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Federal Trade Commission,  
600 Pennsylvania Avenue, NW,  
Washington, DC 20580.

To Whom it May Concern:

My name is Peter McNamara. For over 8 years, I have served as the President of the NH Automobile Dealers Association. For 10 years prior to that time, I served as the legal counsel to the Illinois Auto Dealers Association. During these periods, I have represented the interests of NH and Illinois' franchised new motor vehicle dealers before the state legislature, local governments, and the public at large. The franchised dealers sell cars, trucks, snowmobiles, motorcycles, Off-highway recreational vehicles, on road recreational vehicles, power equipment, farm equipment and construction equipment.

In NH, I also represent the interests of hundreds of independent, or non-franchised, motor vehicle businesses that sell and/or repair vehicles. In these roles, I have gained a comprehensive knowledge about how the motor vehicle industry operates in my state.

I write to publically state my frustration at what I heard presented at the January 19, 2016 FTC workshop. This workshop focused on automobile distribution and the franchise laws that my state and 49 other states have created to regulate certain aspects of the relationship between manufacturers and independent franchised motor vehicle dealers. Sadly, the workshop showcased several speakers invited by the FTC who had clearly made up their minds about the continued need for laws that have helped serve the public interest for many years. The hearing was not a thoughtful, fact based examination of an extremely important industry.

Though there were a few people stating the dealers' viewpoints, it was clear that the other speakers chosen by the FTC were of a single mindset: opposed to the current system of vehicle distribution in the United States and the franchise laws that regulate it. Much of the bilge set forth in the workshop was based on the assumption that economic relationship between manufacturers and dealers is more balanced today and that dealers have grown so large that such laws aren't needed any longer to address the disparity in bargaining power between manufacturers and dealers that led to the enactment of these laws. I was shocked that these people didn't understand or appreciate exactly how the business actually operates. Their comments wronged the franchised dealers in my state, their employees and, most important, to the public at large.

The public policy grounds which supported the enactment of these laws originally (the need for consumer protection, the disparity in bargaining power between manufacturers and

dealers, and the value of community-based businesses) are as valid today as when these laws were first enacted.

For example, during the 2013 amendments to NH RSA 357-C, the House floor debates revealed these statements: “This is not a free market that ‘dealer-owners’ operate in . . . dealer-manufacturer relationship is broken: contracts and terms are non-negotiable, programs are dictated and costs are shifted onto dealers and ultimately consumers.” That the relationships are “one-sided, non-negotiable contracts and an autocratic relationship.” “As there was no proof of return on investment of 5 and 10 year [facility] upgrades . . . [t]he committee was concerned that consumers would pay more for cars if manufacturers continued to demand short turnaround renovations from some of their dealers.”

Most importantly, these laws benefit consumers. As noted above, the NH law limits factory dictated facility upgrades to once every 15 years. With the average cost of upgrades at \$3.6 million, the average loan over 20 years and the depreciation write off at 39 years, the NH legislature limited the time frame in which a manufacturer could demand massive upgrades. The legislature recognized that any costs would ultimately be borne by the consumer. There have been several instances in NH where dealers were forced to complete an upgrade that cost between \$500,000 to \$5,000,000 when a similarly priced upgrade was just completed within 5 to 7 years. Fascia, tile, walls, chimneys, carpeting and concrete that were just put in place just 5 to seven years previously had to be taken out because of manufacturer whims.

Since September of 2013, NH law has provided that a dealer can use locally sourced material and equipment to renovate her facility rather than being forced to use the single source supplier demanded by the manufacturer. In 2013, the legislature heard repeated instances of dealers forced to purchase fascia, tile, bricks, carpeting, tools, lifts, and signs from a single supplier and at a fixed, non-negotiable price. When the dealer presented identical or nearly identical material purchased by another vendor at a lower price, the manufacturer rejected such substitutes out-of-hand. Again, these additional costs are ultimately borne by the consumer.

NH Franchise laws also benefit consumers by allowing a dealer to sell multiple lines of vehicles or equipment. This increases the level of competition and reduces a dealer’s overhead by allowing her to carry a more diverse inventory. Even today, manufacturers still try to force dealers to drop competing vehicle brands. The manufacturers call this “purity”. They only want their vehicles or equipment being sold by that dealer. This, of course, would increase the overhead of a dealer and force those additional costs onto the consumer.

