

**AMERICAN ARBITRATION ASSOCIATION  
AUTOMOBILE INDUSTRY ARBITRATION**

**In the Matter of the Arbitration Between**

Fury Dodge, LLC

and

AAA Case No. 65-532 000047 10

Chrysler Group, LLC

**DETERMINATION**

This binding arbitration proceeding between the above parties was properly commenced and has been conducted in accordance with Section 747 of the Consolidated Appropriations Act of 2010 ("Act"), pursuant to which I have been designated as the arbitrator. Fury Dodge, LLC ("Fury"), located on Highway 5 in Lake Elmo, Minnesota, is and has been a "Covered Dealership" under the Act, and Chrysler Group, LLC ("Chrysler") is and has been a "Covered Manufacturer" under the Act.

On June 9, 10 and 11, 2010, the arbitration hearing was conducted where sworn testimony of seven witnesses (both fact and expert) and voluminous documents were received. Representing Fury was J. Michael Dady and Jeffrey F. Haff, and representing Chrysler was Tracy J. Van Steenburgh and Scott A. Smith, being assisted by Natalie McKenney. In attendance at some or all of the hearing, were James Leonard, Thomas Leonard and William DeAgazio of Fury, Ted Stockton of the Fontana Group, Joseph Froelich of Berd Group, Shavan Giffen, Cheryl Ansel and Michael Curmi of Chrysler, and Josh Pope of Urban Science. This is the Written Determination made pursuant to the Act.<sup>1</sup>

**Determination:** On the evidence received at the hearing, and the files and proceedings herein, the undersigned has determined that Fury be added to the dealer network of Chrysler, with Sales and Service Agreements renewed as provided by the Act.

**The Seven Statutory Factors**

The Act provides that my determination as to whether Fury should be added to Chrysler's dealer network should result from a balancing of the economic interests of Fury, Chrysler and the public at large. The Act provides that in respect to such balancing, the factors (in somewhat different order) to be considered shall include:

---

<sup>1</sup> The earliest that the arbitration hearing could be held was June 9<sup>th</sup>, 2010, and the parties agreed to an expedited briefing schedule, with post-hearing briefs submitted on June 16, 2010. Seven business days following this submission is June 25, 2010, the date this Written Determination has been provided to the AAA and to the parties. Good cause exists for any extension necessary to accommodate these dates.

1. Chrysler's overall business plan;
2. Fury's profitability during 2006, 2007, 2008 and 2009;
3. Fury's current economic viability;
4. Fury's satisfaction of the performance objectives of its franchise agreement;
5. The demographic and geographical characteristics of Fury's market territory;
6. Fury's performance in relation to the criteria used by Chrysler to terminate Fury;
7. The length of Fury's experience.

Each of these factors is discussed below.

### **1. Factor 1: Chrysler's Overall Business Plan**

While the Act is not particularly helpful in explaining what this factor is and how it is to be assessed, both parties have focused on those plans arising from Chrysler's determination that material changes in its dealer network are necessary to its success and/or viability. While these plans were (in some manner) developed over the last twenty years (2000, Alpha and Genesis), the prominent plan at issue here is the 2005 so-called Genesis Plan which included the reduction of Chrysler's dealer network to retain (1) quality dealers having (2) consolidated brands (Chrysler, Dodge and Jeep) at (3) prime locations with (4) competitive facilities leaving (5) fewer dealers with higher throughput. See R9 at 1053.

At the hearing, the parties devoted attention to claimed deficits or merits of the Genesis Plan. While much of this debate does not appear particularly germane to the considerations required by the Act, appropriate review of the Plan and how the Fury rejection was or was not compatible with the plan, is suggested by section 747.

I have concluded that the rationale for the Plan and its two prominent objectives, namely (i) to consolidate Chrysler brands (Chrysler, Dodge and Jeep) "under one roof," and (ii) to reduce the number of dealers--is well-founded. The rationale has been essentially that:

- 1, The dealer network—largely designed in the 50s and 60s, was to have a dealer in most every town without concern about consolidating brands "under one roof," resulting in the large number of dealers in place when Genesis was adopted in 2005.
2. The existing network was thus established during times when the market and marketing needs were materially different than those existing during the last 20 years.
3. The more rural nature of the Nation's populations has given

way to material migrations into metropolitan areas and suburbs, while many smaller rural towns have seen their populations and commercial activity decline.

4. The Nation's means of travel has been materially altered as the interstate highway system has come into place in all states, with large commercial activity attracting travelers to shopping areas and other venues along or adjacent to these convenient transportation arteries.

5. The dominance of the big three domestic automobile makers has given way to stiff competition from imports which have not had the legacy costs of American auto makers and which have been able to tailor their distribution system to fit the changed times. Reductions to the domestic dealer networks have been difficult due to state laws protecting dealers from terminations.

Thus, the evidence supported the underlying rationale of Genesis, namely that the Nation's automobile industry and its large number of dealers with fragmented brand locations and other legacy costs, has had to compete with import dealer networks with (i) far fewer dealers and (ii) all brands "under one roof," which networks have enabled more efficient and less costly new car distribution channeling and the spreading of dealer/distribution costs (particularly fixed costs) over many more units sold, to the end of greater profitability and enhanced capacities to better fund customer services, promotion and advertising, more favorable operational and auto financing, better paid and higher quality employees, greater reinvestment in better and/or strategically located facilities, etc.

