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UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re	:	
	:	**Chapter 11**
MOTORS LIQUIDATION COMPANY, *et al.*, f/k/a General Motors Corp., *et al.*	:	**Case No. 09-50026 (REG)**
Debtors.	:	**(Jointly Administered)**

REPLY MEMORANDUM IN SUPPORT OF MOTION OF GENERAL MOTORS LLC TO ENFORCE 363 SALE ORDER AND APPROVED DEFERRED TERMINATION AGREEMENTS AGAINST ROSE CHEVROLET, INC., HALLEEN CHEVROLET, INC., ANDY CHEVROLET COMPANY, AND LESON CHEVROLET COMPANY, INC.

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TO THE HONORABLE ROBERT E. GERBER,
UNITED STATES BANKRUPTCY JUDGE:

General Motors LLC f/k/a General Motors Company (**"New GM"**) respectfully submits this reply memorandum: (i) in support of the Motion of General Motors LLC to Enforce 363 Sale Order and Approved Deferred Termination Agreements Against Rose Chevrolet, Inc., Halleen Chevrolet, Inc., Andy Chevrolet Company, and Leson Chevrolet Company, Inc. [Doc. Nos. 7269, 7272, 7273, 7274, 7277, 7278 & 7279] (the "**Motion**"); (ii) in reply to the Objection of Leson Chevrolet Company, Inc.'s Memorandum in Opposition [Doc. Nos. 7430 & 7435] to the Motion (the "**Leson Objection**"); and (iii) in reply to the Objection of Rose Chevrolet, Inc., Halleen Chevrolet, Inc. and Andy Chevrolet Company [Doc. Nos. 7442, 7443, 7445, 7446 & 7447] to the Motion (the "**Ohio Dealers' Objection**").

<u>Overview</u>

1. In the Ohio Dealers' Objection and the Leson Objection, Rose Chevrolet, Inc. ("**Rose**"), Halleen Chevrolet, Inc. ("**Halleen**"), Andy Chevrolet Company d/b/a Sims Chevrolet, Inc. ("**Sims**" and, collectively with Rose and Halleen, the "**Ohio Dealers**"), and Leson Chevrolet Company, Inc. ("**Leson**" and, collectively with the Ohio Dealers, the "**Dealers**"), rehash the same arguments that § 747 of the Consolidated Appropriations Act 2010, Pub. Law 111-117, 123 Stat. 3034 (2009) (the "**Dealer Arbitration Act**," attached as Exhibit C to the Motion) divested this Court of its subject matter jurisdiction to interpret, apply and enforce its own prior orders. These tired arguments have been considered and rejected by this Court, the United States District Court for the Northern District of Ohio (the "**Ohio District Court**"), and the United States District Court for the Northern District of Iowa (the "**Iowa District Court**"). The Dealers' respective actions, which seek to void their obligations under their respective Deferred

Termination Agreements (the "**Wind-Down Agreements**"), should have been brought, if at all, in this Court.[1]

2. The Dealers seek to conflate the issue of the appropriate forum for their actions with what they perceive to be the merits of their underlying claims. They are separate issues. As set forth in *Rally*, previously decided by this Court on October 4, 2010, the starting point for the jurisdictional analysis is not the Dealer Arbitration Act but the Wind-Down Agreements that the Dealers executed and that the Court approved in its 363 Sale Order, finding them to constitute "valid and binding contracts, enforceable in accordance with their terms." *See* 363 Sale Order, ¶ 31.

3. Based upon the provisions in the Wind-Down Agreements and the 363 Sale Order, this Court already determined in *Rally* that it has exclusive jurisdiction over any efforts to avoid the Wind-Down Agreements through either challenges to or attempts to enforce arbitration decisions made under the Dealer Arbitration Act:

> I assume without deciding that Congress could, if it wished, to have taken my exclusive jurisdiction away just as Congress can take away jurisdiction from the lower federal courts on other matters. But Congress didn't do that. If we temporarily put aside issues as to the right to judicial review and decisions as to the merits, I assume, without deciding, that a California district court could under its diversity jurisdiction have subject matter jurisdiction over a controversy like this one. But if it did, it would be foreclosed from exercising its subject matter jurisdiction by reason of the final exclusive jurisdiction order that I entered back in July of 2009.

October 4, 2010 Hearing Transcript (the "**Rally Transcript**") at 56:4-15, attached as Exhibit D to the Motion.

[1] All capitalized terms not defined in this Reply shall have the meaning given to them in the Motion.

4. As this Court noted in *Rally*, there are strong policy reasons for vesting exclusive jurisdiction of post-sale disputes over a sale order in the bankruptcy court that approved the sale, because it is important that the purchasers of assets get what they bargained for and it is also important that they have confidence in their ability to do so before committing their funds to a proposed sale. *Id.* at 49:2-13; *see also In re Eveleth Mines, LLC*, 312 B.R. 634, 645 n.14 (Bankr. D. Minn. 2004), *rev'd on other grounds*, 318 B.R. 682 (B.A.P. 8th Cir. 2004).

5. While the Ohio Dealers implicitly ask the Court to reverse itself without offering any new reasons to do so, Leson claims that the Court's *Rally* decision does not apply to it. According to Leson, "this Court's 363 Sale Order and Old GM's 'Wind-Down' Agreements do not govern Leson's relationship with New GM," and Leson is therefore now free to "challenge[] the 'wind-down' agreement's applicability under Louisiana law." Leson Objection, ¶¶ 2, 5. Leson's position, however, is at odds with the Court's *Rally* decision. This Court concluded that its exclusive jurisdiction extends to actions to enforce arbitration awards made under the Dealer Arbitration Act. Motion, Ex. D, Rally Transcript at 47:4-20, 53:1-53:11. The Court found that a successful arbitration provides "a defense to enforcement of the wind-down agreements with respect to any areas where the arbitrator ruled in the dealer's favor," but it does not otherwise void the 363 Sale Order or the Wind-Down Agreements in their entirety. *Id.* at 51:1-3. Such claimed "defenses"—and the resolution of them—belong in this Court precisely because their outcome determines *whether or not* the dealer has to comply with the Wind-Down Agreements and the 363 Sale Order. Indeed, Leson's argument is premised on its view that its Wind-Down Agreement is not valid. Thus, Leson's open attack on the enforceability of the Wind-Down Agreement clearly belongs in this Court. Leson cannot seek to "invalidate" the Wind-Down Agreement and the Court's 363 Sale Order in another forum.

6. Recently, the Iowa District Court concluded independently that this Court has core subject matter jurisdiction over an action brought by another dealer allegedly seeking to enforce an arbitration award. *Thys Chevrolet, Inc. v. General Motors LLC*, No. 10-CV-46-LRR, Doc. No. 36, Order (the "***Thys* Order**"), at p. 17 ("Because Plaintiffs' claims appear contrary to the Wind-Down Agreement and the Bankruptcy Court's Sale Order approving such agreements, they certainly fall within the Bankruptcy Court's reservation of jurisdiction to enforce and implement its Sale Order."). A true and correct copy of the *Thys* Order is attached as Exhibit A.

7. While the Dealers claim that the Dealer Arbitration Act altered this Court's exclusive jurisdiction, they fail to point to any language in the Dealer Arbitration Act that supports their position. Instead, they rely on reasons that purportedly motivated Congress to pass the Dealer Arbitration Act. But the Dealers cannot rewrite the law to include provisions not there by making claims about what motivated a specific Congressperson to support it. The statute is straightforward on this point, and its plain language governs here. So, too, does the Court's 363 Sale Order and the Wind-Down Agreements, absent applicability of the limited defenses to certain provisions of the Wind-Down Agreements that Congress provided to dealers that were successful in their arbitrations, assuming they otherwise qualify to assert such defenses. Thus, the only appropriate forum for the Dealers' Actions is this Court. The Court should accordingly enjoin the Dealers from pursuing the claims asserted in the Actions and order the Dealers to dismiss the Actions.

8. In any court, the claims asserted by the Dealers in the Actions are without merit in any event. As in *Rally*, the Ohio Dealers, who were *unsuccessful* in their arbitrations, have no right to judicial review of their arbitration decisions. The Dealer Arbitration Act does not create judicial review for arbitration awards. Nor does the Federal Arbitration Act (the "**FAA**")

provide an avenue for relief, as New GM did not agree to arbitrate. Indeed, in denying the Ohio Dealers' request for an injunction enjoining New GM from even seeking relief from this Court, the Ohio District Court recently ruled that it, too, had "grave doubts as to its jurisdiction to hear" the Ohio Actions because the FAA does not apply and the Dealer Arbitration Act does not otherwise create a right of judicial review:

> The FAA encompasses agreements among parties to arbitrate. This arbitration was not a result of an agreement among parties, rather it was compelled by Congress. Therefore the FAA is likely not a jurisdictional basis for this court to confer subject matter jurisdiction. Similarly, the DAA [Dealer Arbitration Act] is likely not a basis either, as it fails to authorize or suggest a right to judicial review, but instead appears to indicate a desire by Congress to avoid the courts, while providing a limited remedy to covered dealerships. Petitioners alternatively claim an implied right to judicial review based on New GM's consent to arbitrate. This argument too is not well taken, as New GM provided in its Answering Statement it was not waiving any objections to the proceedings or the AAA's commercial arbitration rules.

Halleen Chevrolet, Inc. v. General Motors LLC, No. 1:10-cv-1:10-cv-02097, Doc. No. 17, Order (the "**Ohio Order**"), at p. 8. A true and correct copy of the Ohio Order is attached as Exhibit B.[2]

9. While Leson prevailed in its arbitration, New GM provided, and Leson accepted, executed and returned to New GM, the letter of intent (the "**LOI**"). Motion, Ex. P, LOI. Thus, New GM complied with its obligations under the Dealer Arbitration Act. *See* Motion, Ex. C, § 747(e). However, by Leson's own admission, Leson has not satisfied the terms of the LOI, even though New GM has granted multiple extensions of time for it to do so. Unless Leson complies with the LOI by October 31, 2010, it will expire by its terms, and Leson will be governed by the Wind-Down Agreement. Try as it may, Leson cannot escape the Wind-Down

[2] The Ohio Order was entered in all three Ohio Actions, which were all assigned to Chief Judge Solomon Oliver, Jr.

Agreement and the Court's 363 Sale Order by asking New GM to provide more than the Dealer Arbitration Act requires or by refusing to do what Leson already agreed to do.

Argument

A. The Dealers' Jurisdictional Arguments Are Not Well Taken.

1. The Dealers Cannot Dispute That The Court Retained Exclusive Jurisdiction To Enforce The Wind-Down Agreements And The 363 Sale Order.

10. As set forth in prior filings, New GM purchased substantially all of the assets of General Motors Corporation n/k/a Motors Liquidation Company and certain affiliates ("**Old GM**") "free and clear" of Old GM's liabilities, claims, and encumbrances, except as expressly assumed under the terms of the 363 Sale Order and the Amended and Restated Master Sale and Purchase Agreement, dated as of June 26, 2009 (the "**MSPA**"). *See* 363 Sale Order, ¶¶ AA, BB. The Court found that the purchaser would not have entered into the MSPA without the free and clear provisions. *Id.*, ¶ DD; *see also id.*, pp. 22-24; *In re Gen. Motors Corp.*, 407 B.R. 463, 500 (Bankr. S.D.N.Y. 2009) (Gerber, J.), *aff'd*, 428 B.R. 43 (S.D.N.Y. 2010) (Buchwald, J.), *and aff'd*, 403 B.R. 65 (S.D.N.Y 2010) (Sweet, J.).

11. To help ensure that the purchaser of assets in bankruptcy receives what it bargained for free and clear of other liabilities or claims, this Court retained exclusive jurisdiction to enforce and implement the 363 Sale Order, the MSPA, and the Dealers' Wind-Down Agreements, which the Dealers signed. 363 Sale Order, ¶ 71. Similarly, the MSPA provides for exclusive jurisdiction in this Court, as does the Wind-Down Agreement approved by the Court. *See* MSPA, § 9.1; Wind-Down Agreement, § 13. Thus, to the extent that a dealer challenges the Wind-Down Agreement, or asserts any claim, defense, or allegation that it is not

required to comply with its obligations under the Wind-Down Agreement, it must assert that claim here and not elsewhere.[3]

12. To ensure compliance with the 363 Sale Order, the Court also enjoined other parties from pursuing claims against New GM seeking to impose successor or transferee obligations on New GM beyond the "free and clear" protections of the Court's orders. *See* 363 Sale Order, ¶ 47 (enjoins any such action that does "not comply, or is inconsistent with, the provisions of this Order or other orders of this Court, or the agreements or actions contemplated or taken in respect thereof . . .."). Section 5(d) of the Wind-Down Agreement likewise contains a covenant not to sue New GM on the claims covered by the terms of the agreement. *See* Wind-Down Agreement, § 5(d). Thus, the Court sought to ensure that the protections that it found important in its 363 Sale Order would be interpreted, applied, and enforced in a consistent manner and that all such claims would be enforced exclusively in this Court. The Dealers cannot seriously dispute that.

2. Numerous Courts, Including The Supreme Court, Have Already Rejected The Dealers' Argument Regarding Subject Matter Jurisdiction.

13. The Dealers continue to dispute this Court's subject matter jurisdiction to enforce its own orders, but that issue has been authoritatively resolved. Just last year, the Supreme Court confirmed that a bankruptcy court "plainly ha[s] jurisdiction to interpret and enforce its own prior orders." *Travelers Indem. Co. v. Bailey*, 129 S. Ct. 2195, 2205 (2009), *on remand to*, 600 F.3d 135 (2d Cir. 2010). There, the Supreme Court held that Travelers, not the debtor, was

[3] When another court has reserved exclusive jurisdiction over a matter, other courts lack subject matter jurisdiction. *See Maselli v. Portfolio Techs., Inc.*, 2007 U.S. Dist. LEXIS 17226, at *8-14 (D.N.J. Mar. 12, 2007) (dismissing action when it was in the exclusively retained jurisdiction of the bankruptcy court); *Haro v. Household Int'l*, 2004 U.S. Dist. LEXIS 25860, at *2-3 (D. Md. Dec. 21, 2004) (dismissing for lack of subject matter jurisdiction when other federal court had retained exclusive jurisdiction in a final order); *Magnolia v. Conn. Gen. Life Ins. Co.*, 157 F. Supp. 2d 583, 586-87 (D. Md. 2001) (same). While it is true that the retention of jurisdiction cannot create jurisdiction where none exists, courts can reserve "exclusive jurisdiction" where they have every right to do so. *See Maselli*, 2007 U.S. Dist. LEXIS 17226, at *8.

entitled to enforce *twenty-three-year-old* bankruptcy court orders entered in Johns-Manville's bankruptcy. *See id.* at 2200. As to whether the bankruptcy court had subject matter jurisdiction, the Supreme Court explained that the "answer here is easy":

> Given the Clarifying Order's correct reading of the 1986 Orders, the only question left is whether the Bankruptcy Court had subject-matter jurisdiction to enter the Clarifying Order. ***The answer here is easy***: as the Second Circuit recognized, and respondents do not dispute, the Bankruptcy Court plainly had jurisdiction to interpret and enforce its own prior orders. *See Local Loan Co. v. Hunt*, 292 U.S. 234, 239, 54 S. Ct. 695, 78 L. Ed. 1230 (1934). What is more, when the Bankruptcy Court issued the 1986 Orders it explicitly retained jurisdiction to enforce its injunctions.

Id. at 2205 (emphasis added); *see also In re Millenium Seacarriers, Inc.*, 458 F.3d 92, 95 (2d Cir. 2006) (holding actions seeking to enforce a bankruptcy sale order are core proceedings), *on remand to*, 354 B.R. 674 (Bankr. S.D.N.Y. 2006) (Peck, J.); *In re Petrie Retail, Inc.*, 304 F.3d 223, 229-30 (2d Cir. 2002) (same).