The “purity” push mentioned above also extends to certain manufacturers trying to eliminate smaller dealers in order to create a limited number of centralized mega dealers. This purity drive leads to increased costs on consumers since there is less competition for that vehicle line in a given geographical area. It also leads to rural customers becoming even more isolated. Manufacturers want less rurally located dealers and more metropolitan located

dealers. Unfortunately, the state of NH has 235 towns with only a single municipality that is greater than 100,000 people.

Fortunately, NH law, like most other states, only allows terminations where there is “good cause” shown. But for this protection, a manufacturer would terminate dealers even though such dealers are profitable, are meeting consumer sales and services demands, and are meeting reasonable sales targets. But for these laws, most rural dealers in NH would likely have been terminated already causing them to lose their investment and the consumer to be without a convenient source to effectively service their existing vehicle and purchase new ones.

What’s more, these laws drive efficiency by ensuring that a stable and level playing field exists in auto retailing. The speakers at the January 19 workshop who said that there is now a fairly equal balance of power between dealers and manufacturers were simply wrong. To the contrary, manufacturers continue to have the clear upper hand in this relationship. Often, the uninitiated lawmaker or citizen is under the belief that if the dealer doesn’t like what the manufacturer is doing, the dealer should simply drop that line of vehicles and pick up another line. Unfortunately, that is next to impossible.

Similarly, some people comment that an existing dealer should simply leave the business if they don’t like a new contract being offered or new demands put upon them by the manufacturer. Unfortunately, at this point the dealer has already invested millions into the dealership, has often signed a personal guarantee, and the livelihood of dozens of employees are at stake.

The following examples should help educate the FTC about the continued need for these laws.

In NH, there are approximately 200 franchised dealers. The average number of new products sold is 533; however, this number is misleading as the median sized dealer sells only 356 vehicles or less than 30 per month. Very few dealers (12%) sell over 1,000 vehicles a month. Simply put, the argument that a dealer selling 29 cars a month or less can stand up to a multi-national, multi-billion dollar conglomerate does not pass the red-faced test.

NH dealers have tried repeatedly to negotiate the contracts with their manufacturers but I can only think of one circumstance in which the manufacturer changed the standard contract. When dealers balk at the demands of the manufacturer, they are frequently threatened with the loss of future inventory. When seeking more popular types of new vehicles, the manufacturer will frequently force the dealer to take on much less popular product.

Another example is the manufacturer that withheld financial rewards from a NH luxury line dealer because the dealer was not “sales effective”. Put another way, the manufacturer thought the dealer was doing a poor job because a large percentage of luxury cars registered in

the dealer's territory were not sold by the dealer. As it turns out, most of these registrations were for phantom cars. As part of an illegal scheme, exporters would buy the luxury cars from other states, find straw-men to register the cars in NH, but the cars would already be on their way to foreign countries like Russia and China. The dealer repeatedly provided information to the manufacturer showing the data was very inaccurate but the financial incentives were still withheld. In 2013, the NH franchise law was amended to limit this from happening again.

Another example of weak bargaining power is a manufacturer forcing a dealer to sell the manufacturer's extended service contracts or other similar products. Despite repeated requests by dealers to drop this demand and allow the dealer to sell other products, the manufacturer refused.

Admittedly, the dealer could sue under the state's franchise laws for some of these violations. However, the cost alone is prohibitive especially considering that a manufacturer has much deeper pockets. The dealer must also weigh further upsetting their relationship with the manufacturer. The dealer may indeed win a battle but will be so starved of inventory that the victory will be meaningless. I have often advised dealers that they have a strong legal case to pursue only to see their resolve collapse under undue pressure by the manufacturer.

After publically helping the NHADA pursue legislative changes, one dealer was threatened with termination. Later he was terminated but the termination was later withdrawn after he agreed to build an exclusive standalone facility for his franchise. Then, a few years later, the manufacturer allowed the dealer to abandon the stand alone facility and move the franchise line make back to the prior location.

The FTC would be enlightened by reading the book, "Arrogance and Accords." This details a massive criminal scheme that occurred in the ranks of one manufacturer. The story began with a NH dealer being awarded a new franchise but he was unable to obtain vehicles for the grand opening unless he agreed to bribe the manufacturer representatives. The dealer refused to do so and instead had to buy vehicles from other same line make dealers. After continuing to refuse to pay the demanded bribes and thus being starved of inventory, the dealer moved the franchise into the same building in which he sold another brand of vehicles. The manufacturer attempted to terminate the dealer but fortunately the dealer was able to protest the termination under NH law.