That the domestic automakers have come to have excess dealers at non-vibrant locations operating at competitively disadvantageous profit levels is clear from the evidence. There is little dispute that the throughput for domestic dealers is appreciably lower than for their import competitors, a large number of domestic dealers are isolated in rural towns on roads with modest traffic counts and away from the vibrant auto-buying "rows" and the like.<sup>2</sup> In short, I concluded and found that the essential rationale behind,

---

<sup>2</sup> Throughput may not be the be-all-to-end-all. Plan proponents claim that greater "throughput" resulting from a reduced number of dealers will make for more profitable dealers capable of enhanced services, facilities and the like. True, of course—but this somewhat obvious notion theoretically can support the elimination of any dealer—as all else being equal (at least to some degree), fewer dealers will result in greater throughput (and likely profitability) for those remaining. But in balancing the economic interests of all interested parties, there are other related issues: (i) At what point will the elimination of dealers result in poor market coverage and consequent inconvenience to consumers; (ii) At what point will the elimination of dealers result in consumer migration to other brands which are providing better and more convenient coverage for shopping, service, etc; and (iii) At what point will the elimination of dealers so eliminate competition (intra or inter brand) that the benefits from a smaller network are more than offset by the harm to consumers associated with non-competitive pricing.

and the prominent objectives of, the Genesis Plan to rationalize the dealer network were sound and based on good business judgment.<sup>3</sup>

Of course, one appreciates that all business plans are designed to advance the interests of the business—and accordingly may not be compatible with the economic interests of others. And it was clear from the evidence that Chrysler has devoted much effort in “making its case” to support the once-in-a-lifetime opportunity to eliminate a large number of dealers through the 2009 bankruptcy proceedings—an opportunity which does not appear to have been attendant any particularized scrutiny to determine whether any particular dealer elimination was compatible with the Plan. Thus, my role cannot be satisfied by an assumption that a favorable finding as to the essential rationale and objectives of Genesis, is comparable with a finding that the elimination of Fury was either in furtherance of the Plan, or in the economic interest of the parties whose interests I am to balance.<sup>4</sup>

Turning now to the degree to which the elimination of Fury was compatible with the Genesis Plan. While much of this assessment will await the below discussion of factor #6 above, a couple of observations should be made here, as I have found that the elimination of Fury was in part consistent with and in part inconsistent with the Genesis Plan. First, the part of the plan to have “quality dealers” does not seem necessarily furthered by the elimination of Fury. The Leonard brothers—who are essentially the “dealer” here, have been long time operators of the highest sales Chrysler dealership in Minnesota, have never received as to either of their dealerships a “jeopardy” letter, have been approved for the acquisition of the Lake Elmo dealership and the acquisition of the Trail Dodge line in South St. Paul, have been continual Five Star dealers, have scored high marks on customer service, etc. Chrysler has not claimed and there is no evidence that Chrysler concluded that the Leonards were not “quality” dealers.

Second, the consolidation-of-brands part of the Plan is compatible with the elimination of dealers (such as Fury) not having Chrysler, Dodge and Jeep. The legislative history, however, expressed concern about unwarranted consideration of this issue. Moreover, it is noteworthy that in respect to the market area involved, the Jeep dealer in Stillwater was also eliminated, and that the next nearest dealerships are two

---

<sup>3</sup> Both sides attempted to support their criticisms or promotions of Genesis with “proof is in the pudding” correlation data. For instance, Fury provided evidence that during the years in which the Genesis Plan has been implemented and the number of dealerships has declined—particularly in 2009 when the bankruptcy enabled a material elimination of dealerships, the market share of Chrysler has declined. While this fact is apparently true, it does not follow that the reduction of dealerships has caused the loss of market share—given the many other factors which could have caused share loss unrelated to the elimination of dealers. Chrysler’s evidence has not been free of this kind of analysis, as it relates long term market share loss to competition from streamlined import dealer networks. Of course, in both of these correlations, it may well be that consumer preferences for import automobiles is associated with their greater appeal or quality and perhaps other factors—with little relationship to dealership counts.

<sup>4</sup> In some ways an analysis of the compatibility between the criteria of Genesis and the Fury reject decision, may be make work, as there is evidence that the reject determination was essentially a view (perhaps of Urban Science) that Fury was an “excess point,” with little meaningful attention paid to the other Genesis objectives.

non-consolidated dealers in White Bear.<sup>5</sup> It is also noteworthy in respect to brand presence, the Plan and the objectives of the dealer rationalization effort was critical of dealers with competing or “dual” brands--Fury had no competing brands. Thus, while the elimination of Fury was consistent with the “consolidation” part of the Plan, there are mixed issues.

As to location, for reasons discussed below, the elimination of Fury was compatible with the prime-location factor of Genesis, although this issue is not totally one-sided as discussed below.

In respect to the facilities factor, the elimination of Fury was not compatible with the Plan, as Fury’s relatively new facility was scored high by Chrysler. And if one eliminates the “location” portion of the facilities scoring (as the location deficit already has been discussed above), Fury would have scored even higher.<sup>6</sup> The Genesis Plan pictures tell us something about what types of facilities were regarded favorably and unfavorably—Fury’s 1998 amply-sized facility being in the former category. Compare pp 1059 and 1060 at Ex. R-9.