14. Included within that jurisdiction is the power to enjoin parties from prosecuting proceedings in other courts in violation of bankruptcy court orders. *Travelers*, 129 S. Ct. at 2205 (holding bankruptcy court had power to enjoin 27 lawsuits that violated a prior order); *see also Evans v. Dearborn Machinery Movers Co.*, 200 F.2d 125, 128 (6th Cir. 1952) (A bankruptcy court "may enjoin the prosecution of an action in state court where facts are averred and established showing that such relief is necessary to effectuate its orders."). The Bankruptcy Court may also enforce its orders by enjoining litigants from proceeding with other federal actions. *See Celotex Corp. v. Edwards*, 514 U.S. 300, 313 (1995) (holding that district court improperly allowed plaintiffs to proceed with action in violation of bankruptcy court injunction), *on remand to sub nom. Edwards v. Armstrong World Indus., Inc.*, 56 F.3d 24 (5th Cir. 1995); *Megliola v. Maxwell*, 293 B.R. 443, 448-49 (N.D. Ill. 2003) (affirming bankruptcy injunction of

district court class action); *accord United States v. Int'l Bhd. of Teamsters,* 907 F.2d 277, 279-81 (2d Cir. 1990) (affirming injunction of actions pending in other federal district courts).

15. Just this summer, the United States District Court for the Southern District of New York (the "**New York District Court**") adjudicated the very same issues argued here. In the *Chrysler* bankruptcy proceedings, Judge Gonzales enjoined *dealers* from proceeding with other lawsuits against the *purchaser* of assets in Chrysler's bankruptcy, including lawsuits pending in other *federal* courts (like the Ohio Actions) and proceedings pending in state motor vehicle agencies (where Leson commenced its challenge to the Wind-Down Agreement). *See In re Old Carco LLC*, Case No. 09-50002, Doc. No. 5372, at pp. 3-4 (Bankr. S.D.N.Y. Aug. 31, 2010) (the enjoined Wisconsin actions were pending in federal court and the enjoined Crain and Spitzer actions were pending in Arkansas and Ohio motor vehicle agencies). This Court has previously recognized that many issues presented by the Old GM and Chrysler bankruptcies share common elements. *See In re Gen. Motors Corp.*, 407 B.R. at 487.

16. On appeal of Judge Gonzales' decision, the New York District Court affirmed, finding that Judge Gonzales had jurisdiction to enter his order enforcing the bankruptcy court's sale and rejection orders against dealers in circumstances similar to those present here. Finding that the dealers' jurisdictional arguments were, once again, "easily dismissed," the Court found:

> The Supreme Court has long-recognized the power of courts to interpret and enforce their own prior orders. *See Travelers Indem. Co. v. Bailey*, 129 S. Ct. 2195, 2205 (2009) (*citing Local Loan Co. v. Hunt*, 292 U.S. 234, 239 (1934)). Here, as in *Travelers Indemnity*, the Bankruptcy Court explicitly retained jurisdiction to enforce both the Sale and Rejection Orders . . . . Moreover, it is difficult for this Court to imagine how the Bankruptcy Court's interpretation of its own prior orders, both of which were integral to, and issued in due course of, a chapter 11 proceeding, could be interpreted ex post facto as anything other than related to the Bankruptcy itself.

In re Old Carco LLC, Case No. 1:09-cv-08875, Doc. No. 35, at 16-17 (S.D.N.Y. July 2, 2010). Thus, this Court has jurisdiction to enforce the 363 Sale Order and the Wind-Down Agreements that it approved.

3. Contrary To The Ohio Dealers' Argument, The Court Has Core Jurisdiction And Would, In Any Event, Have "Related To" Jurisdiction.

17. The Ohio Dealers erroneously argue that the Court lacks core jurisdiction over this dispute, relying on case law that has little or no relevance to the question before the Court. *See* Ohio Dealers' Objection, ¶¶ 58-66. The Ohio Dealers do not address the ample and controlling case law that holds a bankruptcy court has core subject matter jurisdiction under 28 U.S.C. §§ 157 and 1334 to interpret and enforce its own 363 Sale Order. *See, e.g., In re Millenium Seacarriers*, 458 F.3d at 95 (holding actions seeking to enforce a bankruptcy sale order are core proceedings); *In re Petrie Retail*, 304 F.3d at 229-30 (same). Applying that settled law, this Court already held that a similar matter—the *Rally* matter—was "a core proceeding." Motion, Ex. D., Rally Transcript at 46:2-47:3.

18. Matters regarding the 363 Sale Order are core proceedings pursuant to 28 U.S.C. § 157(b)(2)(N) ("Core proceedings include . . . orders approving the sale of property."). "And, the enforcement of orders resulting from core proceedings are themselves considered core proceedings." *In re Williams*, 256 B.R. 885, 892 (B.A.P. 8th Cir. 2001); *see also In re Wolverine Radio Co.*, 930 F.2d 1132, 1145 (6th Cir. 1991) (holding motion to enforce free and clear provisions under 363 was a core proceeding), *cert. dismissed*, 503 U.S. 978 (1992); *In re Skinner*, 917 F.2d 444, 448 (10th Cir. 1990) ("Civil contempt proceedings arising out of core matters are themselves core matters."); *In re Franklin*, 802 F.2d 324, 326 (9th Cir. 1986) ("Requests for bankruptcy courts to construe their own orders must be considered to arise under

title 11 if the policies underlying the Code are to be effectively implemented."); *In re Eveleth Mines*, *LLC*, 312 B.R. at 645 n.14.

19. Even when the dispute between non-debtors is over the legitimacy of an arbitration award, a bankruptcy court has core jurisdiction where the dispute "require[s] the court to interpret and give effect to its previous sale orders." *In re Allegheny Health, Educ. & Research Found.*, 383 F.3d 169, 175-76 (3d Cir. 2004). There, Tenet assumed in connection with a 363 sale certain of the debtor's liabilities under a collective bargaining agreement. *Id.* at 172. After the 363 sale closed, the union and Tenet disputed whether Tenet had assumed the accrued sick leave obligations in the 363 sale. *Id.* at 172-73. The parties submitted their dispute to arbitration and, after losing, Tenet sought review from the bankruptcy court. *Id.* Because the matter required the bankruptcy court to interpret its 363 sale order, the Third Circuit concluded that the bankruptcy court had *core* subject matter jurisdiction and appropriately determined that Tenet had not assumed the accrued sick leave obligations. *Id.* at 175-76. As other courts have found, a "bankruptcy sale order under 11 U.S.C. § 363, free and clear of all liens, is a judgment that is good as against the world, not merely as against [the] parties to the proceedings." *In re Farmland Indus., Inc.*, 567 F.3d 1010, 1015 n.2 (8th Cir. 2009) (quotation omitted), *on remand to*, 408 B.R. 497 (B.A.P. 8th Cir. 2009).

20. Moreover, even if the Court's reservation of jurisdiction were not supported by ample precedent, which it clearly is, the fact remains that it is a final order entered by a court of competent jurisdiction entitled to *res judicata* effect. *See, e.g.*, *Winget v. JP Morgan Chase Bank, N.A.*, 537 F.3d 565, 579 (6th Cir. 2008) ("[A] sale order is a final order for res judicata purposes."), *cert. denied*, 129 S. Ct. 2159 (2009); *Regions Bank v. J.R. Oil, Co.*, 387 F.3d 721, 731-32 (8th Cir. 2004) (same); *In re Met-L-Wood Corp.*, 861 F.2d 1012, 1016 (7th Cir. 1988)

(same), *cert. denied*, 490 U.S. 1006 (1989). The Dealers consented to the entry of the 363 Sale Order and this Court's jurisdiction by signing and delivering their respective Wind-Down Agreements. *See* Motion, Exs. E, F, G & N, §§ 1, 13. There is no basis to support a challenge to the 363 Sale Order at this late date.[4]

4. This Court Already Correctly Rejected The Dealers' Claim That The Dealer Arbitration Altered This Court's Exclusive Jurisdiction.

21. The Ohio Dealers and Leson claim that the Dealer Arbitration Act altered this Court's jurisdiction, but this Court already properly rejected that argument in *Rally*. *See* Motion, Ex. D, Rally Transcript at 56:4-8. So, too, did the Iowa District Court in *Thys*. As the Iowa District Court concluded, "the plain language of the statute makes clear it was not intended to 'reverse' or 'overrule' any wind-down agreements or any of the Bankruptcy Court's orders." Ex. A, *Thys* Order, at p. 16 n.5.; *see also* Motion, Ex. D., Rally Transcript at 56:4-8. Not only are the Dealers' positions at odds with multiple prior holdings, they are also at odds with the plain language of the statute.

22. The starting point in statutory interpretation is the text of the statute. *See BedRoc Ltd., LLC v. United States*, 541 U.S. 176, 183 (2004) (plurality opinion), *on remand to*, 368 F.3d 1149 (9th Cir. 2004); *United States v. LaBonte,* 520 U.S. 751, 757 (1997), *modification denied*,

[4] The Ohio Dealers also argue that the Court lacks the broader "related to" jurisdiction granted to the Court under 28 U.S.C. § 1334. *See* Ohio Dealers' Objection, ¶¶ 67-71. That is both irrelevant and erroneous. Core jurisdiction exists and, even if that were not the case, the dispute easily satisfies the much broader "related to" test. *See Wolverine Radio*, 930 F.2d at 1142; *see also In re Old Carco LLC*, Case No. 1:09-cv-08875, Doc. No. 35, at 17 (S.D.N.Y. July 2, 2010). As the New York District Court found in the Chrysler proceedings, "it is difficult for this Court to imagine how the Bankruptcy Court's interpretation of its own prior orders . . . could be interpreted ex post facto as anything other than related to the Bankruptcy itself." *Id.* Citing cases from other Circuits, the Ohio Dealers also argue that the entry of the 363 Sale Order somehow "narrowed" this Court's "related to" jurisdiction. *See* Ohio Dealers' Objection, ¶¶ 75-79. That, too, is wrong. The "narrowing" cases that the Ohio Dealers cite refer to disputes arising after a bankruptcy plan was confirmed, and no plan has been confirmed here. Moreover, the Second Circuit determines a bankruptcy court's post-confirmation jurisdiction by looking at the terms of the plan: "The bankruptcy court's post-confirmation jurisdiction therefore is defined by reference to the Plan." *In re Johns-Manville Corp.*, 7 F.3d 32, 34 (2d Cir. 1993). Thus, even under the rule advocated by the Ohio Dealers, the Court's retention of jurisdiction would preserve this Court's jurisdiction over the dispute.

521 U.S. 1116; *United States v. Gonzales*, 520 U.S. 1, 4 (1994) ("Our analysis begins, as always, with the statutory text."), *on remand to*, 122 F.3d 1328 (10th Cir. 1997). The Court should "assume that in drafting this legislation, Congress said what it meant." *See LaBonte*, 520 U.S. at 757-58; *see also BedRoc*, 541 U.S. at 183. Thus, the "inquiry begins with the statutory text, and ends there as well if the text is unambiguous." *BedRoc*, 541 U.S. at 183.

23. Where the plain language is unambiguous, it does not matter what the Dealers may have wanted the law to say or why others supported the bill; rather, all that matters is what the law, in fact, says. Here, the statute is straightforward on this front, and the plain language governs.

5. The Fact That Leson Prevailed Does Not Change The Jurisdictional Analysis.

24. Leson pins its hopes to avoid the terms of the Wind-Down Agreement and the 363 Sale Order to its arbitration victory, claiming that "this Court's 363 Sale Order and Old GM's 'Wind-Down' Agreements do not govern Leson's relationship with New GM." Leson Objection, ¶ 2; *see also id.*, ¶ 26. In essence, Leson claims that the Dealer Arbitration Act allows it to pretend that New GM is Old GM and that Old GM never filed for bankruptcy. Nothing in the Dealer Arbitration Act supports this theory and this Court has already rejected it.

25. In explaining why it has core jurisdiction over a challenge to an arbitration award, this Court pointed to language in the 363 Sale Order and Wind-Down Agreements that would also cover proceedings to *enforce an arbitration award*:

> Now there can be no dispute what the sale order actually said. Nor can there be any dispute as to the wind-down agreement said. Section 13 of the wind-down agreement had that continuing jurisdiction clause providing that the dealer hereby consented to and agreed that the bankruptcy court would retain full complete and exclusive jurisdiction to interpret, enforce and adjudicate

> disputes concerning the terms of this agreement and any other matter related thereto.
>
> Here and to the extent Rally was successful in the arbitration, of course that would be a defense to win any effort to make it terminate its agreement. And to the extent that it wishes to either enforce the agreement as it has the right to do with the three franchises for which it prevailed or to defeat the agreement with respect to the one agreement where it lost, in any event they concern the terms of the agreement and, in particular, any other matter related thereto. I don't think that's subject to serious dispute.

Motion, Ex. D, Rally Transcript at 47:4-20; *see also id.* at 53:1-11 ("And I think that if New GM had failed to honor the arbitrator's award, as I indicated a moment ago, I'd almost certainly enforce it.").

26. Notably, the Iowa District Court reached the same conclusion. Contrary to Leson's claim that its case is somehow unique as to the jurisdictional issues, *see* Objection, ¶ 5 n.1; *id.*, ¶ 49, the Iowa District Court just rejected the same or similar arguments that Leson is raising here. In *Thys*, the plaintiffs claimed the covered dealer "won" its arbitration and "that New GM has ignored the Arbitral Order by refusing to continue Family Auto's Buick franchise and taking the position that the 'wind-down process remains in effect with respect to the Buick franchise.'" Ex. A, *Thys* Order, at p. 11. The Iowa District Court, however, transferred the action to this Court, finding that this Court had both "core" and "related to" jurisdiction. In so ruling, the Court quoted the *Travelers* case, which explained that "'the Bankruptcy Court plainly ha[s] jurisdiction to interpret and enforce its own prior orders.'" *Id.*, at p. 16 (*quoting Travelers*, 129 S. Ct. at 2205).

27. As Chief Judge Reade found, the plaintiffs' claims "certainly fall within the Bankruptcy Court's reservation of jurisdiction to enforce and implement its Sale Order and, more specifically, resolve disputes 'with respect to or concerning' the wind-down agreements. In other words, Plaintiffs' claims turn, at least in part, on the interpretation and enforcement of the

Bankruptcy Court's orders." *Id.*, at p. 17. The Iowa District Court explained that the plaintiffs' § 747 claims did not change the result. The Court found that such claims were "inextricably intertwined with the bankruptcy for a variety of reasons." *Id.* at p. 18. Elsewhere, the Court explained that "[i]t stands to reason that the court responsible for these orders is better positioned to interpret and enforce them. Presumably, that is why the Bankruptcy Court retained exclusive jurisdiction to do so." *Id.* at p. 20 (analyzing transfer).

28. Leson cannot seek to undo the terms of the Wind-Down Agreement or the 363 Sale Order in other forums. Louisiana law cannot, as Leson suggests, be used to "challenge[] the 'wind-down' agreement's applicability" (¶ 5) or "invalidate" the Wind-Down Agreement (¶ 7). This Court previously held that state laws, like the ones Leson (and the Ohio Dealers) reference, that "impair the ability to reject, or to assume and assign" contracts must be "trumped by federal bankruptcy law." *In re Gen. Motors Corp.*, 407 B.R. at 515; *see also* Ex. A, *Thys* Order, at p. 21 n.8 (noting same). The mere fact that Leson argues it should be entitled to "invalidate" the Wind-Down Agreement speaks volumes as to where this dispute belongs. Under this Court's orders, such claims must be brought here.[5]

6. The Ohio Dealers' Estoppel Argument Has Also Been Adjudicated.

29. The Ohio Dealers claim, as in *Rally*, that New GM should be judicially estopped from contesting the district court's federal question jurisdiction in the Ohio Actions because it alleged that such jurisdiction (and diversity jurisdiction) existed in another case arising out of a Dealer Arbitration Act proceeding. *See* Objection, ¶¶ 105-107 (*citing General Motors LLC v. Santa Monica Group, Inc.*, United States District Court for the Central District of California, No.

