter, the courts may be guided by the interpretations of the Federal Trade Commission Act, as amended.

N.H. REV. STAT. § 357-C:15

357-C:15 PENALTY.

Any violation of this chapter shall constitute a misdemeanor.

N.H. REV. STAT. § 357-C:16

357-C:16 SEVERABILITY.

If any provision of this chapter or the application thereof to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of the chapter which can be given effect without the invalid provisions or applications, and to this end the provisions of this chapter are severable.