Finally, the goal of having fewer dealers and achieving higher throughputs is compatible with the elimination of Fury—or of any other dealer. But as discussed below, Fury’s throughput during the years in question has been better than most dealers. (The evidence was that 50% of the Chrysler dealers contributed only 10% of Chrysler unit sales, showing that Fury was typically within the top half of dealers as measured by throughput.) And it is noteworthy that Chrysler, in the last two full years of “scoring” dealers prior to the rejection determinations, put Fury in the top 29% to 47% in respect to all scorecard considerations. See Ex. R-29.

In light of the above, the Overall Business Plan, while regarded as within the business judgment of Chrysler by the Bankruptcy Court,<sup>7</sup> and as good business judgment by the undersigned, is not in many respects compatible with the elimination of Fury. While I find that Lake Elmo was not a “prime” location and that Fury did not have full consolidation of brands, I also find that Fury had good facilities, did not have dual or competitive brands, scored high in customer service, and on the basis of all the overall criteria used by Chrysler to “score” dealers was well within the top half of all dealers. In

---

<sup>5</sup> See Ex. R-6 at paragraphs 10 and 19, where Chrysler—in respect to its Plan and objectives in dealer rationalization, is critical of a network in which a “Chrysler Jeep dealer competes with a nearby Dodge dealer,” the precise situation left in place a few miles from the Lake Elmo point where Barnett Chrysler Jeep competes with very nearby White Bear Dodge.

<sup>6</sup> While uncertain of the source of this information, Mr. Stockton provided evidence that Fury’s facilities scores were among the best.

<sup>7</sup> The Bankruptcy Court discussed whether it should measure the subject rejections on a “heightened” or “equity balancing” standard, concluded that it would not do so and measured the rejections on a standard which largely defers to the business judgment of Chrysler. Accordingly, the Bankruptcy Court judgment is by no means preclusive to the issues here, and provides little useful guidance as to the factors and balancing required under the Act.

light of the evidence, I was left to wonder whether Fury would have been eliminated under the Genesis Plan without the on-time wholesale reduction opportunity afforded by the bankruptcy proceeding. In short, this “business plan” factor, regardless of the wisdom of the Plan, slightly favors Fury, although the factor neither materially supports nor materially fails to support the rejection.

**2. Factors 2 and 3: Fury’s Profitability from 2006 to 2009, and Fury’s Current Viability:** These two factors have been included in one discussion, as they are inextricably related—it is difficult to discuss one without the other.<sup>8</sup> As to profitability, I have found that the factor weighs in favor of Fury, but not to the extent Fury would suggest.<sup>9</sup> My finding is attendant some agreement with Chrysler’s observation that this factor is something of a “mixed bag.” As to viability, I have found the factor weighs in favor of Fury.

First, one cannot discount Chrysler’s own recognition of Fury’s consistent profitability—particularly in connection with Chrysler’s critical 2009 rejection determinations about which Chrysler concluded that Fury was profitable and was financially “healthy and growing.” While one can, in a litigation environment, re-analyze any financial statement to contend that profitability should be enhanced or discounted,<sup>10</sup> any objective observer should be concerned if Chrysler made these significant “keep or reject” decisions without then doing whatever careful analysis of profitability Chrysler felt was warranted. If careful analysis is important enough to do in litigating against its dealers, seemingly it would have been important in determining whether or not to terminate such dealers in the first instance. In short, I had to assume that in 2009, Chrysler either performed a careful analysis and determined (as Chrysler recorded) that Fury was profitable, or Chrysler did not perform such an analysis in its belief that the “Net Earnings” lines (lines 71 and 79) on Chrysler’s form by which Fury provided its “Dealer Financial Statement” was the appropriate measure.<sup>11</sup>

---

<sup>8</sup> Over time, viability is dependent upon profitability, as long term debt and equity capital will not continue to fund unprofitable operations. And profitability and viability presumably have much to do with the ability of the dealer to improve facilities, service customers, survive down times, avoid a failed Chrysler branded dealership, market and advertise to improve sales, hire top personnel, etc—all of which seemingly are to the advantage of Chrysler as well as the dealer.

<sup>9</sup> Profitability appears to be an important factor, as the legislative history notes Congressional concern about profitable dealers being eliminated.

<sup>10</sup> One has to imagine that there are arbitrations in which the dealer reported a loss but wanted to offer expert testimony as to host of reasons why the loss should be turned into a profit—excessive non-cash depreciation charges needing normalization, excessive related party rents for owner owned land and buildings needing normalization, excessive owner compensation needing normalization, etc. While perhaps this kind of analysis could be performed here as well, such as in respect to the high “rent” expense which is being paid to another Leonard entity to service the debt associated with what may well have been an excessive (almost \$4 million) purchase price for this single purpose building in Lake Elmo (a fact noted by Chrysler). As in all litigation concerning the profitability and value of a business, these forensic efforts often yield widely varying numbers on both sides of the reported financials.