[5] Leson's action was originally filed in the Louisiana Motor Vehicle Commission, and then New GM removed it to the United States District Court for the Eastern District of Louisiana. As noted in Leson's objection, the federal court *sua sponte* remanded the case on the basis that administrative actions are not removable. Although the court initially stayed that remand order, the court has indicated that it will remand the matter.

CV 10-4787). Again, this Court already properly rejected the Dealers' judicial estoppel argument in *Rally*, as did the Iowa District Court in *Thys.*

30. As the record makes clear, New GM in the *Santa Monica* case was only attempting to enforce a separate written settlement agreement (separate and distinct from the Wind-Down Agreement) and was not asking the district court to enforce or interpret the 363 Sale Order or Wind-Down Agreement. The doctrine of judicial estoppel precludes a party only from taking inconsistent *factual* positions. This Court found that New GM did not take any inconsistent factual positions; indeed, the facts in the two cases are entirely different. Motion, Ex. D, Rally Transcript at 58:18-59:11. Nor was New GM asking the district court to conduct a legal or factual review of any arbitration award, as the Ohio Dealers seek in the Ohio Actions. *Id*. at 57:2-58:17. As the Iowa District Court found, "New GM's position in this case is not clearly inconsistent with its position in the California Action, which did not involve potential breaches of a wind-down agreement or the Bankruptcy Court's orders. Simply put, the cases are not comparable." Ex. A, *Thys* Order, at p. 24-25.

31. Given the obvious factual dissimilarities, the Ohio Dealers could not possibly meet any of the elements necessary for a finding of judicial estoppel, let alone all of them. For judicial estoppel to apply, the positions must be "clearly inconsistent," create a risk of inconsistent court determinations, and give unfair advantage or impose unfair detriment on the litigants. *New Hampshire v. Maine*, 532 U.S. 742, 750-51 (2001), *reh'g denied*, 533 U.S. 968. None of those apply here. The present cases involve different relief, there is no risk of "inconsistent court determinations," and GM's successful enforcement of the *Santa Monica*

settlement agreement obviously gave it no "unfair advantage" over the Ohio Dealers or imposed any "unfair detriment" on them. *Id.* at 750-51.[6]

B. Even If Rose, Halleen And Sims Had Filed In This Court, Their Claims Are Barred On The Merits.

1. The FAA Does Not Apply.

32. Independent of the "exclusive jurisdiction" provisions, there can be no doubt that the Ohio Dealers' requests to vacate a Dealer Arbitration Act award are not permitted by law. The FAA, by its terms, has no application to this matter, as this Court previously found. *See* Motion, Ex. D, Rally Transcript at 50:14-18. The FAA governs only contractual arbitrations and New GM did not agree to arbitrate. *See* 9 U.S.C. § 2. Nor does the Dealer Arbitration Act contain any other right to judicial review of a § 747 award.

33. In fact, in denying the Ohio Dealers' motion seeking to enjoin New GM from pursuing any relief in this Court, the Ohio District Court recently rejected the Ohio Dealers' arguments that the FAA or Dealer Arbitration Act give the Ohio Dealers the right to appeal their arbitration awards:

> The FAA encompasses agreements among parties to arbitrate. This arbitration was not a result of an agreement among parties, rather it was compelled by Congress. Therefore the FAA is likely not a jurisdictional basis for this court to confer subject matter jurisdiction. Similarly, the DAA [Dealer Arbitration Act] is likely not a basis either, as it fails to authorize or suggest a right to judicial review, but instead appears to indicate a desire by Congress to avoid the courts, while providing a limited remedy to covered dealerships. Petitioners alternatively claim an implied

[6] In their Objection, the Ohio Dealers also try to argue that the Leson Action should "estop" New GM from enforcing this Court's orders. In *Leson*, however, New GM simply removed a proceeding filed by Leson before the Louisiana Motor Vehicle Commission under 28 U.S.C. § 1441. *See* Objection, ¶¶ 108-110. Leson's allegations formed the basis for removal under the well-pleaded complaint rule. After removing the action, New GM promptly filed this Motion. New GM did not seek an interpretation of the 363 Sale Order, Wind-Down Agreement or Dealer Arbitration Act from the United States District Court for the Eastern District of Louisiana in *Leson*. To the contrary, New GM has consistently taken the position this Court is the exclusive forum for the resolution of such controversies.

> right to judicial review based on New GM's consent to arbitrate. This argument too is not well taken, as New GM provided in its Answering Statement it was not waiving any objections to the proceedings or the AAA's commercial arbitration rules.

Ex. B, Ohio Order, at p. 8. The Ohio District Court did not decide the question of concurrent jurisdiction, but concluded that the Ohio Dealers "have not shown they are likely to succeed on the merits" for the relief sought. *Id.* at pp. 8-9.

34. The Ohio Dealers continue to argue that judicial review is available under the FAA, *see* Ohio Dealers' Objection, ¶¶ 97-103, but, as this Court determined in *Rally* and as the Ohio District Court found, the FAA is triggered only if there is an arbitration agreement and here, indisputably, there is not. *See* 9 U.S.C. § 2 (the FAA applies only to "[a] written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy . . ..."); Motion, Ex. D, Rally Transcript at 50:14-18.

35. As the Supreme Court has held, "[t]he FAA covers only contracts involving interstate commerce or maritime affairs." *Southland Corp. v. Keating*, 465 U.S. 1, 23 (1984); *see also Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 401 (1967); *Bernhardt v. Polygraphic Co. of Am.*, 350 U.S. 198, 201 (1956) ("§§ 1 and 2 [of the FAA] define the field in which Congress was legislating").[7] Thus, "an agreement to arbitrate . . . is required for jurisdiction under the Federal Arbitration Act." *United Food & Commercial Workers Local 951*

[7] Indeed, the Supreme Court has reiterated on countless occasions that arbitration under the FAA is a matter of agreement. *See, e.g.*, *Granite Rock Co. v. Int'l Bhd. of Teamsters*, 130 S. Ct. 2847, 2857 n.6 (2010) ("[A]rbitration is strictly a matter of consent"); *Rent-A-Center, W., Inc. v. Jackson*, 130 S. Ct. 2772, 2776 (2010) ("The FAA reflects the fundamental principle that arbitration is a matter of contract."); *Vaden v. Discover Bank*, 129 S. Ct. 1262, 1271 (2009) ("§ 2 provides that arbitration agreements in contracts 'involving commerce' are 'valid, irrevocable, and enforceable.'"); *Preston v. Ferrer*, 552 U.S. 346, 349 (2008) (The FAA "establishes a national policy favoring arbitration when the parties contract for that mode of dispute resolution."); *The Citizens Bank v. Alafabco, Inc.*, 539 U.S. 52, 53 (2003) (per curiam) (holding the FAA applies to agreements "evidencing a transaction involving commerce"), *on remand to*, 872 So. 2d 809 (Ala. 2003); *Volt Info. Scis. v. Bd. of Trustees*, 489 U.S. 468, 479 (1989) ("Arbitration under the Act is a matter of consent, not coercion, and parties are generally free to structure their arbitration agreements as they see fit."); *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 219 (1985) ("The Act, after all, does not mandate the arbitration of all claims, but merely the enforcement—upon the motion of one of the parties—of privately negotiated arbitration agreements."), *on remand to*, 760 F.2d 238 (9th Cir. 1985).

v. Mulder, 31 F.3d 365, 371 (6th Cir. 1994) (affirming dismissal of motion to confirm an arbitration award for lack of subject matter jurisdiction). And, contrary to the Ohio Dealers' claims, federal courts do not have the power to confirm arbitration awards independent of the FAA or some other statute. As the Sixth Circuit explained in *Mulder,* "not all the disputants have agreed to undergo arbitration, and we are unable to find any legal basis to require them to do so in the absence of an agreement. Hence, we conclude, as did the district court, that this action must be dismissed for lack of subject matter jurisdiction." *Id.* Even the Ohio Dealers' own *Rainwater* case confirms this straightforward proposition of law. *Rainwater v. Nat'l Home Ins. Co.*, 944 F.2d 190, 192 (4th Cir. 1991) (cited in ¶ 86) ("[A] court has jurisdiction to confirm an award only if the parties have agreed that the award is final."). Thus, the FAA simply does not apply.

36. Repeating arguments previously made, the Ohio Dealers reargue the implied consent argument again, claiming that New GM agreed to the American Arbitration Association's Commercial Arbitration Rules. *See* Ohio Dealers' Objection, ¶¶ 85-94. As this Court found in *Rally*, the premise of this argument fails given New GM's repeated *objections* to the blanket applicability of the AAA Rules. *See* Motion, Ex. D, Rally Transcript at 51:13-24; New GM's Answering Statement, p. 10, attached as Exhibit E to the Motion. The Ohio District Court likewise rejected that argument in the Ohio Actions. Ex. B, Ohio Order, at p. 8.

37. Moreover, as this Court found in *Rally*, the AAA rule that the Ohio Dealers reference, Rule 48(c), does not authorize full-scale judicial review of any rulings. *See* Ex. D, Rally Transcript at 52:8-9 (It "conveys a right to enforce the arbitration award not attack it.") Rather, the rule merely implies consent "that judgment upon the arbitration award may be entered in any federal or state court having jurisdiction thereof," *i.e.*, consent that the award can

be *enforced* if the loser balks at compliance. The Ohio Dealers are not seeking to enforce the arbitrator's awards but to *escape* enforcement.

38. Finally, *all* of the cases that the Ohio Dealers cite deal with the inapposite situation where the AAA rules were incorporated by reference into *arbitration agreements* otherwise enforceable under the FAA. *See Idea Nouva, Inc. v. GM Licensing Group, Inc.*, 617 F.3d 177, 180-81 (2d Cir. 2010) (reference to AAA in agreement) (cited in ¶¶ 85, 90-93); *EMO Energy Solutions, LLC v. Acre Consultants*, 2008 U.S. Dist. LEXIS 100677, at *3-4 (E.D. La. Nov. 25, 2008) (reference to AAA in agreement) (cited in ¶ 85); *Rainwater*, 944 F.2d at 192 (reference to AAA in agreement) (cited in ¶ 85); *Bryson, III v. Gere*, 268 F. Supp. 2d 46, 52 (D.D.C. 2003) (reference to AAA in agreement) (cited in ¶ 87). Here, again, New GM did not agree to arbitrate, so the FAA does not apply, let alone authorize judicial review.

39. Even if the FAA applied, New GM's participation in AAA proceedings would not open the door to the FAA's judicial review provisions. *See Okla. City Assocs. v. Wal-Mart Stores, Inc.*, 923 F.2d 791, 794 (10th Cir. 1991). In order to confirm an award under the FAA, a party must show more than the FAA applies. A party must also show that "the parties in their agreement have agreed that a judgment of the court shall be entered upon the award." 9 U.S.C. § 9. Cases finding a reference to the AAA sufficient to satisfy this additional requirement, like the Ohio Dealers' cases, do so when the reference to the AAA is *in the underlying arbitration agreement*. *See* Ohio Dealers' Objection, ¶¶ 85-94. When parties arbitrate before the AAA without such a reference in the underlying agreement, courts lack subject matter jurisdiction to confirm an arbitration award. *Wal-Mart*, 923 F.2d at 795. In *Wal-Mart*, the Court found that whether "Wal-Mart implicitly consented to the AAA Rules during the arbitration" was immaterial because "Section 9 requires *some* manifestation of the agreement to have judgment

entered in the contract itself." *Id.* Thus, there is no legal or factual basis for the Ohio Dealers' argument that New GM gave its "implied consent" to unauthorized judicial review.

2. There Is No Other Statutory Basis For Review.

40. The Dealer Arbitration Act also does not authorize, or even suggest, any right to judicial review. To the contrary, the Congressional proponents of the Act sought a streamlined and expeditious binding arbitration procedure culminating in swift reinstatement of dealers who obtained a favorable award. *See* Remarks of Rep. Van Hollen, Cong. Rec. H14477 (attached to the Motion as Exhibit F). Given the Act's ringing silence on the issue of judicial review and the expressed emphasis of its proponents on expedition, the burden plainly falls on the Ohio Dealers to point to something concrete which would create a right to judicial review *sub silentio*. This they have failed to do.

3. The Ohio Dealers' Constitutional Argument Is Contrary To Supreme Court Precedent.

41. In a last ditch effort to construct a right to judicial review which Congress did not enact, the Ohio Dealers suggest, in paragraphs 46 through 57 of their Objection, that the Constitution allows Congress to require binding arbitration, but it must allow for traditional judicial review of the underlying proceeding, citing *Thomas v. Union Carbide Agricultural Products Co.*, 473 U.S. 568 (1985). The same issue was already briefed and addressed in *Rally*. As set forth in those briefs, the holding in *Thomas* supports the right of Congress to create a new statutory arbitration right *without* providing for full or—as New GM argues in this case—*any* judicial review.[8]

[8] The Ohio Dealers' claim that the current bankruptcy system is unconstitutional under *Northern Pipeline* is also wrong. *See In re McLaren*, 990 F.2d 850, 853 (6th Cir. 1993) (holding Bankruptcy Code constitutional). Congress fixed the constitutional problems with the previous bankruptcy system that the Supreme Court identified in *Northern Pipeline*. *Id.* Subsequent to such reforms, the Supreme Court issued its decisions in *Travelers* and *Celotex* confirming a bankruptcy court's jurisdiction to enforce its own orders, which decisions are controlling here.

42. *Thomas* involved a "data sharing" provision of the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA"), 7 U.S.C. § 136 *et seq.*, that allowed the EPA to use data already in its files to review applications for pesticide approval provided that the applicant offered to compensate the party that originally submitted the data. In place of a prior provision permitting the EPA Administrator to determine the amount of compensation, the applicant and data submitter were required to agree on the amount or, failing agreement, submit the issue to binding arbitration. *See Thomas,* 473 U.S. at 573-74. This arbitration requirement was, like the compulsory arbitration at issue in this case, entirely a creature of statute. Like the parties in this case, the applicant and data submitter in *Thomas* had no pre-existing common law or statutory rights concerning the issues which the statute directed them to arbitrate. *See id*. at 584.

43. Thus, in contrast to the issue in *Crowell v. Benson*, 285 U.S. 22 (1932), FIFRA did not "displace[] a traditional cause of action" or "affect a pre-existing relationship based on a common-law contract" which "clearly fell within the range of matters reserved to Article III courts" under the holding of the *Northern Pipeline* case. *Thomas*, 473 U.S. at 587. *Thomas* held that under the circumstances, Congress' decision to provide only very limited judicial review of FIFRA arbitration awards did not violate the separation of powers clause of the Constitution. Here, as in *Thomas,* Congress could have dealt with the issue of compensating data submitters entirely legislatively, without involving an Article III court or an arbitrator. *Id*. at 590 ("Congress, without implicating Article III, could have authorized EPA to charge follow-on registrants fees."). In such circumstances, "when Congress selects a quasi-judicial method of resolving matters that 'could be conclusively determined by the Executive and Legislative Branches,' the danger of encroaching on the judicial powers is reduced." *Id*. at 589 (citation omitted). The same is true of dealer reinstatement under the Dealer Arbitration Act. Under

Article I of the Constitution, and setting aside any other constitutional objections, Congress could have simply ordered that dealers be reinstated; the fact that it chose instead to submit reinstatement decisions to an impartial arbitrator does not implicate any legitimate constitutional concerns.

44. This conclusion follows not only from the Supreme Court's analysis in *Thomas* but, as the Supreme Court there recognized (473 U.S. at 588), from its decision in *Switchmen's Union of North America v. National Mediation Board*, 320 U.S. 297 (1943), which upheld the constitutionality of a provision of the Railway Labor Act "that established a 'right' of a majority of any craft or class of employees to choose its bargaining representative and vested the resolution of disputes concerning representation solely in the National Mediation Board, without judicial review." 473 U.S. at 588 (review by federal court of Board determination not necessary to preserve or protect "right" created by Congress).