According to the book, the manufacturer attempted to "drag out the proceedings until the plaintiff went broke. It had worked before." Fortunately the dealer survived the termination attempt, due in no small part, to the state franchise laws. But that isn't the end of the story -- according to Automotive News, more than 2 dozen indictments resulted in jail sentences and spawned a class-action dealer lawsuit which cost the manufacturer \$390 million to settle.

In another example of the imbalance of power, a manufacturer forced a dealer to buy back a retail installment contract after alleging that a strawman purchase (mother bought and financed a car but the son was driving it). Even the manufacturer's call logs noted that the son only began the car payments after the mother took ill. The manufacturer ignored the dealer's pleas and protest, ignored the call log, and claimed the dealer violated the captive finance agreement even though the dealer had no knowledge of the alleged straw purchase. As the dealer had unequal bargaining power, the franchise law had to be amended to ensure similar actions are prevented from happening again.

Even today, one manufacturer is providing dealer cash incentives to all of its dealers in the states that surround NH but not to its dealers that reside in NH. The manufacturer claims that NH's franchise laws are costing them additional money but openly admitted to the state legislature and others that they've done no cost analysis. No other manufacturer has reacted in this way to their NH dealers. Despite repeated meetings and requests by dealers and others, the manufacturer has blocked these incentives for 22 months.

Finally, this imbalance in bargaining power allows manufacturers to act opportunistically toward their dealers. Manufacturers routinely take advantage of their dealers, seeking to transfer costs to them and punishing those who won't comply. And, as you will see, these instances are not from the distant past. Manufacturer overreaches continue to occur right up to today. Here are just some examples that I have personally witnessed.

- When dealer is seeking something from the manufacturer (changing a successor, relocating, seeking more inventory, etc), the manufacturer had demanded certain things in exchange: like purchasing of new signs, purchasing of inventory that is less desirable, and relocating the store)
- When a dealer seeks to relocate his store, the manufacturer demands the dealer sign an exclusivity clause (meaning no other line makes can be sold on the same property)
- Forcing a dealer to spend thousands to millions of dollars just to obtain a new vehicle model
- Forcing a dealer into pre-dispute binding arbitration or into waiving jury trials
- During a manufacturer bankruptcy, the closing a 12 dealers, many of whom were profitable or who met the sales and service requirements of the manufacturers
- Threats of termination when a dealer refuses to take on additional inventory
- Drop-shipping un-asked for tools and equipment
- Demanding that dealers paint all the tool boxes a single color
- Demanding that the service bays be used exclusively for one line make of vehicle
- Refusing to pay for warranty repairs which fixed the problem but were done by auto technicians that didn't meet every single continued training requirement by the manufacturer even in instances where the training was multiple states away and had very limited seats
- Incentive programs that favor larger dealers over smaller dealers

- Withholding incentive money when
  - there are weeds in the parking lot
  - there is a dent in the siding of the building
  - the door knobs are the wrong color
- forcing dealers to:
  - replace undamaged tile with the same or similar color tile but which is slightly smaller
  - put in a reception desk in the middle of the show room when there is an existing reception desk where the traffic flow occurs
  - Replacing recently installed energy efficient lights with very inefficient lights demanded by the manufacturer
  - Replacing energy efficient slightly tinted windows with less efficient window.
  - Replacing the gabled roof with a flat roof
  - Replacing the chimney brick with a different type of chimney brick.
  - Replacing interior curved wall with a flat wall to meet new image program
  - Replacing cladding on exterior pillars for a different color cladding to meet the new image design
  - Buy from a single source vendor despite finding the same products or tools from a different vendor and a cheaper price
  - Replace solid furniture with particle board furniture that met the new image program
  - Hang only certain pictures that met the image program

Because of these market realities, state legislators in all 50 states have voted over and over to ensure that the system of retailing vehicles remains consumer friendly and fair.

Repeatedly, courts have upheld these laws and, in doing so, cited the legislative purpose of protecting consumer interests as well as the retailer interest. In 2015, the NH Supreme court held that the purpose of the 2013 changes to the law “. . . to protect equipment dealers and consumers from perceived abusive and oppressive acts by manufacturers — is unquestionably a significant and legitimate public purpose.” The court also noted that “Numerous federal and state courts, addressing constitutional challenges to laws similar to RSA chapter 357-C, have concluded that protecting dealers and consumers from the oppressive acts of manufacturers constitutes a legitimate public purpose.”

The FTC needs to stop gazing at clouds of theory and fix its vision on what is happening on the ground before drawing conclusions about this important market. Lastly, the FTC also needs to respect the fundamental role the states have in determining the regulation these markets need.

Thank you for your consideration.

Sincerely,

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