<sup>11</sup> One notes Chrysler’s after-the-fact argument that the “13 month” financial report (one including year-end tax and other accounting adjustments) should be given weight here, apparently ignoring the fact

Another important factor which is not the subject of expert debate, is the comparative between Fury and other Chrysler dealers, particularly in respect to the very difficult circumstances facing the industry in 2008 and 2009.<sup>12</sup> During these extraordinary times, Fury was profitable while so many dealers were not, a fact not only bearing on this dealership's ability to operate profitably, but this dealership's viability through difficult times. Chrysler, in these proceedings, has noted the extraordinary difficulty during this period, referring to the "economic tsunami of 2008-2009. . . vehicle sales [in Minneapolis St Paul locality falling from] 15,600 in 2005 to 5,500 in 2009 [and] escalating gas prices to the competitive disadvantage of Old Chrysler products [without smaller gas efficient products]." And in the bankruptcy proceedings, Chrysler swore that in the difficult 2008-2009 time frame, 397 dealers closed or filed for bankruptcy. If Chrysler and all observers generally recognized such extreme and extraordinary circumstances during 2008-2009, the fact that so many of its dealers lost money or failed to even survive says something about Fury which survived and was profitable.<sup>13</sup>

Finally, the evidence was that Chrysler's reject determination was not based on Fury's performance, but Chrysler's determination that a dealer in Lake Elmo was not necessary—a so-called "excess point."

In light of the above, the forensic inroads now being made on Fury's profitability, which were not a part of the rejection decision, warrant some degree of skepticism. Nonetheless, I have tried to assess these inroads—and agree that Fury's profitability may be something of a "mixed bag." Chrysler claims that Fury's profitability was heavily underpinned by its used car—rather than new car—operations. This analysis resulted from a selection of the segmented numbers from Fury's financials. These statements show strong new and used car sales during each of 2006 and 2007 (300+ new v. apx 400 used), and a much less robust new car comparison in 2008 and (annualized) 2009 (apx 180 new v. 500+ used). And the gross profit contribution shows that used car sales contributed greater gross profits than did new car sales.<sup>14</sup>

---

that such reports were not even available to Chrysler, let alone reviewed, when the 2009 reject determinations were made. It is also noteworthy that the legislative intent behind the Act evidences concern about giving weight to tax motivated adjustments used to reduce a dealer's tax obligation which tend to understate a dealer's profitability.

<sup>12</sup> To the extent the evidence showed Chrysler's assessment of profitability of all its dealers, I have to assume that the profitability was recognized in the same way as Chrysler recognized that of Fury in the 2009 rejection. In short, the comparatives (showing Fury profitable when a large number of dealers were not) were apples to apples. See e.g. Ex R-9 at Bates 1056.

<sup>13</sup> Not only was Fury profitable in 2008 when more than 50% of Chrysler dealers lost money, it operated at a significant profit into May of 2009 when the reject determination was made. See Ex. R-35.

<sup>14</sup> As discussed below, new car profitability was noted in the Act's legislative history, so it seems to deserve heightened attention here.

The segmented analysis presents an admitted inroad on Fury's profitability as a new car dealer, which I have considered. There are, however, some caveats. First, given the extraordinary economic and credit market conditions, 2008 and 2009 are far less representative than 2006 and 2007. Second, there was some degree to which new cars purchased at auction and sold as "used cars" in 2008 and 2009 impacted the numbers—albeit the approximately 75 units apparently involved would not fully mitigate the inroad. Third, the analysis should include new car revenue associated with revenue streams other than those from new car sales, such as new car warranty service and parts—a highly profitable revenue stream which is not recorded on the new car sales segment of the dealer's financials. Fifth, there was evidence of Fury's conservative accounting and/or deferred recognition of new car sale profit in respect to the accounting for and/or recognition of trade-in profit when the trade-in was sold—which accounting and recognition would tend to understate new car profitability and overstate used car profitability. However, the impact of this accounting treatment was not quantified, and Fury had significant used car sales other than trade-ins. Finally, there was significant profit associated with "miscellaneous income," which derived prominently from new car incentives.<sup>15</sup>

In short, I have to agree with Chrysler that the "profitability" factor is mixed. However, given the three non-disputed facts discussed above—particularly that Chrysler itself recognized Fury's profitability as against most dealers which were not consistently profitable during 2006-2009, I found that the profitability factor—while somewhat mixed--favored Fury. And while I have considered the inroads on this profitability shown by the analysis of Chrysler's expert, there was no evidence that the inroads were considered by Chrysler in rejecting Fury.

As to Fury's viability, I have found that Fury was viable—a finding well supported by the evidence and by reason. Chrysler's assertion that Fury would be less viable if added back to the network, was again based on Chrysler's expert opinion concerning Fury's new car profitability—an opinion which has been discussed above. But Fury's viability as a firm—which is the important consideration if one is concerned about a dealership failure, is dependent upon its overall profitability associated with all the segments of the firm's ordinary and recurring revenues, whether service, parts, used car sales or new car sales. As discussed above, there is no dispute that Fury as a firm has always been profitable, even during 2008 when most Chrysler dealers were not. And there was no dispute and Chrysler's expert affirmed, that Fury is viable even without a new car line. Given the success of the Leonard's in their state-leading Chrysler dealership in South St Paul, and the full analysis of the Fury financial statements, there is

---

<sup>15</sup> Chrysler contends that the contribution to profit from miscellaneous revenue should be discounted. However, while Fury did not provide as full an explanation of this revenue as would be useful, it did describe the main component as new car incentives, and Chrysler failed to demonstrate that this income was not operational or was extraordinary. And in the Chrysler manual explaining how its financial statement form should be prepared, Chrysler does not instruct that this line item is for extraordinary or non-operational items, but simply for items about which the form has no other specified field. Finally, as noted earlier, Chrysler has always scored profitability—including in its reject determination here—based on profits which include the miscellaneous income.

no question that Fury would be more profitable and viable with a new car line adding gross profit from new car sales, warranty service and parts, dealer incentives, trade-in profitability, etc.<sup>16</sup> And the expert's opinion that Fury was apparently more capable of used car sales and less capable of new car sales seems incompatible with the Leonard's strong new car success during the first two full years after they acquired the Lake Elmo location, and their state leading success in South St Paul.