45. The same is true of Congress' decision not to provide for judicial review of arbitration awards granting or denying dealer reinstatement. Having created the new "right" to reinstatement, Congress chose arbitration without judicial review as the method for determining the extent of that right. By electing arbitration, the dealers were entitled to take advantage of their new right to possible reinstatement, but they were not entitled to seek enlargement of that right beyond the procedural mechanism that Congress chose to provide. As in *Thomas*, by electing to participate in the "data sharing" program, the applicants "explicitly consent[] to have [their] rights determined by arbitration." *Id.* at 592; *see also R.J. O'Brien & Assoc. v. Pipkin*, 64 F.3d 257, 261 (7th Cir. 1995).

46. Finally, even assuming the premise suggested (but not supported) by the Ohio Dealers—that the Dealer Arbitration Act's failure to authorize judicial review "could implicate

[i.e., throw into doubt] the constitutionality of this federal statute," Objection, ¶ 103 n.19—the Ohio Dealers cite no case that suggests that this Court is empowered to re-write the statute to supply such a right. To the contrary, applicable case law explicitly precludes such action. *See, e.g.*, *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 841 (1986) (the canon of construction requiring a court to interpret a statute when "fairly possible" in a manner that avoids the constitutional question "must not and will not [be carried] to the point of perverting the purpose of the statute … or judicially rewriting it"), *quoting Aptheker v. Sec'y of State*, 378 U.S. 500, 515 (1964) (citations and internal quotation marks omitted). Thus, if the lack of judicial review makes the Dealer Arbitration Act unconstitutional, as the Dealers suggest, this Court's inability to remedy the omission means the Ohio Dealers have no enforceable rights under the Dealer Arbitration Act, and its claims would fail on those grounds.

4. Rose, Halleen And Sims Have No Colorable Basis For Asking The Court To Vacate Or Modify The Arbitration Awards.

47. As New GM explained in its Motion, there are no factual allegations to support any claim of "undue means, corruption, and fraud" directed to the arbitrator at all, which would be the only arguable basis for review. *See* Motion, ¶¶ 34-35 & Ex. D, Rally Transcript at 77:17-19. The Ohio Dealers' Objection ignores that issue, as well as the fact that the fourth dealer (Dunn) at the same omnibus hearing involving Rose, Halleen, and Sims prevailed in its arbitration in front of the same arbitrator. *See* Motion, ¶¶ 34-35.

48. Abandoning many of their prior "fraud" arguments (*Id.*, ¶¶ 36-37), the Ohio Dealers now largely argue that the arbitrator's supposed "acceptance" of New GM's business plan shows that the arbitrator was biased. In particular, the Ohio Dealers cite another decision from a different arbitrator in support of their "bias" argument and claim that the arbitrator erred in declining to apply state law to the arbitration proceedings under the Dealer Arbitration Act.

See Objection, ¶¶ 5-10. New GM already addressed those issues in detail, and the Ohio Dealers simply ignore New GM's arguments. *See* Motion, ¶¶ 38-39. As New GM explained, the law on these issues fully supported the arbitrator's conclusions, all of which was fully briefed for the arbitrator by the parties. The Dealer Arbitration Act, in fact, directed the arbitrator to consider the manufacturer's "business plan," not the plan advocated by dealers. *See* Motion, Ex. C, § 747(d)(2). The Ohio Dealers are simply arguing their disagreements on disputed questions of law, but that is no basis for overturning an arbitration award. *See generally* Motion, Ex. D, Rally Transcript at 77:21-78:2. Thus, the Ohio Dealers' applications would fail under any scenario.

C. <u>Even If Leson Had Filed In This Court, Leson's Claims Fail On The Merits.</u>

49. New GM provided Leson with New GM's standard "customary and usual letter of intent," which was the same form agreement that was offered to other dealers nationwide that prevailed in arbitrations. Motion, ¶ 22 & Ex. P. Leson signed the LOI on July 1, 2010. *See id.* Among other things, the LOI provides that Leson would be reinstated to the dealer network "[u]pon compliance with the terms and conditions" in the LOI, one of which is that the reinstatement would "be accomplished by amending the existing Wind-Down Agreements in place." Motion, Ex. P at p. 1. In addition, the LOI included as an exhibit a form amendment for the Wind-Down Agreement. *Id.*, Ex. A. Unless and until Leson satisfies the terms of the LOI, the original Wind-Down Agreement remains in full force and effect.

50. Leson never disputes that it signed the LOI on July 1, 2010. Leson also never disputes that it has *failed* to comply with the LOI. Leson Objection, ¶¶ 59-60. Instead, Leson argues that the LOI does not comply with Section 747 because, Leson asserts, "it is a form letter directed only at dealers that won in arbitration" and other dealers that continued with New GM or settled arbitrations did not receive the same LOI. *See id.* at ¶ 67. As to those dealers that continued with New GM at the outset, Leson's argument makes no sense. Dealers that remained

in New GM's dealer network received Participation Agreements. There was no need for those dealers to receive LOIs, and Section 747 has no application to those dealers. As to dealers whose arbitrations were settled, those dealers were offered LOIs with the same standard terms as those in Leson's LOI. Moreover, as to each of the issues in controversy here, the LOI merely required that Leson be in compliance with the Dealer Sales and Service Agreement, which defines the requirements for the relationship sought to be reinstated.

51. Thus, Leson's argument boils down to the assertion that the requirement in the LOI that Leson have $2.85 million in net working capital is unfair. But Leson's position is undermined by two undisputed facts. First, Leson admits that it *signed* the LOI containing the net working capital standard. Second, Leson agrees that the $2.85 million in net working capital that New GM required in the LOI is the *same* working capital figure Old GM required of Leson prior to the Wind-Down Agreement under the Dealer Agreement between Old GM and Leson. *See* Leson Objection, ¶ 18. Thus, Leson simply does *not* want to be treated the same as every other GM dealer, nor does it seek reinstatement of the terms of the relationship between Leson and Old GM as of June 1, 2009; instead, it wants this Court to rewrite the LOI (and, by implication, the Dealer Agreement) to provide better terms for Leson than it had prior to the Wind-Down Agreement. That is untenable.

52. Moreover, the working capital deficiency is *not* the only barrier to Leson's reinstatement under the LOI. Leson has failed to establish the inventory financing (or "floor plan" financing) required by the LOI and the Dealer Agreement that would enable Leson to purchase and stock new vehicles in accordance with New GM's standard requirements. No one disputes that. Like the Net Working Capital Standard, the requirement for such financing merely echoes the requirements of the Dealer Agreement and is manifestly reasonable. *See, e.g., Chic*

Miller's Chevrolet, Inc. v. Gen. Motors Corp., 352 F. Supp. 2d 251, 257-58 (D. Conn. 2005) (holding GM was justified in terminating the dealer agreement when the dealer failed to maintain inventory financing); *Hale Trucks of Md., LLC v. Volvo Trucks N. Am., Inc.*, 224 F. Supp. 2d 1010, 1020 (D. Md. 2002) (same). A dealer which is unable to purchase and inventory new motor vehicles is not a compliant new motor vehicle dealer at all. Thus, all of Leson's arguments about net working capital are not only erroneous (as set forth below) but also simply irrelevant. Based on the undisputed record, Leson has *not complied* with one of the most fundamental requirements for operating a New GM dealership—*i.e.*, obtaining the requisite inventory financing for purchasing new vehicles. The merits of Leson's claims can end there.

1. Leson Has Not Met Its Burden Of Proving That The LOI Should Be Voided.

53. Leson's new argument that it signed the LOI under "duress" is nothing more than a claimed "defense to enforcement" of the Wind-Down Agreement, and Leson thus has the burden of proving its claim. Motion at ¶ 22. Yet, *no evidence* has been submitted to support such a claim. In fact, the dealer-operator who signed the LOI stands mute; the only supporting declaration submitted by Leson comes from the dealer's daughter. *See* Leson Objection, Ex. Q. That declaration says nothing about duress. The first time Leson ever asserted in any tribunal that it signed the July 1, 2010 LOI under "duress" was a single sentence in Leson's Commission Complaint filed on September 15, 2010, more than *three months* after executing the LOI, and that complaint, too, provides no details or evidence to support the conclusory allegation. *See* Motion, Ex. Q. Leson's deadline for providing such evidence has now run.

54. Moreover, the duress argument would fail under any scenario. Leson, like other dealers that prevailed in the arbitrations, was given ten days to decide whether to sign the LOI. A week after the LOI was sent to Leson, Leson wrote to complain about some of the terms of the LOI and to tried to negotiate different terms. *See* Leson Objection, ¶ 34. New GM's decision

rejecting such requests does not make out a case for "duress," particularly given that the conditions in dispute were found in the pre-existing Dealer Agreement between Leson and Old GM. *See Barnett v. Int'l Tennis Corp.*, 263 N.W.2d 908, 913 (Mich. Ct. App. 1978) (discussing treatise indicating that party alleging duress must show that he has been the victim of a *wrongful or unlawful* act or threat that deprives the victim of his unfettered will; party must have no adequate legal remedy, among other things).[9] Instead, New GM simply took the position that the same terms should apply to all dealers, as it was required to do even under Leson's view of the law. Instead of signing the LOI, Leson could have simply sued New GM in this Court over the LOI. Leson, which has no shortage of lawyers, chose not to do so. Rather, it voluntarily signed the LOI and then, after the fact, proceeded to ask another tribunal to "void" the LOI. This, it cannot do.

55. In addition to duress, Leson alleges in its opposition for the first time that the LOI should be voided because of New GM's alleged "fraud." *See* Leson Objection, ¶¶ 35, 36. Leson's conclusory statement, without reference to any factual support, does not pass muster under any pleading standard. *See, e.g.,* Fed. R. Civ. P. 9(b). Moreover, the fatal defect in this allegation is that the universal legal requirement for a fraud claim is "reliance." *See, e.g., Highway Motor Co. v. Int'l Harvester Co.*, 247 N.W.2d 813, 817 (Mich. 1976) (reversing finding of fraud when plaintiff failed to prove reliance). Leson alleges no actions or inactions in reliance on any statement by New GM, and the LOI itself contains a stipulation by Leson that it is "not relying on any representations, promises, guarantees, or information provided by GM" when

[9]The Wind-Down Agreement that this Court approved and which Leson executed provides that Michigan law applies to disputes regarding the Wind-Down Agreement. *See* Motion, Ex. N, Leson Wind-Down Agreement, § 15. The Dealer Agreement also provides that Michigan law applies. The LOI does not contain a separate choice of law provision, but it references both the Wind-Down Agreement and the Dealer Agreement. *See* Motion, Ex. P. The result would be the same regardless of which law is cited, however, since such principles are neither unusual or controversial.

signing the LOI. *See* Motion, Ex. P, at p. 3. Thus, as with the duress allegation, Leson has supplied no law or evidence to support its unpled fraud claim, and both the law and evidence are to the contrary.

2. Even If Leson Had Met Its Burden To Show That The LOI Should Be Voided, Its "Customary and Usual" Arguments Are Incorrect.

56. Leson must first "void" the LOI before it can assert any other arguments. If the agreement is valid, the analysis should end there. In this case, Leson has no basis to "void" the LOI. Thus, the agreement itself bars Leson's remaining arguments. Even assuming for the sake of argument that Leson's other arguments warrant consideration, they likewise fail on the undisputed record present here.

57. Setting aside the obvious fact that Leson signed the LOI, Leson now argues that the LOI is not "customary and usual" under several theories. First, Leson claims that it is unreasonable that the LOI is being implemented through an amended Wind-Down Agreement. Leson Objection, ¶¶ 57-60. Leson's position ignores the reality that the Wind-Down Agreement is currently in effect and currently controls the relationship between GM and Leson. Even if Leson were to eventually satisfy the terms of the LOI, certain terms in the Wind-Down Agreement have to be changed, including, by way of example, the provisions requiring Leson to cease operations by October 31, 2010 and the provisions requiring New GM to pay Leson a wind-down payment (which Leson would have to return). Moreover, Leson's argument is a red herring in any event. The "amendment" to the Wind-Down Agreement has no real significance. The real complaint is that Leson has to supply the required net working capital and there can be no argument that such a requirement is "customary and usual." Indeed, the Dealer Agreement itself obligates every dealer in the country to meet the net working capital requirements calculated by GM. Thus, *that requirement* clearly is "usual and customary."

58. Second, Leson argues that the LOI is not "customary and usual" because it included "operational prerequisites" which supposedly are not allowed by § 747. Leson Objection, ¶ 60. Leson does not explain this argument and there is nothing in § 747 to support it. Indeed, the obvious purpose of the LOI—the only remedy permitted by § 747—is to establish the operational prerequisites to a dealer agreement. Leson's argument would render the statutorily-required LOI without purpose or meaning.

59. Third, Leson argues that the LOI is not "customary and usual" because the $2.85 million net working capital standard is "commercially unreasonable." That argument cannot withstand analysis. There is no dispute that the working capital requirement in the LOI is the same one that GM requires under the Dealer Agreement. Under Leson's view, every dealer that prevailed in the arbitrations could seek to revise GM's standard capital requirements before reinstatement. That is untenable. Leson has agreed to the same level of capitalization for years. *See* Lesson Objection, ¶ 18. Moreover, as alleged support for its position, Leson argues that its own calculation of net working capital should be "less than $1.8 million *utilizing the 12-month period from June 2009-May 2010*." Leson Objection, ¶ 63 (emphasis added). That argument is facially unsupportable because the benchmark time period chosen by Leson for determining its net working capital figure is *when Leson was in a wind-down status, and not operating as a full-fledged dealer*.[10] Leson's argument is also wholly inconsistent with its repeated claim that it simply wants to be treated as if it had never been wound down. *See, e.g.,* Leson Objection, ¶ 56 ("Leson should have been naturally rolled into new GM without any interruption of its dealership"), ¶ 67 (GM is "[t]reating dealers that won reinstatement through arbitration differently" than dealers who were not "wound down"). As noted above, the $2.85 million

[10] New GM's Capital Standard Addendum requires that a capital standard be set "based on the dealership operations it is expected to conduct," not on operations it conducted over the limited, unrepresentative, wind-down period. *See* Motion, Ex. V.

figure was the net working capital required in Leson's Dealer Agreement prior to the Wind-Down Agreement when Leson was a fully operating dealership. Leson cannot have it both ways. Leson either wants to be reinstated as a fully operating dealer or it does not. If it does, then it must comply with the requirements of the LOI. That is not unreasonable under any analysis.

3. Leson's Statements About What The Arbitrator Allegedly Concluded Are Incorrect.

60. Leson repeatedly argues that the arbitrator has already concluded that Leson's net working capital figure should be less than $2.85 million. *See, e.g.*, Leson Objection, ¶ 18. That is both incorrect and irrelevant. Section 747 empowered the arbitrator to grant specific, limited relief and nothing else. The arbitrator was not empowered by § 747 to re-write the terms of an LOI or to dictate future terms. Thus, the arbitrator would not have been empowered to decide what Leson's net working capital should be. In any event, the arbitrator here did not determine that $2.85 million in net working capital was too high for Leson. To the contrary, *Leson represented to the arbitrator that "[u]pon reinstatement, Leson foresees no obstacles in being able to meet the required capital needs and maintain working capital* ***at or above GM's standard****."* *See* Leson's Prehearing Brief, at 23. A true and correct copy of an excerpt from Leson's Prehearing Brief is attached as Exhibit C.[11] Leson also represented to the arbitrator, and the arbitrator found, that the "dealership has secured . . . a commitment letter from a local bank for prospective [floor plan] financing once it is reinstated by General Motors." Motion, Ex. O, at p. 7. Yet, Leson now states—after the fact—that it has not been able to obtain a commitment for floor plan financing after all, which independently bars Leson's claims, as set forth above.

[11] New GM is not attaching Leson's entire Prehearing Brief because it may contain information subject to a confidentiality agreement entered in the § 747 arbitration.

Without inventory financing, it cannot be disputed that Leson has failed to comply with a "customary and usual" requirement for being a New GM dealer. *See* Leson Objection, ¶ 65.