Also in respect to the viability (and profitability) of Fury, the benefits derived from the fact that Fury's owners also own another nearby Chrysler dealership was taken into account. The common funding of expenses, the advantages for dealer trades and new car referrals, the referrals of customers between the dealerships relative to convenience in service and the like, the funding of common accounting, common legal, common senior management, and other common expenses related to both dealerships, employee coverages, etc, all add to Fury's profit potential and viability.

Fury claimed that the Leonard's personal financial well-being should be factored into the issue of Fury's viability, and placed into evidence the financial statements of Tom and Jim Leonard. I put little weight on this evidence, and largely agree with Chrysler's expert in this regard. While admittedly an owner's wealth is a positive factor in respect to any risk to the business associated with temporary or extraordinary cash needs (e.g. a catastrophic uninsured loss, short term business interruption, etc) during which the owner could provide working capital, an owner's wealth should not be considered to protect against going concern risk based on sustained unprofitability. As noted earlier, economic theory informs us that owners will not continually fund an unprofitable business.

Finally, but not unimportantly, in 2009, Chrysler concluded in respect to the category "Financial Status," that Fury was "Healthy and Growing." Ex. R-28. And another third party—which undoubtedly knows much about and studies Fury's financial strength, namely Fury's lender, regards Fury as viable as evidenced by the acquisition loan and the \$12 million credit line (in times when credit to small business has been tough). In this regard, Fury's lender apparently concludes that Fury is more viable if added back to the Chrysler network, as the undisputed testimony was that Fury's lender has agreed (in the event of the add) to increase Fury's line by another \$2 million.

### **3. Factor 4: Fury's Satisfaction of the Performance Objectives of the Franchise (Sales & Service) Agreement ("SSA").**

This factor also favors Fury, but is also mixed. The performance objectives of the Franchise Agreements at issue here are: (a) selling; (b) service; (c) facilities; and (d) finances. While there are other objectives or requirements, such as personnel, advertising, business systems, orders, delivery, prices, etc, the above four are those about

---

<sup>16</sup> Given the fact that Fury is presently profitable with only used car sales, and is thereby more than covering all of its fixed and semi-fixed costs (such as the facility, utilities, management, etc), it is inconceivable that the incremental gross margin from new car sales and related warranty parts and service would not add to Fury's profitability—enhancing its future viability.

which there was any evidence—it being assumed that the other objectives have been satisfactory and that Chrysler would have presented evidence of related deficiencies.

One first notes that in the materials evidencing Chrysler's 2009 determination to reject Fury, there was no reference to deficient performance under Fury's SSA other than the notation (without comment) concerning (i) Fury's 2008 MSR and (ii) actual working capital compared to guideline working capital. As noted earlier, the evidence was that the reject decision was not a result of performance deficiencies, but rather that Fury was an "excess" or unnecessary location. Accordingly, the factor involving a comparison of Fury's performance against the demands of the SSA is not weighed as heavily as it might have been had such performance been a part of the reject decision.

(a) Selling: While the evidence was that Fury's unit sales were better than most of the dealers nationwide and better than many dealers which were retained, the MSR for 2007 and 2008 was recorded in the rejection notice at 110% and 74% respectively. Accordingly, Chrysler would have had reason to be concerned about this selling requirement. However, there was material question as to the meaningfulness of the 2008 MSR metric. Not only was 2008 an extraordinary and non-representative year for the sale of Chrysler products—as all have acknowledged, there was a late-2008 material change in Fury's fair share allocation which was applied retroactively throughout all of 2008. While this admitted impact was not quantified, the impact did impact Fury's reported 2008 MSR. Additionally, the issue concerning the new cars purchased at auction and sold as "used" cars, understating new car sales and overstating used car sales by some 75 vehicles, impacted the 2008 numbers. Accordingly, I found that the "selling" performance item in respect to this factor favored Chrysler--but only slightly.<sup>17</sup>

(b) Service: As noted above, Fury compared favorably to national and Business Center dealers in respect to Customer Service and First Time Fixed criteria—as was officially noted in Chrysler's reject notice and in its scoring of Fury on annual "Scorecards." Fury's performance in respect to this SSA obligation was well met.

(c) Facilities: Fury has a relatively new facility, being build in 1998 with more than ample showroom and service space. As discussed elsewhere, Fury scored 40.3 out of 50 in respect to its Lake Elmo facilities, and would have scored even higher if not for somewhat low scoring in respect to "location." And the "location" scoring could not likely be deemed contractually inadequate performance under the SSA when Chrysler a short time earlier approved Leonard's purchase of the Lake Elmo dealership. Moreover, the SSA expressly forbids the dealer from operating a dealership from any other location and from changing location without Chrysler's consent. In short, the "location" portion of Chrysler's facilities scoring was not a contractual deficiency respecting Fury's "facilities" SSA obligations.

---

<sup>17</sup> There was evidence that dealers with MSR performances beneath 50% were retained, while dealers above 100% were rejected, and evidence that there were a large number of dealers who failed to meet their MSR in 2008. Without knowing all the other facts concerning such dealers, however, is difficult to appreciate the degree to which these are or are not anomalies or the degree to which this data should influence the weight to be given to Fury's 2008 failure to meet MSR.

(d) Finances: This performance objective involves both a working capital and a credit/financing requirement. As to working capital, the evidence is that Fury was initially in compliance, was not in compliance for a couple of years, and essentially returned to near compliance or compliance during the year and one-half prior to the mid-2009 reject decision. There was no evidence that Chrysler was ever critical of any working capital level or that it played any role in the reject decision (albeit it is recorded on Chrysler's official reject notice).<sup>18</sup> As to credit, there was no evidence that Fury had ever failed to have adequate credit—whether for inventory or in respect to car sales. And as discussed above, Fury had significant credit during times when credit was tough to come by and is eligible for enhanced credit if the dealership is restored. In short, I have found that this performance objective weighs slightly against Fury by reason of the working capital deficiencies—but again note that under the 2009 measure of “Financial Status,” Chrysler recognized Fury as “Healthy and Growing.”

In conclusion, the adherence-to-franchise-agreement factor, while slightly favoring Fury, is of little help in balancing the interests, as it is mixed and was not part of the 2009 decision-making.

#### **4. Factor 5: The demographic and geographical characteristics of Fury's market territory**

This factor—an important factor in my view--favors Chrysler. The Lake Elmo point was not necessary to reasonably accommodate the selling or servicing of new vehicles—whether as measured by the sales needs of Chrysler or the convenience needs of customers.<sup>19</sup> While I accept the view that as a result of Fury's rejection there will be some greater time and distance travel for some customers, the mere existence of some modest travel inconvenience cannot be the sole test, as there will always be some additional time and distance for some customers living close to an eliminated dealership. And here the average differences were not large.<sup>20</sup>

It may be that at one point not too long prior to June 2009, the Fury dealership was “provisioned” as a desired dealer, and it appears that there were times when Chrysler sought to have a Genesis dealer in the Stillwater Trade Zone.<sup>21</sup> Further, it may be that when the opportunity for a more wholesale elimination of dealers through a bankruptcy presented itself that Chrysler (with the help of its consultant) materially expanded its view of dispensable points,

---

<sup>18</sup> Mr. Leonard testified that Chrysler never made him aware of guides which were not being met.

<sup>19</sup> While the behavior of other manufacturers may not have significant relevance here, it was noted that no other manufacturer has (or apparently feels the need to have) a dealership in Lake Elmo.

<sup>20</sup> I do note, however, that Chrysler's testimony before the Senate Commerce Committee was that a “strong presence in rural areas, small towns and “hub” towns “ are a “huge asset” which Chrysler would “intend to maintain.”

<sup>21</sup> The evidence was that the Stillwater Trade Zone had a rapidly growing population (both individuals and households) and a growing employment base—evidence which supports the utility and viability of a dealership in this Zone. However, the percentage growth is on a relatively modest base, and accordingly the numerical increase in potential car buyers is not as profound as Fury's expert claims.

labeling Fury as “excess” to support such view.<sup>22</sup> Nonetheless, the issue before me is not whether Chrysler altered its position to take advantage of the 2009 bankruptcy, but rather whether the Stillwater Sales Zone needed a dealership—particularly a non-consolidated dealership. Congress has stated that this factor should look to the demographic and geographic characteristics of the area being serviced by Fury. In that regard, and with due respect for the stimulated competitive response theory, I find that the Lake Elmo point can be covered by surrounding dealers without meaningful harm to Chrysler or its customers.<sup>23</sup>

This is not to say that the location issue is not something of a head-scratcher. As noted above, the termination of the Jeep dealership in Stillwater, the failure to have any Genesis dealer between White Bear and Hudson, the presence of competing dealerships in White Bear, and the projected growth between the outer edges of St Paul and Stillwater, make the elimination of this point—based purely on location, less than fully one-sided.<sup>24</sup> Additionally, Mr. Leonard testified that when Fury was purchased in 2005, Chrysler (through Lewis Scott of the Denver BC) represented that Chrysler planned to make Lake Elmo a Genesis (all three brands) dealer, and that Chrysler wanted Fury to acquire the Stillwater Jeep dealership and move it to Lake Elmo. While these factors detract from Chrysler’s claims about the location factor, I nonetheless find that this factor favors Chrysler, and that neither the public nor Chrysler is meaningfully harmed by the elimination of the Lake Elmo point.

#### **5. Factor 6: Fury’s performance in relation to the criteria used to terminate Fury**

This factor, while slightly mixed, favors Fury. The criteria used by Chrysler as set out in Chrysler’s rejection letter were: (a) brand affiliation (lack of consolidation or competitive duals); (b) raw sales volume; (c) sales performance measured by MSA; (d) market share; (e) location; (f) type of market; (g) facilities; (h) customer service; (i) history of experience; (j) working capital levels; (k) history of profitability; (l) loss of financing; (m) whether the point was provisioned; and (n) ability of location to block the accomplishment of a Genesis point.