4. Leson Is Not Entitled to Discovery.

61. Leson's request for discovery is unwarranted. *See* Leson Objection, ¶¶ 50, 51. The central facts are undisputed. No one disputes that Leson signed the LOI. No one disputes that Leson failed to challenge the LOI here or elsewhere prior to signing the LOI and agreeing to it. No one disputes that the Dealer Agreement itself requires (1) inventory financing and (2) working capital in an amount calculated by New GM using its standard formula, and that such requirements have been in place for years. And no one disputes that New GM calculated its working capital requirement using the same formula that is set forth in the Dealer Agreement. Having chosen to proceed to sign the LOI, Leson cannot now turn around and argue that it should be entitled to discovery in an effort to avoid the very obligation set forth in the Dealer Agreement itself. As noted above, the threshold issue relates to Leson's attempt to void the LOI that it signed. Leson has not put forth facts, or even alleged specific facts, sufficient to support its conclusory claims despite that it is Leson's burden to do so. The bottom line is that Leson signed the LOI and has proven no basis for voiding the LOI. In any event, Leson's complaint is much ado about nothing. GM is merely requiring Leson to return to provide inventory financing and also provide the working capital that was set forth in Leson's pre-wind down Dealer Agreement. Those matters are undisputed.

Relief Requested

WHEREFORE, New GM respectfully requests that this Court: (i) enter an order substantially in the form attached to the Motion as Exhibit X, granting the relief sought in the Motion and herein; and (ii) grant New GM such other and further relief as the Court may deem just and proper.

Respectfully submitted,

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EXHIBIT A

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
CEDAR RAPIDS DIVISION

THYS CHEVROLET, INC. and FAMILY AUTO CENTER, INC.,	
Plaintiffs,	No. 10-CV-46-LRR
vs.	**ORDER**
GENERAL MOTORS LLC,	
Defendant.	

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I. INTRODUCTION

The matters before the court are Defendant General Motors LLC's "Motion to Dismiss or, in the Alternative, Transfer Venue to the United States Bankruptcy Court for the Southern District of New York" ("Motion to Dismiss") (docket no. 12) and "Motion for Leave to Submit Ruling from Monday Enjoining Dealer Action Issued by the United States Bankruptcy Court for the Souther District of New York" ("Motion for Leave") (docket no. 34).

II. PROCEDURAL BACKGROUND

On August 26, 2010, Plaintiffs Thys Chevrolet, Inc. ("Thys Chevrolet") and Family Auto Center, Inc. ("Family Auto") filed a Complaint (docket no. 2) seeking injunctive relief. That same date, Plaintiffs filed a "Verified Complaint and Motion for Preliminary and Permanent Injunctive Relief" ("Motion for Injunctive Relief") (docket no. 3). Plaintiffs requested expedited relief. On August 31, 2010, the court entered an Order (docket no. 5) setting a hearing on the Motion for Injunctive Relief for September 16, 2010.

On September 10, 2010, Defendant General Motors LLC ("New GM") filed a "Motion to Postpone Preliminary Injunction Hearing Scheduled for September 16, 2010, Hold an Expedited Status Conference, and Establish Briefing Schedule on Legal Issues" ("Motion to Continue") (docket no. 7). In the Motion to Continue, New GM indicated that it would seek dismissal of the instant action on the grounds that the Bankruptcy Court for the United States District Court for the Southern District of New York ("Bankruptcy Court") "has exclusive jurisdiction to resolve the issues raised in the Complaint." Motion to Continue at 1.

On September 10, 2010, the court held a telephonic status conference to address the issues raised in the Motion to Continue. That same date, the court entered an Order (docket no. 10) granting the Motion to Continue to the extent it sought to postpone the hearing on the Motion for Injunctive Relief. The court directed the parties to file simultaneous briefing on or before September 14, 2010 to address the court's jurisdiction.

On September 14, 2010, New GM filed the Motion to Dismiss. That same date, Plaintiffs filed a "Brief in Support of Exclusive Subject Matter Jurisdiction Over This Matter in the United States District Court" ("Plaintiffs' Brief") (docket no. 14). On September 15, 2010, New GM filed a brief ("New GM's Brief") (docket no. 20) in support of the Motion to Dismiss. On September 23, 2010, New GM filed a supplemental brief ("New GM's Supp. Brief") (docket no. 24) in support of the Motion to Dismiss. That same date, Plaintiffs filed a supplemental brief ("Plaintiffs' Supp. Brief") (docket no. 25) in support of their resistance to the Motion to Dismiss.

On September 27, 2010, the court held a telephonic hearing ("Hearing") on the Motion to Dismiss. Attorneys James Arenson and Harry Zanville appeared on behalf of Plaintiffs. Attorneys Jeffrey Jones and Greg Lederer appeared on behalf of New GM. At the conclusion of the Hearing, the court reserved ruling on the Motion to Dismiss pending the instant order. That same date, Plaintiffs filed a "Supplemental Filing" (docket no. 29) in reference to an exhibit discussed at the Hearing. On September 30, 2010, New GM filed a "Response to Plaintiffs' Supplemental Response/Addendum" (docket no. 33).

III. FACTUAL BACKGROUND

A. Players

Family Auto is an Iowa corporation with its principal place of business in Toledo, Iowa. Family Auto used to be an automobile dealership and was licensed by the State of

Iowa to sell new Chevrolet and Buick automobiles. Edward Polaco owns Family Auto.

Thys Chevrolet is an Iowa corporation with its headquarters in Toledo, Iowa. It is an automobile dealership owned by Joel Thys and licensed by the State of Iowa to sell new Chevrolet and Buick automobiles.

New GM is a Delaware limited liability company with its principal place of business in Michigan. New GM designs, manufactures, distributes and sells motor vehicles and parts to authorized GM dealerships. Buick Motor Division ("Buick") is a division of New GM. "[New] GM and Buick conduct business in the Northern District of Iowa, pursuant to numerous franchise dealer sales and service agreements ("DSSA") with GM dealers." Motion for Injunctive Relief at ¶ 7.

B. GM's Bankruptcy and the Wind-Down Agreements

On June 1, 2009, General Motors Corporation ("Old GM") filed for bankruptcy in the Bankruptcy Court, Case No. 09-50026. In the bankruptcy proceedings, Old GM sought to sell certain assets to a new company (the "363 Acquirer") under Section 363 of the Bankruptcy Code pursuant to certain conditions approved by the Bankruptcy Court (the "Section 363 Sale").

As part of Old GM's reorganization, it executed "wind-down agreements" with numerous GM dealers. On June 12, 2009, Old GM and Family Auto executed a "Wind-Down Agreement" in which Family Auto agreed to wind-down its Buick operations by October 31, 2010, in exchange for monetary payments and other terms.[1] Exhibit A to Affidavit of Michael Poindexter (docket no. 20-2) at 5. In the Wind-Down Agreement, Family Auto agreed it would not propose or consummate a change in ownership or a transfer of its business or assets:

> [Family Auto] shall not, and shall have no right to, propose to [Old] GM or the 363 Acquirer . . . or consummate a change

[1] Family Auto's Chevrolet operations were not subject to the Wind-Down Agreement and are not at issue in the instant action.

> in Dealer Operator, a change in ownership, or, subject to [Old] GM's or the 363 Acquirer's, as applicable, option, a transfer of the dealership business or its principal assets to any Person . . . . Accordingly, neither [Old] GM nor the 363 Acquirer, as applicable, shall have any obligation . . . to review, process, respond to, or approve any application or proposal to accomplish any such change, except as expressly otherwise provided in the preceding sentence.

Id. at 9-10. The Wind-Down Agreement also provided that:

> 13. Continuing Jurisdiction. By executing this Agreement, [Family Auto] hereby consents and agrees that the Bankruptcy Court shall retain full, complete and exclusive jurisdiction to interpret, enforce, and adjudicate disputes concerning the terms of this Agreement and any other matter related thereto. The terms of this [clause] shall survive the termination of this Agreement.

Id. at 11.

C. The Bankruptcy Court Approves the Sale

On June 1, 2009, Old GM and other affiliates (collectively, the "Debtors") filed a motion under § 363 seeking the Bankruptcy Court's approval to proceed with the sale. On July 5, 2009, the Bankruptcy Court issued an order ("Sale Order") approving the proposed sale of Old GM's assets. The Sale Order provides, in relevant part:

> The transfer of the Purchased Assets to the Purchaser will be a legal, valid, and effective transfer of the Purchased Assets and, except for the Assumed Liabilities, will vest the Purchaser with all right, title, and interest of the Sellers to the Purchased Assets free and clear of liens, claims, encumbrances, and other interests . . . .

New GM's Exhibit B (docket no. 7-3) at 14. The Bankruptcy Court found that "[t]he Purchaser would not have entered into the [Master Sale and Purchase Agreement] and would not consummate the 363 Transaction . . . if the sale of the Purchased Assets was not free and clear of all liens, claims, encumbrances, and other interests (other than Permitted Encumbrances), ..." *Id.* at 16.

The Bankruptcy Court found that Old GM offered wind-down agreements to many dealers "as an alternative to rejection of the [dealers'] existing Dealer Sales and Service Agreements" and found that the wind-down agreements "provide substantial additional benefits to dealers which enter into such agreements." *Id.* at 20. The Bankruptcy Court noted that "[a]pproximately 99% of the dealers offered Deferred Termination Agreements[2] accepted and executed those agreements and did so for good and sufficient consideration." *Id.* (footnote added). Accordingly, the Bankruptcy Court approved Old GM's entrance into the wind-down agreements and found that they "represent valid and binding contracts, enforceable in accordance with their terms." *Id.* at 35.

The Bankruptcy Court also reserved exclusive jurisdiction over matters concerning the Sale Order and the wind-down agreements:

> This Court retains exclusive jurisdiction to enforce and implement the terms and provisions of this Order, the [Master Sale and Purchase Agreement], all amendments thereto, any waivers and consents thereunder, and each of the agreements executed in connection therewith, including the Deferred Termination Agreements, in all respects, including, but not limited to, retaining jurisdiction to . . . resolve any disputes with respect to or concerning the Deferred Termination Agreements.

Id. at 49. Upon the Bankruptcy Court's approval of the Section 363 Sale, the 363 Acquirer was reorganized and assigned the wind-down agreements to New GM.

D. Section 747 Arbitration

In December of 2009, Congress enacted § 747 of the Consolidated Appropriations Act, 2010, Pub. Law No. 11-117, 123 Stat. 3034 (2009) ("Dealer Arbitration Act" or

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[2] The Sale Order provides that the term "Deferred Termination Agreements" includes "Wind-Down Agreements." *Id.* at 19.

"§ 747"). Section 747 gives a "covered dealership"[3] the right to seek, through binding arbitration, continuation or reinstatement to the dealer network. § 747(b). In deciding whether a dealer should be reinstated or continued, the arbitrator must balance the economic interest of the covered dealership, the covered manufacturer and the public at large. § 747(d). The arbitrator must consider a variety of factors, including the dealer's profitability, the "manufacturer's overall business plan," the dealer's "economic viability," the "demographic and geographic characteristics" of the dealer's market territory and "the length of experience of the covered dealership." *Id.*

If the arbitrator finds in favor of a dealer, "the covered manufacturer shall as soon as practicable, but not later than 7 business days after receipt of the arbitrator's determination, provide the dealer a customary and usual letter of intent to enter into a sales and service agreement." § 747(e). "After executing the sales and service agreement and successfully completing the operational prerequisites set forth therein," the dealer must return to the manufacturer any financial compensation the manufacturer provided in consideration of its initial decision "to terminate, not renew, not assign or not assume the covered dealership's applicable franchise agreement." *Id.*

On January 25, 2010, Family Auto submitted its notice of intent to arbitrate pursuant to § 747.

E. Family Auto Sells its Assets to Joel Thys

On February 27, 2010, with the arbitration pending, Family Auto executed an Asset Purchase Agreement with Joel Thys. Specifically, Joel Thys contracted to buy Family Auto's assets—defined as its "[s]eller goodwill in connection with its General Motors

[3] A "covered dealership" is "an automobile dealership that had a franchise agreement for the sale and service of vehicles . . . in effect as of October 3, 2008, and such agreement was terminated, not assigned[,] . . . not renewed, or not continued during the period beginning on October 3, 2008, and ending on December 31, 2010." § 747(a)(2).

business and its rights, as they may exist, to operate the Chevrolet and Buick franchises"—for $750. Plaintiffs' Exhibit 4 (docket no. 2-2) at 22 (emphasis removed). On March 3, 2010, Family Auto and Joel Thys closed on the Asset Purchase Agreement. On March 5, 2010, Family Auto and Joel Thys executed a "Management Contract" under which Family Auto granted Joel Thys the right to operate the GM franchise, use all equipment and inventory, and "operate the dealership under Family Auto Center['s] Iowa dealer['s] license DL1130." Plaintiffs' Exhibit 6 (docket no. 2-2) at 29. Additionally, Joel Thys agreed "to lease the property on a month to mont[h] basis for the amount of $100.00[.]" *Id.*

F. Letter of Intent

On March 11, 2010, New GM offered Family Auto a letter of intent ("Letter of Intent" or "Letter"). In the Letter of Intent, New GM stated that it had "carefully reviewed [Family Auto's] situation in light of the provisions of the Arbitration Statute to determine if [New GM] wish[ed] to proceed with the arbitration process." Plaintiffs' Exhibit 10 (docket no. 2-2) at 37. New GM stated it was "pleased to offer [Family Auto] this letter of intent, as provided for in the Arbitration Statute . . . concerning the Buick brand(s) . . . ." *Id.*

In the Letter of Intent, New GM offered to reinstate Family Auto's Buick franchise if Family Auto complied with certain conditions set forth in the Letter. If Family Auto satisfied the conditions, New GM agreed to reinstate Family Auto's Buick franchise by "amending the existing Wind-Down Agreement in place between [Family Auto] and GM for the [Buick] vehicles." *Id.* Among other conditions, New GM asked Family Auto to: (1) withdraw its § 747 arbitration claim by April 30, 2010; (2) comply with certain space/premises requirements; (3) confirm its location for resumed operations; (4) establish and maintain $296,000 of net working capital; (5) obtain all applicable licenses to conduct Buick franchise operations; and (6) return its wind-down payments. New GM asked Family Auto to sign and return the Letter of Intent within 10 days of receipt. If Family

Auto failed to do so, the Letter of Intent would be "deemed rescinded" and New GM would have "no further obligations." *Id.* at 39.

If Family Auto executed the Letter of Intent, it would have sixty days to satisfy the conditions set forth in the Letter:

> If [Family Auto] does not provide GM with satisfactory evidence of compliance with all of the terms and conditions of this Letter of Intent within 60 days from [the] execution of this letter, then this Letter of Intent will expire and GM shall have no obligation to execute the Wind-Down Amendment.

Id. at 37. If Family Auto satisfied the Letter's conditions, New GM offered to amend the existing Wind-Down Agreement within 15 days:

> Within 15 days of [Family Auto's] completion of the conditions and requirements of this Letter of Intent, GM will execute and deliver to [Family Auto] an amendment to the Wind-Down Agreement . . . , which will allow [Family Auto] to resume normal dealership operations for [the Buick] Brand(s).

Id. The Letter of Intent stated that it could "not be transferred or assigned, in whole or in part, without the express written consent of GM." *Id.* at 39.

According to New GM, it offered similar letters of intent to "hundreds" of dealers that had filed arbitration demands due to "the number of arbitrations pending, the short time permitted under the statute, the resources available to GM, the resources devoted to resolving a similar number of Chrysler arbitrations, and the limited number of witnesses available to attend the hearings[.]" New GM's Brief at 8. The Letter of Intent reflects that, on March 13, 2010, Polaco executed the Letter of Intent on Family Auto's behalf.[4]

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[4] The parties seem to dispute whether Family Auto ever executed the Letter of Intent. Plaintiffs contend that the Letter of Intent "expired because it was not timely accepted." Plaintiffs' Brief in Support of Motion for Preliminary and Permanent Injunction (docket no. 2-1) at 6. To support this assertion, Plaintiffs cite to a brief that New GM filed in the arbitration proceedings, in which New GM asserted that it "never (continued…)

G. Arbitral Order

On June 17, 2010, Arbitrator Edward C. Stringer entered an order ("Arbitral Order") stating, in its entirety:

> 1. I have jurisdiction of this § 747 proceeding because
>
>   a. Family Auto Center, Inc. is a covered dealer;
>
>   b. Family Auto Center, Inc. filed a timely demand for arbitration; and
>
>   c. I have acted within the time period described.
>
> 2. General Motors LLC submitted this Order which requests that I issue an Order continuing Family Auto Center, Inc. as a Buick dealer pursuant to the terms of § 747.
>
> WHEREFORE, IT IS THE ORDER OF THE ARBITRATOR that Family Auto Center, Inc. should be and hereby is continued.
>
> Having no other powers in this matter, this arbitration is now dismissed and this is a final order.