(a) Brand affiliation: This is mixed, as Fury had only two of three Chrysler brands, but did not have a line competing with Chrysler.

(b) Raw sales volume: This is difficult to score, as there was little direct information concerning sales volumes of other dealers which were or were not terminated. Clearly Fury was not a top performer, but generally had sales greater than 50% of Chrysler’s other dealers.

(c) Sales performance measured by MSA: Like (b) above and as discussed earlier, this too is difficult to score, as 2008 involved an extraordinary time, with a mid-stream change in fair

---

<sup>22</sup> Mr. Leonard testified that he was never advised that Fury had been designated an “excess point” until after Fury was rejected, and that Chrysler’s President discussed with him the possibility of making Lake Elmo a “satellite” site (off the South St Paul dealership) after the arbitrations were completed. This testimony was not rebutted by Chrysler.

<sup>23</sup> While the area between St Paul and Stillwater is clearly a growth area, there was evidence that the governing body in Lake Elmo has wanted to temper population growth within Lake Elmo, and the future roadways locations and related traffic counts at the Fury dealership is not clear.

<sup>24</sup> There was evidence that Fury attracted customers from fast growing nearby Woodbury. However, there was no quantification of this market, nor any proof that Woodbury residents would be materially inconvenienced by the elimination of Fury. Indeed, the Woodbury market appears to be easily served by Leonard’s South St Paul dealership.

share allocation, etc. Fury's MSA scores for the 2006 through 2009 timeframe, with the exception of the extraordinary 2008, were essentially average.

(d) Market share: I am not aware of any useful measurement evidence.

(e) Location: As discussed earlier, this Lake Elmo point was not materially necessary to Chrysler or customers.

(f) Type of market: I am not sure to what this refers—perhaps “metro”, and am not aware of any useful comparative evidence.

(g) Facilities: As discussed earlier, Fury had good facilities.

(h) Customer service: As discussed earlier, Fury was graded high on customer service.

(i) History of experience: I am not sure to what this refers. The experience of Fury at Lake Elmo was short (four to five years), but the experience of these owners was long.

(j) Working capital levels: As discussed earlier, Fury failed to consistently meet Chrysler's working capital guides.

(k) History of profitability: As discussed earlier, Fury had a history of profitability, with some caveat concerning the prominence of used car profitability as opposed to new car profitability during the difficult 2008 time frame.

(l) Loss of financing: As discussed earlier, Fury had no loss of financing.

(m) Was point provisioned: As discussed earlier, this is unclear, depending upon timing.

(n) Could the Fury location result in the blocking of a Genesis point: It would appear that Fury could have blocked a Genesis point.

After analyzing all of the criteria Chrysler advised Fury (and others) it was using to make the subject reject decision, and considering the evidence that these performance criteria in fact were not used in respect to the Fury decision—the decision being based on the Lake Elmo location being an excess point, it seemed clear that Chrysler failed to make the reject decision based on a full analysis of the stated criteria.<sup>25</sup> In short, this factor—while favoring Fury slightly, provided little help in balancing the interests.

## **6. Factor 7: The length of Fury's experience.**

Are we dealing with merely the experience of Fury as a legal entity in Lake Elmo, or are we to focus on the experience of related owners/operators/managers? Is the issue here the experience of the Leonards re viability and capability, the harshness of terminating long term

---

<sup>25</sup> Despite Chrysler's testimony before the Senate Commerce Committee that it had “conducted a thorough analysis of every dealer . . . to assess individual market requirements and dealer performance” relative to various criteria, which analysis was “consistently applied to every dealer,” this was not the evidence in this arbitration. Here there was no documentation as would be expected showing any such analysis of Fury, and there was no witness having knowledge of the “thorough analysis consistently applied” supporting the rejection of Fury.

dealers who have known no other business activity or the harshness of terminating new dealers who may not have had the opportunity to recoup their investment? Here this dealership is of short duration, but its owners (the Leonards) have long histories of successfully operating a Chrysler dealership, and their vocational life has been in automotive sales and service. And in 2005 the Leonards paid a substantial amount (for which they became personally indebted) for the Fury dealership and related realty, properties they undoubtedly would not have acquired if the dealership was just a used car business. The opportunity to recoup their investment—significantly in a single purpose building and equipment, has been impaired by the 2009 rejection, undoubtedly postponing the time of recoupment, the related cost of capital, diminished return on capital, etc. So on all of the ways which this factor could be part of an assessment of economic benefit or harm to either Chrysler or Fury, the factor seems to favor Fury.