Plaintiffs' Exhibit 15 (docket no. 2-2) at 52.

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[4](…continued)
received a response to the [Letter of Intent] and the [Letter of Intent] has since expired by its terms." Plaintiffs' Exhibit 11 (docket no. 2-2) at 42. New GM acknowledges making this statement, but asserts it was a mistake because, "[a]t the time of GM's filing [in the arbitration proceeding], counsel was unaware that the [Letter of Intent] had been returned." New GM's Brief at 8 n.2. New GM directs the court to Family Auto's response in the arbitration proceedings, in which Family Auto disputed New GM's position, stating it was "simply not true" that the Letter of Intent had expired. Exhibit 7 to Affidavit of J. Todd Kennard (docket no. 20-1) at 149. In the same filing, Joel Thys stated that "I have copies of the postal documentation that is proof that GM received the signed [Letter of Intent]." *Id.* Family Auto also stated that it had complied with many conditions set forth in the Letter of Intent and that it would comply with the remaining terms. The court also notes that Plaintiffs submitted a copy of the Letter of Intent as an exhibit in support of their Motion for Injunctive Relief. *See* docket no. 2-2 at 37-39. The Letter of Intent reflects that Edward Polaco executed it, on Family Auto's behalf, on March 13, 2010.

The parties have different views about what led to the Arbitral Order and, unsurprisingly, its legal effect. According to Plaintiffs, the parties agreed to the Arbitral Order "in lieu of proceeding to try the case" through arbitration. Motion for Injunctive Relief at ¶ 21. Plaintiffs contend that the Arbitral Order simply requires New GM to continue Family Auto's Buick franchise, and that New GM is "[i]gnoring" this directive. *Id.* at ¶ 22.

New GM, on the other hand, provides this explanation:

> Given the fact that New GM had already offered a [Letter of Intent] to Family Auto, the parties simply submitted an agreed order to the Arbitrator authorizing continued operations "in accordance with § 747"—i.e., awarding Family Auto a letter of intent to seek reinstatement to New GM's dealer network under the terms and conditions of the [Letter of Intent]. In fact, Family Auto had *already received* and executed the [Letter of Intent] called for by § 747. Family Auto, however, never satisfied or otherwise complied with the Letter of Intent. As a Result of Family Auto's failure to comply with the Family Auto [Letter of Intent], the Wind-Down Agreement between [Old GM] and Family Auto—which was assumed and assigned to New GM under the Bankruptcy Court's orders—remains in effect as to Family Auto's Buick operations.

New GM's Brief at 9 (emphasis in original) (citations omitted).

H. Plaintiffs' Claims

In the instant action, Plaintiffs claim that New GM has ignored the Arbitral Order by refusing to continue Family Auto's Buick franchise and taking the position that the "wind-down process remains in effect with respect to the Buick franchise." Motion for Injunctive Relief at ¶ 22. Plaintiffs also contend that New GM has "refused to give effect to the transfer of [Family Auto's] Buick franchise to Thys as required by the Iowa Motor Vehicle Franchise Act." *Id.* at ¶ 23. Accordingly, Plaintiffs ask the court to "issue a permanent injunction enjoining GM to extend formal recognition of the change in ownership and the management and transfer of the Buick dealer franchise from Family [Auto] to Thys, and treat Thys, for all purposes, as the dealer owner and dealer operator on terms previously held by Family [Auto]." *Id.* at 9.

IV. ANALYSIS

New GM asks the court to dismiss the instant action pursuant to Federal Rule of Civil Procedure 12(b)(1) for lack of subject matter jurisdiction and/or Rule 12(b)(3) for improper venue. Alternatively, New GM asks the court to transfer this case to the Bankruptcy Court pursuant to 28 U.S.C. §§ 1412 and/or 1404.

A. Bankruptcy Court's Jurisdiction

New GM contends that, in light of the Bankruptcy Court's reservation of exclusive jurisdiction and the Wind-Down Agreement's reservation of exclusive jurisdiction in the Bankruptcy court, "the Bankruptcy Court is the only forum with jurisdiction to proceed." New GM's Brief at 16. Plaintiffs contend that the Complaint alleges "three clear traditional and unchallengeable grounds for this [c]ourt's jurisdiction in this case." Plaintiffs' Brief at 3. Namely, federal question, diversity and supplemental jurisdiction. In addition, Plaintiffs argue that the Bankruptcy Court lacks jurisdiction over the instant action.

Although the Bankruptcy Court clearly reserved exclusive jurisdiction to enforce and implement its Sale Order and resolve disputes relating to the wind-down agreements, "bankruptcy courts are unable to expand their own jurisdiction by order." *U.S. Commodity Futures Trading Comm'n v. NRG Energy, Inc.*, 457 F.3d 776, 780 (8th Cir. 2006); *see also Binder v. Price Waterhouse & Co., LLP*, (*In re Resorts Int'l, Inc.*) 372 F.3d 154, 161 (3d Cir. 2004) ("[N]either the bankruptcy court nor the parties can write their own jurisdictional ticket."). In other words, the Bankruptcy Court's retention of jurisdiction is meaningless unless the Bankruptcy Court could exercise jurisdiction over the instant action in the first place. Therefore, the court turns to consider whether the Bankruptcy Court has jurisdiction over Plaintiffs' claims.

1. Bankruptcy court jurisdiction

Bankruptcy courts "may hear and determine all cases under title 11 and all core proceedings arising under title 11, or arising in a case under title 11 . . . ." 28 U.S.C. § 157(b)(1). In these "core proceedings," the bankruptcy court may enter appropriate orders and judgments, subject to appellate review by the district court. *Id.* Although not core proceedings, bankruptcy courts also have jurisdiction to hear proceedings that are "otherwise related to a case under title 11." 28 U.S.C. § 157(c)(1). In contrast to core proceedings, the bankruptcy court's role in "related to" proceedings is limited to submitting "proposed findings of fact and conclusions of law to the district court," which must enter any final order or judgment. *Id.*

As the foregoing explains, "[b]ankruptcy courts have jurisdiction over civil proceedings 'arising under,' 'arising in,' or 'related to' title 11." *GAF Holdings, LLC v. Rinaldi*, (*In re Farmland Indus., Inc.*) 567 F.3d 1010, 1017 (8th Cir. 2009) (quoting 28 U.S.C. § 157(b)(1), (c)(1)). "'Civil proceedings in a bankruptcy case are divided into two categories, core proceedings and non-core, related proceedings.'" *Id.* (quoting *Specialty Mills, Inc. v. Citizens State Bank*, 51 F.3d 770, 773 (8th Cir. 1995)). "Core proceedings are those cases 'arising under' or 'arising in' a case under Title 11." *Id.* (quoting 28 U.S.C. § 157(b)(1)). "Non-core 'related to' proceedings 'could conceivably have an effect on the estate being administered in bankruptcy.'" *Id.* (quoting *Specialty Mills*, 51 F.3d at 774).

"Claims 'arising under' Title 11 are 'those proceedings that involve a cause of action created or determined by a statutory provision of title 11.'" *Id.* at 1018 (quoting *In re Wood*, 825 F.2d 90, 96 (5th Cir. 1987)). Claims "'arising in'" Title 11 "'are those that are not based on any right expressly created by title 11, but nonetheless, would have no existence outside of the bankruptcy.'" *Id.* (quoting *In re Wood*, 825 F.2d at 97). In other words, "'claims that arise in a bankruptcy case are claims that by their nature, not their particular factual circumstance, could only arise in the context of a bankruptcy case.'" *Id.* (quoting *Stoe v. Flaherty*, 436 F.3d 209, 218 (3d Cir. 2006)).

With respect to "related to" jurisdiction, the Eighth Circuit Court of Appeals applies the "conceivable effect" test, which provides that a civil proceeding is "related to" bankruptcy where "'the outcome of that proceeding could *conceivably have any effect on the estate* being administered in the bankruptcy . . . .'" *Id.* at 1019 (quoting *Specialty Mills*, 51 F.3d at 774) (emphasis in *Farmland Indus.*). Thus, "'[a]n action is related to bankruptcy if the outcome could alter the debtor's rights, liabilities, options, or freedom of action . . . and which in any way impacts upon the handling and administration of the bankruptcy estate.'" *Id.* "Related to" proceedings include actions between third parties which have an effect on the bankruptcy estate. *Id.* (quoting *Celotex Corp. v. Edwards*, 514 U.S. 300, 307 n.5 (1995)). "The conceivable effect test implements a fairly broad interpretation of the scope of a bankruptcy court's 'related to' jurisdiction . . . ." *Abramowitz v. Palmer*, 999 F.2d 1274, 1277 (8th Cir. 1993); *see also Farmland Indus.*, 567 F.3d at 1019 (describing jurisdictional grant as "extremely broad").

2. Analysis

New GM argues that the Bankruptcy Court has jurisdiction under all three doctrines—arising under, arising in and related to. Unsurprisingly, Plaintiffs contend that the Bankruptcy Court lacks jurisdiction under any theory. The court need only consider whether Plaintiffs' claims are at least related to the bankruptcy proceedings. *See Wood*, 825 F.2d at 93 ("For the purpose of determining whether a particular matter falls within bankruptcy jurisdiction, it is not necessary to distinguish between proceedings 'arising under', 'arising in a case under', or 'related to a case under', title 11. These references operate conjunctively to define the scope of jurisdiction. Therefore, it is necessary only to determine whether a matter is at least 'related to' the bankruptcy."); *see also Dogpatch Props., Inc. v. Dogpatch U.S.A., Inc.*, (*In re Dogpatch U.S.A., Inc.*) 810 F.2d 782, 785-786 (8th Cir. 1987) (noting that, although the parties likely consented to bankruptcy court's jurisdiction and the plaintiffs' claims were likely core proceedings, the court "need not rely" on either theory "because the bankruptcy court properly held that [the claims] were related to a case under chapter 11 and thus were within the jurisdiction of the bankruptcy court"). For the reasons explained below, the Bankruptcy Court has jurisdiction over the instant action.

a. Related to jurisdiction

Here, Plaintiffs' claims are related to the bankruptcy because the relief they seek—a permanent injunction directing New GM to extend "formal recognition" to the transfer of ownership from Family Auto to Thys Chevrolet—runs contrary to the Wind-Down Agreement, which the Bankruptcy Court approved in its Sale Order. Motion for Injunctive Relief at 9. In the Wind-Down Agreement, Family Auto agreed that it would not propose or consummate a change in ownership or transfer the assets of its dealership. In the instant action, Plaintiffs ask the court to give effect to just that: a transfer of its assets to Thys Chevrolet. The Bankruptcy Court approved of Old GM's wind-down agreements with many dealers, including Family Auto, and ordered that the 363 Acquirer take the purchased assets—including the wind-down agreements—"free and clear" of all "liens, claims, encumbrances, and other interests (other than Permitted Encumbrances) . . . ." New GM's Exhibit B at 14. Because the relief that Plaintiffs seek could impact the handling and administration of the bankruptcy estate—by altering New GM's obligations with respect to the assets sold in the bankruptcy—Plaintiffs' claims could conceivably have an effect on the bankruptcy estate. *See Farmland Indus.*, 567 F.3d at 1019 (stating that the court must determine whether the plaintiff's claims "could conceivably have an effect" on the bankruptcy estate). Accordingly, the Bankruptcy Court has, at minimum, related to jurisdiction over Plaintiffs' claims.

Plaintiffs arguments against related to jurisdiction are unpersuasive. The fact that New GM is not the bankruptcy debtor is of no consequence, because "related to" actions include those "'between third parties which have an effect on the bankruptcy estate.'" *Id.* (quoting *Celotex Corp.*, 514 U.S. at 307 n.5). Plaintiffs also speculate that, because

Congress has been an "advocate and savior" to Old and New GM, "[i]t is unlikely and illogical that Congress, the group which saved New GM from bankruptcy through billions of dollars in TARP funds, would [enact] a law like § 747 if it altered Old GM's rights, liabilities, options, or freedom of action in the handling of the estate's administration." Plaintiffs' Supp. Brief at 4 n.2. In addition to again overlooking the fact that related to jurisdiction extends to suits between third parties if they could conceivably affect the bankruptcy *estate* (not just the debtor), Plaintiffs cite no authority for this proposition and the court gives it no weight.[5]

b. Core proceeding

While it need not reach the issue, the court notes that, in addition to being "related to" the bankruptcy, this case constitutes a core proceeding. In its Sale Order, the Bankruptcy Court expressly retained "exclusive jurisdiction to enforce and implement the terms and provisions" of its Sale Order, the wind-down agreements, and to "resolve any disputes with respect to or concerning the Deferred Termination Agreements[6] . . . ." New GM's Exhibit B at 49. As the United States Supreme Court recently explained, "the Bankruptcy Court plainly ha[s] jurisdiction to interpret and enforce its own prior orders." *Travelers Indem. Co. v. Bailey*, 129 S.Ct. 2195, 2205 (2009) (noting that, "when the Bankruptcy Court issued [its prior orders,] it explicitly retained jurisdiction" to enforce

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[5] Plaintiffs also characterize § 747 as representing "Congress' specific intent to reverse the Bankruptcy Court order of massive terminations of auto dealerships[.]" Plaintiffs' Brief at 5; *see also* Plaintiffs' Supp. Brief at 5 (stating that § 747 "overruled" the Bankruptcy Court's orders). However, the plain language of the statute makes clear it was not intended to "reverse" or "overrule" any wind-down agreements or any of the Bankruptcy Court's orders. Rather, it merely provided certain dealers with a forum and opportunity to seek reinstatement or continuation based upon the arbitrator's consideration of numerous factors and interests.

[6] As previously noted, the Bankruptcy Court defined "Deferred Termination Agreements" to include the wind-down agreements.

them); *see also United Taconite, L.L.C. v. Minnesota*, (*In re Eveleth Mines, L.L.C.*) 318 B.R. 682, 687 (B.A.P. 8th Cir. 2004) (noting that there is "ample precedent" for the proposition that "since the [bankruptcy] court had jurisdiction to enter the Sale Order, it must also have jurisdiction to interpret and enforce that order").

Because Plaintiffs' claims appear contrary to the Wind-Down Agreement and the Bankruptcy Court's Sale Order approving such agreements, they certainly fall within the Bankruptcy Court's reservation of jurisdiction to enforce and implement its Sale Order and, more specifically, resolve disputes "with respect to or concerning" the wind-down agreements. In other words, Plaintiffs' claims turn, at least in part, on the interpretation and enforcement of the Bankruptcy Court's orders.

"[O]rders approving the sale of property" are core proceedings. 28 U.S.C. § 157(b)(2)(N). Therefore, courts generally treat as a core proceeding any action that depends on an interpretation or enforcement of the bankruptcy court's sale orders. *See In re Millenium Seacarriers, Inc.*, 458 F.3d 92, 95 (2d Cir. 2006) ("Orders approving the sale of property constitute core proceedings and the [lawsuit at issue], which turns on the terms of the Sale Order, amounts to a request that the bankruptcy court enforce that order. We therefore deem the [lawsuit] a core proceeding and conclude that the bankruptcy court's initial decision to exercise jurisdiction over that action was not error.") (internal citation and quotation marks omitted); *In re Allegheny Health Educ. and Research Found.*, 383 F.3d 169, 176 (3d Cir. 2004) ("[W]e hold that the bankruptcy court correctly determined that the suit was a core proceeding because it required the court to interpret and give effect to its previous sale orders."); *In re Eveleth Mines, LLC*, 312 B.R. 634, 644-45 (Bankr. D. Minn. 2004) (observing that "'the enforcement of orders resulting from core proceedings'" is itself a core proceeding) (quoting *In re Williams*, 256 B.R. 885, 892 (8th Cir. B.A.P. 2001)).

Applying this principle here, the court concludes that the instant action constitutes a core proceeding within the Bankruptcy Court's jurisdiction. Plaintiffs attempt to sever their claims here from the bankruptcy by portraying the instant action as being heavily predominated by § 747. *See* Plaintiffs' Brief at 8 (stating that Bankruptcy Court lacks jurisdiction because Plaintiffs' claims "are based wholly upon the ruling of the arbitrator acting under section 747 authority and Section 322A of the Iowa Code"). However, Plaintiffs' view of the case ignores the fact that § 747 and, more importantly, the relief they seek in this case, is inextricably intertwined with the bankruptcy for a variety of reasons. Plaintiffs seek a permanent injunction directing New GM to recognize the transfer of ownership from Family Auto to Thys. The court agrees with New GM that the gravamen of this case is the propriety of the claimed transfer from Family Auto to Thys, which "goes to the very heart of the bankruptcy case . . . ." New GM's Brief at 16-17. Simply put, Plaintiffs ask the court to order New GM to take action that appears to be at odds with both the Wind-Down Agreement and the Bankruptcy Court's Sale Order. Because a resolution of Plaintiffs' claims will turn on the interpretation and enforcement of the Bankruptcy Court's Sale Order, the court concludes that the instant action is a core proceeding.

B. Dismissal or Transfer

New GM asks the court to dismiss the instant action without prejudice, noting that Plaintiffs can then bring their claims in the Bankruptcy Court. Alternatively, New GM asks the court to transfer this case to the Bankruptcy Court. For the reasons explained below, the court finds that transfer is appropriate.

1. Sections 1412 and 1404

"A district court may transfer a case or proceeding under title 11 to a district court for another district, in the interest of justice or for the convenience of the parties." 28 U.S.C. § 1412. Similarly, "[f]or the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought." 28 U.S.C. § 1404(a). There is some confusion among federal courts as to when either statute is applicable. *See Oil Tool Rentals, Co. v.*

SH Exploration, LLC, No. 4:10CV00324 SWW, 2010 WL 2949673, at *1 n.2 (E.D. Ark. July 22, 2010) (noting that some courts hold that § 1404 applies to cases that are "only 'related to' a bankruptcy case as opposed to proceedings arising in or under a bankruptcy case"); *Creekridge Capital, LLC v. Louisiana Hosp. Ctr., LLC*, 410 B.R. 623, 628 (D. Minn. 2009) (detailing split of authority and concluding that § 1412 also applies to actions "related to a bankruptcy proceeding in another forum"). At least two district courts in the Eighth Circuit have held that § 1412 also governs the transfer of "related to" actions. *See Creekridge Capital*, 410 B.R. at 628; *Quick v. Viziqor Solutions, Inc.*, No. 4:06CV637SNL, 2007 WL 494924, at *3 (E.D. Mo. Feb. 12, 2007). Accordingly, the court shall apply § 1412 in its transfer analysis.[7]

2. Transfer analysis

Transfer under § 1412 is discretionary. *Creekridge Capital*, 410 B.R. at 629; *see also Terra Int'l, Inc. v. Miss. Chem. Corp.*, 119 F.3d 688, 697 (8th Cir. 1997) (stating that district courts possess "much discretion" in deciding whether to transfer a case under § 1404). As the party moving for transfer, New GM has the burden to show by a preponderance of the evidence that transfer is warranted. *Creekridge Capital*, 410 B.R. at 629.

a. Interest of justice

In *Creekridge Capital*, the court identified the factors most courts consider under § 1412's "interest of justice" prong:

> (1) the economical and efficient administration of the bankruptcy estate, (2) the presumption in favor of the forum where the bankruptcy case is pending, (3) judicial efficiency,

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[7] The court notes that the statutes are virtually identical and the court would transfer the instant action under either statute. *See* 15 Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice and Procedure* § 3843 at 245 (3d ed. 2007) ("[C]ourts have held that [§ 1412] requires essentially the same analysis and turns on the same issues as the transfer of civil actions under Section 1404(a).")

> (4) the ability to receive a fair trial, (5) the state's interest in having local controversies decided within its borders by those familiar with its laws, (6) the enforceability of any judgment rendered, and (7) the plaintiff's original choice of forum.

410 B.R. at 629 (citing *In re Bruno's, Inc.*, 227 B.R. 311, 324-25 nn. 45-51 (Bankr. N.D. Ala. 1998)).

The court finds that several of these factors weigh in favor of transfer. Transfer to the Bankruptcy Court will promote the economical and efficient administration of the bankruptcy because the Wind-Down Agreement and the Bankruptcy Court's orders will undoubtedly play a central role in this litigation. It stands to reason that the court responsible for these orders is better positioned to interpret and enforce them. Presumably, that is why the Bankruptcy Court retained exclusive jurisdiction to do so.

Transfer will also promote judicial efficiency because of the Bankruptcy Court's relative familiarity with the issues Plaintiffs raise in this action. The core of Plaintiffs' claims is the Wind-Down Agreement. In its Sale Order, the Bankruptcy Court specifically approved of such agreements, finding them to be "valid and binding contracts, enforceable in accordance with their terms." New GM's Exhibit B at 35. The court also agrees with New GM that "[t]he Bankruptcy Court has already advanced along a substantial 'learning curve' with respect to the Wind-Down Agreements." New GM's Brief at 19. The Bankruptcy Court's relative familiarity with the wind-down agreements and all related issues weighs in favor transfer. *Cf. Gulf States Exploration Co. v. Manville Forest Products Corp.* (*In re Manville Forest Prods. Corp.*), 896 F.2d 1384, 1391 (2d Cir. 1990) (affirming denial of transfer under § 1412, in part because "the bankruptcy court had developed a substantial 'learning curve' and . . . transferring venue would have delayed the final resolution of the bankruptcy case").

There is also "a strong presumption in favor of placing venue in the district court where the bankruptcy case is pending." *Quick*, 2007 WL 494924, at *3. Plaintiffs concede that this so-called "home court" presumption weighs in favor of transfer. *See*

Plaintiffs' Supp. Brief at 4 ("Other than favorability of the home court, there is absolutely no reason why transferring this matter is in the 'interest of justice.'"). While this factor is less important where the debtor is a non-movant in the motion to transfer venue, *Quick*, 2007 WL 494924, at *3, the court finds that it is entitled to some weight in favor of transfer.

Other factors are largely irrelevant or, if relevant, appear neutral. Neither side suggests they could not receive a fair trial in the Bankruptcy Court or that they would face difficulties in enforcing a judgment. The court's familiarity with local controversies and laws is of minimal importance here, as this case centers primarily on bankruptcy issues and § 747. Plaintiffs contend that this court's familiarity with Iowa law on issues of "dealership franchise law" make this forum more fair and efficient. Plaintiffs' Supp. Brief at 5. However, to the extent Plaintiffs' claims implicate Iowa law,[8] the Bankruptcy Court confronted similar statutes from a variety of jurisdictions in connection with the wind-down agreements and could do so in this case.

The only factor that arguably weighs against transfer is the deference ordinarily owed to Plaintiffs' choice of forum. However, this factor is entitled to less weight when "the transaction or underlying facts did not occur in the chosen forum." *Nelson v. Soo Line R.R. Co.*, 58 F. Supp. 2d 1023, 1026 (D. Minn. 1999) (considering transfer under § 1404(a)) (internal citation omitted). While some underlying facts—such as the purported transfer from Family Auto to Joel Thys—occurred in this forum, other important transactions, including the Wind-Down Agreement and the Bankruptcy Court's Sale Order originate in the Southern District of New York. Regardless, on balance, the factors

[8] Plaintiffs claim that New GM has failed to comply with Iowa Code Section 322A.12, which governs a franchiser's duty to give effect to a transfer of a franchisee's dealership. The court notes that the Bankruptcy Court found similar statutes to be "trumped" by federal bankruptcy law. *See* New GM's Exhibit A (docket no. 7-2) at 90 (holding that state laws that "impair the ability to reject, or to assume and assign" contracts "must be trumped by federal bankruptcy law").

discussed above strongly outweigh Plaintiffs' choice of forum. Accordingly, the court finds that transferring this case to the Bankruptcy Court would be in the interest of justice.

b. Convenience of the parties

Section 1412 is stated in the disjunctive. Thus, a court may transfer a case "under *either* the interest of justice rationale or the convenience of the parties rationale." *In re Dunmore Home, Inc.*, 380 B.R. 663, 670 (Bankr. S.D.N.Y. 2008) (emphasis in original); *Creekridge Capital*, 410 B.R. at 629 (noting disjunctive phrasing and stating that § 1412 transfer is appropriate upon a sufficient showing under either prong). In light of the court's conclusion that transfer serves the interest of justice, it need not address the convenience of the parties.

C. Plaintiffs' Other Arguments

Plaintiffs raise a host of other arguments against the Bankruptcy Court's jurisdiction and/or transfer of the instant action. The court addresses each of them here.

1. Adhesion contract or economic duress

Plaintiffs contend that the Wind-Down Agreement is a voidable contract of adhesion. Similarly, Plaintiffs claim the Wind-Down Agreement is voidable due to economic duress. The Bankruptcy Court considered and rejected similar arguments in the course of approving the wind-down agreements. *See* New GM's Exhibit A at 90 ("There is no basis in law or fact for holding these contractual modifications were unlawfully 'coerced.'"). The Bankruptcy Court reasoned that similar contract modifications with bankruptcy debtors have "never been regarded as unlawful coercion." *Id.* at 89. "Rather, it has been recognized as an appropriate use of the leverage that Congress has given to debtors for the benefit of all of the other creditors who are not contract counterparties, and for whom the restructuring of contractual arrangements is important to any corporate restructuring." *Id.* The court need not address the merits of these arguments, as the

Bankruptcy Court is fully capable of doing so upon transfer.[9]

2. Estoppel

Plaintiffs argue that New GM is estopped from claiming that Plaintiffs are bound by the Wind-Down Agreement. The gist of this argument is that when New GM agreed to the Arbitral Order, it "waived any rights to rely on provisions of the Wind-Down Agreement" because "[t]wo authorities in direct conflict with one another cannot logically exist—one must give way." Plaintiffs' Brief at 13. Plaintiffs cite no authority in support of this argument. Additionally, this argument presupposes that the Wind-Down Agreement and Arbitral Order are in direct conflict, an issue the Bankruptcy Court will likely confront as part of this case. Accordingly, the court need not address it here.

3. Withdrawal

Plaintiffs contend that, if the court referred this case to the Bankruptcy court, it would be mandatory for the district court to withdraw it. Withdrawal is governed by 28 U.S.C. § 157(d), which states, in part: "The district court shall, on timely motion of a party, so withdraw a proceeding if the court determines that resolution of the proceeding requires consideration of both title 11 and other laws of the United States regulating organizations or activities affecting interstate commerce." The court agrees with New GM that this issue is not ripe, as Plaintiffs have not filed a motion to withdraw, either in this court or in the Southern District of New York. The appropriate court may address this issue if and when Plaintiffs raise it.[10]

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[9] While the court notes the Wind-Down Agreement's forum selection clause, it does not rely on that provision as a basis for transferring this case. The court finds that transfer is appropriate based on the factors discussed in Section IV.B, *supra*, independent of the forum selection clause.

[10] Plaintiffs argue that withdrawal would be mandatory here because "only non-[bankruptcy] [c]ode matters are at issue" and the claim for enforcement of the Arbitral Order "dominates" this action. Plaintiffs' Brief at 12. As previously stated, Plaintiffs'

(continued…)

4. Judicial estoppel

At the Hearing, Plaintiffs argued that the doctrine of judicial estoppel may bar New GM from contesting the issue of jurisdiction. Specifically, Plaintiffs contend that New GM has taken an inconsistent position in *General Motors LLC v. Santa Monica Group, Inc., et al.*, Case No 10-CV-4784-DMG-RC (C.D. Cal. 2010) ("California Action"). *See* New GM's Complaint in California Action (docket no. 29-1). In the California Action, New GM argued that the district court had federal question jurisdiction because its claims arose under § 747. New GM also asserted diversity jurisdiction.

Plaintiffs' argument for judicial estoppel is unconvincing. In the California Action, New GM alleged that the defendant breached a settlement agreement reached during a § 747 arbitration by later refusing to dismiss the arbitration proceedings. Accordingly, New GM brought claims for a declaratory judgment, specific performance and injunctive relief. "The doctrine of judicial estoppel 'protects the integrity of the judicial process.'" *Stallings v. Hussmann Corp.*, 447 F.3d 1041, 1047 (8th Cir. 2006) (quoting *Total Petroleum, Inc. v. Davis*, 822 F.2d 734, 738 n.6 (8th Cir. 1987)). In deciding whether to apply the doctrine, a court should consider at least three factors, the first of which requires that "'a party's later position must be clearly inconsistent with its earlier position.'" *Id.* (quoting *New Hampshire v. Maine*, 532 U.S. 742, 750 (2001)). New GM's position in this case is not clearly inconsistent with its position in the California Action, which did not involve potential breaches of a wind-down agreement or the

[10] (...continued)
claims in this case are inextricably intertwined with the Wind-Down Agreement and the Bankruptcy Court's orders. Furthermore, courts take a narrow view of the mandatory withdrawal statute, holding that "[w]ithdrawal is mandated only where the issues presented require significant interpretation of federal laws." *Wittes v. Interco Inc.*, 137 B.R. 328, 329 (E.D. Mo. 1992) (internal quotation marks and citation omitted). [A] literal reading of the statute 'would eviscerate much of the work of the bankruptcy courts' . . . ." *Id.* (quoting *O'Connell v. Terranova* (*In re Adelphi Inst., Inc.*), 112 B.R. 534, 536 (S.D.N.Y. 1990)).

Bankruptcy Court's orders. Simply put, the cases are not comparable. Accordingly, the court declines to apply judicial estoppel.

5. Summary

As the foregoing explains, Plaintiffs' additional arguments lack merit and do not alter the court's conclusion with respect to the Bankruptcy Court's jurisdiction or the appropriateness of transferring this case. Accordingly, the court shall transfer the instant action to the Bankruptcy Court.

V. CONCLUSION

In light of the foregoing, it is **HEREBY ORDERED THAT** Defendant General Motors LLC's Motion to Dismiss (docket no. 12) is **GRANTED IN PART** and **DENIED IN PART** as follows:

(1) The Motion to Dismiss is **DENIED** to the extent it seeks dismissal of the instant action;

(2) The Motion to Dismiss is **GRANTED** to the extent it seeks transfer of the instant action to the United States District Court for the Southern District of New York; and

(3) This action shall be **TRANSFERRED** to the United States District Court for the Southern District of New York for reference to the Bankruptcy Court.

Defendant General Motors LLC's Motion for Leave (docket no. 34) is **DENIED AS MOOT**. Upon transfer, the Clerk of Court is **DIRECTED** to **CLOSE THIS CASE**.

IT IS SO ORDERED.

DATED this 12th day of October, 2010.

LINDA R. READE
CHIEF JUDGE, U.S. DISTRICT COURT
NORTHERN DISTRICT OF IOWA

EXHIBIT B

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

ROSE CHEVROLET, INC., HALLEEN CHEVROLET, INC., ANDY CHEVROLET CO. *doing business as* SIMS CHEVROLET, INC.,	)	Case Nos.: 1:10 CV 2140, 1:10 CV 2097, 1:10 CV 2153
Petitioners	)	
v.	)	JUDGE SOLOMON OLIVER, JR.
GENERAL MOTORS, LLC	)	
Respondent	)	ORDER

On October 8, 2010, Petitioners Rose Chevrolet, Inc., Halleen Chevrolet, Inc., and Sims Chevrolet, Inc. ("Plaintiffs"), each moved for an emergency stay and declaratory judgment through a temporary restraining order, preliminary injunction, and/or permanent injunction ("TRO"), in their respective cases because Respondent, General Motors LLC threatened to collaterally attack this Article III court's federal question and diversity jurisdiction through an Article I Bankruptcy Vourt in the Southern District of New York by 3:00 p.m. on Friday, October 8. 2010. (ECF No. 5.)[1]

The court held a teleconference with counsel for both parties to this case on October 8, 2010, during which the court heard oral argument on the TRO Motion. Since that time, the court has also reviewed the extensive briefing submitted by Petitioners and Respondent, as well as the various

1 As all the filings are the same in each case, the court will use the numbering in Case No. 1:10-cv-2097 to represent all of the filings.

exhibits attached to the filings. For the reasons stated below, the Motion for a TRO is denied.

On June 1, 2009, General Motors Corporation n/k/a Motors Liquidation Company ("Old GM"), filed a voluntary Chapter 11 petition for relief from the Bankruptcy Court. (General Motors LLC's Opposition to Emergency Motion for Stay and Declaratory Judgment Through a TRO and Injunction, at 5, ECF No. 7.) In order to preserve the value of its assets, Old GM sold most of its assets to a new company with new ownership. (*Id.*) The alternative to the sale would have been liquidation, which would have created "appalling consequences for [Old GM's] creditors, its employees, and our nation." *In re Gen. Motors Corp.*, 2009 WL 2033079, at *1 (S.D.N.Y. July 9, 2009). Following an evidentiary hearing, the Bankruptcy Court entered an order authorizing sale of assets pursuant to amended and restated master sale and purchase agreement with NGMCO, Inc., authorizing assumption and assignment of certain executory contracts and unexpired leases in connection with the sale, and granting related relief. (GM Opp. at 5.) This order is known as the 363 Sale Order. (*Id.*) The 363 Sale Order authorized and approved the Amended and Restated Master Sale and Purchase Agreement ("MSPA), by Old GM and General Motors LLC ("New GM"). (*Id.*) The United States Treasury, the Canadian government, a deed of trust, and unsecured claimants of Old GM, made up New GM's ownership. (*Id.*) The Bankruptcy Court found that the purchaser acquired the assets, "free and clear of liens, encumbrances, and other interests (other than Permitted encumbrances)...". (363 Sale Order, Ex. A, at 45-46, ECF No. 7.) The Bankruptcy Court stated that the purchaser would not have entered into the MSPA and proceeded to complete the transaction had the sale of the purchased assets not been free and clear. (*Id.* at 59.)

In order to ensure long-term viability of New GM, the Section 363 Sale allowed New GM to strengthen integral parts of its business, including New GM's dealer network. (GM Opp. at 6.)

"Old GM, government officials, the Auto Task Force, and industry commentators, determined that the dealer network needed to be reduced, realigned, and modernized to allow New GM to compete more efficiently in the marketplace." (*Id.*) Old GM applied a set of factors to identify poorly performing dealerships that would not become a part of the New GM network. (*Id.*) The dealers that were not retained were offered Wind-Down agreements, "which provided monetary payments that allowed the continuance of selling and servicing GM vehicles under certain conditions until October 31, 2010." (*Id.*) The Bankruptcy Court approved the Wind-Down Agreements and found in the 363 Sale Order that the agreements were "valid and binding contracts, enforceable in accordance with their terms." (*Id.*)

The Wind-Down agreements were used with over 2,000 dealerships throughout the United States. (TRO, at 3.) Concerned by the effects of the auto industry's bankruptcies, the House of Representatives, Committee on the Judiciary, held three days of hearings on these issues. (*Id.*) Congressional committees also conducted investigations, hearings, and gathered evidence. (*Id.*) Because of the concerns over the closures of a significant number of dealerships, the resulting unemployment that would ensue, and damage to the livelihoods of the dealership owners, Congress passed the Dealership Arbitration Act. (*Id.* at 4; GM Opp. at 9.) Section 747 of the Consolidated Appropriations Act of 2010 (Public Law 111-117 (2009)) ("Section 747"), commonly known as the Dealership Arbitration Act, provided dealerships that had been terminated pursuant to a Wind-Down Agreement the opportunity to seek reinstatement to the New GM dealer network through binding arbitration. (GM Opp. at 9.) Prior to arbitration "covered manufacturers"(those auto manufacturers which the United States Government has an ownership interest), such as New GM, were required to provide each "covered dealership" (those affected by Wind-Down Agreements), with a summary of terms and the rights given by the statute, as well as the specific criteria used to terminate the dealership, not renew the dealership contract, or to determine why the contract was not assumed or assigned by New GM. (Section 747.) All the arbitrations were to be conducted and fully completed by June 14, 2010, or July 14, 2010, at the latest, if the arbitrator determined an additional 30 days was warranted. (GM Opp. at 9.; Section 747.) Under Section 747, Congress mandated that there would be no depositions in the proceedings and discovery was limited to requests for documents specific to the dealership. (Section 747.) Congress also stated that the arbitrator could not award compensatory, punitive, or exemplary damages to any party. (*Id.*) Congress provided criteria to be used by the arbitrator in determining if the dealership would be reinstated**:**

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

(Id.) Congress also stated that the arbitrator should "balance the economic interest of the covered dealership, the economic interest of the covered manufacturer, and the economic interest of the public at large and shall decide, based on that balancing, whether or not the covered dealership should be added to the dealer network of the covered manufacturer." (*Id.*) Additionally, Congress provided the for the arbitrators to be chosen from the list of qualified arbitrators maintained by the Regional Office of the American Arbitration Association. (*Id.*) It also provided for the time frame the arbitrator had to reach a decision and what factors should be included in the written determination. (*Id.*) Further, Congress established the process by which a covered dealership

should be reinstated, continued, or added to the dealership network, should the arbitrator find in their favor. (*Id.*)

Old GM offered the Petitioners Wind-Down Agreements as an alternative to "outright rejection of the Dealer Agreement". (GM Opp. at 10.) These agreements were accepted, executed, and returned to Old GM in June of 2009. (*Id.*) Under the agreements, each Petitioner agreed to terminate its Dealership Agreement no later than October 31, 2010. (*Id.*) The Petitioners' Wind-Down Agreements were assigned to New GM under the terms of the 363 Sale. (*Id.*)

On January 13, 2010, New GM provided its required notice regarding Section 747 and the criteria it used in deciding to issue Wind-Down Agreements for the Petitioners' dealerships. (TRO at 5.) Each of the Petitioners timely filed a demand for arbitration, and their matters were assigned to Arbitrator Dale A. Crawford, a former state court judge. (*Id.*) Testimony was provided at consolidated hearings on June 8-11, 2010. (GM Opp. at 10.) Closing briefs were submitted on June 24, 2010, and the Arbitrator's award was disseminated to the parties on June 30, 2010. (TRO at 5.) Arbitrator Dale Crawford, heard the claims of four dealerships, one of which was decided against New GM, requiring that dealership to be reinstated. (*Id.*) The arbitrator provided a lengthy legal analysis which contains "multiple errors, bias, and requires the Award to be vacated", according to Petitioners. (*Id.*) On September 20, 2010, Petitioners filed Applications to Vacate with this court. (ECF No. 1.) Petitioners assert this court has federal question jurisdiction stemming from Section 747 and diversity jurisdiction because of the parties are of different states. (TRO at 6.)

New GM filed a motion on September 10, 2010 in the Bankruptcy Court in the Southern District of New York to enforce the 363 Sale Order against Rally Auto Group, Inc., as a result of its arbitration award in its favor, enabling it to enforce the terms of the 363 Sale Order and Wind

Down Agreement. (Objection of Rally Auto Group, Inc. to Proposed Orders Submitted by General Motors LLC's Motion to Enforce the 363 Sale Order and For Related Relief and the Order Granting the Oral Application of Rally for a Stay Pending Appeal of the Order Granting GM's Motion, ECF No. 9-5.; GM Opp. at 18.) Rally is a dealership that had been seeking to have the arbitration award vacated or modified in the Central District of California. (Obj. Of Rally, at 2.) Rally submitted a 32 page objection with over 130 pages of exhibits on September 23, 2010. (GM Opp. at 18.) New GM filed a reply, and a hearing was held on October 4, 2010. (*Id.*) Bankruptcy Judge Gerber issued a lengthy decision, during which he stated that he had exclusive jurisdiction over the dispute, had core subject matter jurisdiction, and that there was no right to appeal under the Dealer Arbitration Act. (*Id.* at 18-19.) He stated that because there was nothing in the Dealer Arbitration Act to modify the subject matter jurisdiction of the courts or previous orders he had issued, he had core subject matter jurisdiction over the issue. (*Id.* at 19.) Additionally, as both parties appeared to agree, the Federal Arbitration Act ("FAA") does not apply because it implicates contractual agreements to arbitration which is not the case here since arbitration was compelled by Congress. (*Id; see* 9 U.S.C. § 2.) He also stated that he did not find a right to judicial review under the Dealership Arbitration Act. He indicated that since federal statutes routinely provide for such review, its absence was instructive in this instance. (*Id.*) He concluded that Congress chose not to create a right to judicial review as a means of avoiding the excessive costs and delays of litigation. (*Id.*) He also disagreed with Rally's conclusion that New GM conceded its right to judicial review by its willingness to proceed under the American Arbitration Association's ("AAA") commercial arbitration rules, since New GM expressly stated it was not waiving any objections it may have to the arbitration or the AAA's rules, by participating in the arbitration. (*Id.* at 20.) Therefore, Bankruptcy Judge Gerber found, any issues relating to the 363 Sale Order and Wind Down Agreements, such as the arbitrations stemming from the Dealership Arbitration Act, should be brought in front of his court, and no other court. *(Id.*) Rally requested and was granted a stay of the order in order to appeal to the district court. (*Id.*) The parties have not provided any further information regarding this stay and appeal.

Based on the Rally decision, New GM sent Petitioners a letter on October 6, 2010, requesting that they dismiss their actions in this court in order to comply with the Bankruptcy Court's 363 Sale Order. (Motion of General Motors LLC to Enforce 363 Sale Order and Approved Deferred Termination Agreements Against Rose Chevrolet, Inc., Halleen Chevrolet, Inc., Andy Chevrolet Inc., and Leson Chevrolet Company, Inc., at 2, ECF No. 9-1.) New GM threatened to collaterally attack this court's subject matter jurisdiction in the Bankruptcy Court by Friday, October 8, 2010 at 3:00 p.m, if these actions were not dismissed by Petitioners before that time. (TRO at 6.) The Petitioners' actions herein were not withdrawn and New GM filed their motion in the Bankruptcy Court in the Southern District of New York on October 8, 2010. (Mot. to Enforce 363 Sale Order and Approved Deferred Termination Agreements.) Petitioners were given until Tuesday, October 19, 2010 to make any objections to the motion. The hearing on the motion has been set for October 26, 2010. Petitioners filed a renewed motion for emergency relief with this court on October 18, 2010, requesting an order as soon as possible because of the imminent Tuesday, October 19, 2010 briefing deadline. (ECF No. 16.) Petitioners are requesting that this court enjoin the Bankruptcy Court from proceeding with the matters which are the subject of their actions before this court. They assert that if such relief is not granted they will suffer irreparable harm. For the foregoing reasons, this request is hereby denied.

The court has grave doubts as to its jurisdiction to hear the current actions in front of it. The Petitioners assert the Federal Arbitration Act ("FAA") and the Dealer Arbitration Act ("DAA") as bases of jurisdiction for the court. The FAA encompasses agreements among parties to arbitrate. This arbitration was not a result of an agreement among parties, rather it was compelled by Congress. Therefore the FAA is likely not a jurisdictional basis for this court to confer subject matter jurisdiction. Similarly, the DAA is likely not a basis either, as it fails to authorize or suggest a right to judicial review, but instead appears to indicate a desire by Congress to avoid the courts, while providing a limited remedy to covered dealerships. Petitioners alternatively claim an implied right to judicial review based on New GM's consent to arbitrate. This argument too is not well taken, as New GM provided in its Answering Statement it was not waiving any objections to the proceedings or the AAA's commercial arbitration rules.

Given the truncated time frame and the fact that the court has not been provided with authority by the petitioners which support the conclusion that this court may/should enjoin the parallel proceeding in the Bankruptcy Court, the court does not find that it has such authority at this time. While the court has not ruled out the possibility that it may have concurrent jurisdiction, no authority has been provided to this court to support petitioners' claims that this court has exclusive jurisdiction. Additionally, it appears that the challenges to the Wind-Down Agreements and the decisions of the arbitrators under the Dealer Arbitration Act have some relationship to the Bankruptcy Court's orders. Thus, it also appears that if the court were to assert exclusive jurisdiction or seek to prohibit litigation in Bankruptcy Court, this will affect the Wind-Down Agreements and the October 31, 2010 deadlines, part of the 363 Sale Order. Therefore, the Petitioners' Motion for a Temporary Restraining Order (ECF No. 5) and Motion for Temporary

Restraining Order/Renewed/and Injunction with New Information (ECF No. 16) are denied because Petitioners have not shown they are likely to succeed on the merits. Further, they do have an avenue of review of the orders of the Bankruptcy Court as they may do so in the United States District Court for the Southern District of New York. Even if the court were to have concurrent jurisdiction, there is no showing that the court would have authority to enjoin the Bankruptcy Court's proceedings. This is without regard to any suggestion that the Bankruptcy Court does or does not have the power to enjoin proceedings in this court.

IT IS SO ORDERED.

/S/ SOLOMON OLIVER, JR.
CHIEF JUDGE
UNITED STATES DISTRICT COURT

October 18, 2010

EXHIBIT C

ARBITRATION OF DISPUTE BETWEEN

LESON CHEVROLET COMPANY, INC.

&

GENERAL MOTORS, LLC

BEFORE THE AMERICAN ARBITRATION ASSOCIATION

CASE # 69 532 00046 10 JMLE
A.J. KROUSE, III, ARBITRATOR
AAA New Orleans Regional Office

LESON CHEVROLET COMPANY, INC'S PREHEARING BRIEF

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Redacted into its dealership facilities. *See*, Leson's Arbitration Exhibits 9A and 9B, *in globo*. Rather than borrow the money to make these improvements, Leson took its cash and paid for these renovations. But, had Leson decided to borrow these funds and secured the loan with this cash, it would have been much better off under GM's DPS formula. That is, GM would have allowed Leson to deduct the Redacted from "Current Liabilities." This would essentially add Redacted to the Actual Capital calculation under the DPS formula. Presuming this debt were carried in 2008, which is a reasonable assumption, Leson's capital calculation would total approximately Redacted thus resulting in a DPS capital calculation in excess of 10.[18]

Finally, Leson has substantial equity its property, approximately Redacted and upon reinstatement intends on borrowing between Redacted against this asset to provide substantial additional working capital. Upon reinstatement, Leson foresees no obstacles in being able to meet the required capital needs and maintain working capital at or above GM's standard.

5. The Demographic and Geographic Characteristics of the Covered Dealership's Market Territory

Leson Chevrolet is the only Chevrolet dealer on the Westbank of the Mississippi River in Jefferson Parish, which is the most populated parish in Louisiana. Leson is located on the corner of Manhattan Blvd. and the Westbank Expressway, which is one of the busiest intersections in the Greater New Orleans area. Leson's prominent geographic location makes it highly visible, convenient, and accessible to those who live and work on the Westbank. Leson's location makes it an important part of the Westbank Expressway business corridor, which serves communities such as Gretna, Algiers, Terrytown, Harvey and Marrero. Major infrastructure improvements

[18] This figure is derived from dividing Redacted (the lower range for the corrected Capital Standard) by the Actual Capital of Redacted and then multiplying by 100 to derive the capital ratio of 112.6. This result would then be multiplied by the .1 DPS factor to yield 11.26. Thus, the resultant 2008 DPS calculation, including the recalculated Capital and Profit components, would now total 82.66.