### **Balancing the Economic Interests of Chrysler, Fury and the Public at Large**

The undersigned struggled with how the above seven factors are to relate to this balancing, and precisely how the balancing should be done. Simply adding the “favor” and “disfavor” scores of the seven factors do not provide a meaningful analysis, and when weighing the importance of the various factors—such as viability and location, I found that the balancing was considerably more difficult and resulted in a much closer call, than a simple scorekeeping might suggest. Legislative history offered a few, but not many, clues:

**1. Legislative History:** The legislative history, essentially statements of Congresspersons made in the House and Senate relative to the Act, and testimony before Congressional committees, informs us about (a) the importance of the profit and viability factor, (b) the manufacturer’s use of criteria in making the rejection decision, (c) the relationship of state law to the factors, (d) the non-exclusive nature of the factors, and (e) the nature of the public interest to be balanced,

a. Importance of the profit and viability factor: Representative Van Hollen: *“Profitable dealers should have never been terminated in the first place.”* While the Act of course does not so provide, the statement is of some interest in evaluating the factors, and plays some modest role in my evaluation of the profitability and viability factors.

b. Manufacturer’s Use of Criteria: While the Act did not suggest that an arbitrator should order reinstatement if the manufacturer failed to honor its own criteria in the rejection decision, this issue was expressly identified as a factor by the Act. Also important to the legislation was the provision of the Act which required that the manufacturer provide a to-be-rejected dealer with “. . . *the specific criteria pursuant to which such dealer was terminated.* . . .”

Here Chrysler claimed that it had no obligation to do anything more than set out the criteria used in respect to all its rejections, and formulated a boilerplate form letter setting out a lengthy list of criteria which constituted all of the criteria--whether or not any particular criteria was measured or played a role in the subject dealership getting the reject notice. Chrysler went on to claim that it had no obligation to notify the particular to-be-rejected dealer as to how such dealer was measured in respect to each of the stated criteria or which if any of the criteria played a role in the decision.

Chrysler’s narrow reading of the above provision of the Act seems questionable, and in any event Chrysler failed to do that which the provision contemplated—namely give each dealer “specific” information as to why such dealer was terminated. The legislative history makes this clear:

Representative Conyers: *"In order to provide a covered automobile dealership with the information useful to determine whether to elect to enter into binding arbitration, the dealership will receive in writing notice from the covered manufacturer detailing the specific criteria pursuant to which such dealership's franchise agreement was terminated. . . . This transparency is a vital step in giving dealerships the opportunity to understand why their franchise agreements were terminated. . . ."*

Representative Van Hollen: *"The manufacturers should provide their respective covered dealers with each and every detail and criterion related to the evaluation of the dealership and the decisions to terminate . . ."*

I found that Chrysler failed to provide Fury with a meaningful description of the criteria by which Fury was evaluated and terminated. While this finding does not dictate outcome here, the failure seems to elevate the importance of examining the degree to which Chrysler abided its own criteria in the rejection decision respecting Fury. The failure also raises some question as to the weight I should give to after-the-fact expert analysis and rationalizations which were not provided to the dealer in May and June of 2009. The legislative history notes that it is important that parties be *"treated fairly in their business relationships. . . ."* and that the process provide the dealerships with *"a fair and impartial review of the termination decision."* The history further provides that the above notice provision was to ensure a review *"according to an equitable and balanced standard, taking into account . . . the property and due process rights of manufacturers and dealers will be safeguarded."* The evidence here did not demonstrate that Fury was treated fairly in respect to Chrysler's notice of rejection. See n. 23, supra.

c. The relationship of state law to the factors: Representative Van Hollen in respect to the Act's provision that the arbitrator can consider "any relevant information": *" . . . we expect that arbitrators should consider relevant state laws, which provide a context for analyzing franchise agreements and the obligations of dealers and manufacturers."* I was not particularly influenced by this legislative history, however, as there was nothing in the Act, except as subsumed in my right to receive "any relevant information" in balancing the parties' interests, which specifically suggested that state law had a role, and I note that the Act was designed to provide an adjudication when redress was not available under state law. See sections b and g of Section 747. However, as discussed here, the concept of "time to recoup an investment"—a factor in state law termination proceedings—seems to be "relevant information" to provide context in which to measure the dealer's economic interests to be balanced, and this legislative history seems to endorse attention to such context.

d. The non-exclusiveness of the factors: The Act states that the factors to be considered shall "include" the seven, and legislative history appears to support the notion that the seven are not exhaustive. Representative Van Hollen: *" . . . the list is not exhaustive, because the legislation provides that the parties can introduce any relevant information."* And Representative Conyers: *" . . . the list is not exclusive, and the arbitrator would have the discretion to consider all the relevant facts on a case by case basis."*

e. The nature of the public interest to be balanced: There are many references to the public interest in the legislative history, making it clear that the following elements were part of the landscape envisioned by Congress: (i) the American taxpayers and the recovery of their investment in Chrysler and General Motors; (ii) reasonable access to dealerships for the convenience of customers obtaining service—particularly in rural areas, (iii) the viability of the

manufacturer relative to adding dealers to the network, (iv) employees of dealerships; and (v) other existing dealers impacted by adding a rejected dealer back into the network.

## **2. Relating the Factors to the Balancing:**

After analyzing the Act and reviewing the legislative history, and considering all of the evidence and argument presented by the parties, it appears that one should assume the following relationships between the factors and the balancing of the parties' economic interests.

(a) Profitability and Viability of the Dealer: A finding that a dealer is profitable and viable—plainly important factors, seemingly would weigh in favor of adding a dealer, as a profitable and viable dealer does not pose a risk of the obvious economic harm to the manufacturer associated with a failed dealership, and can provide the quality of facilities, service, advertising, sales personnel and the like to enhance the sales of the manufacturer's products and the manufacturer's goodwill. For reasons discussed above, these two factors weigh modestly in favor of adding Fury to the network, as to do so (in respect to this factor) results in an economic benefit to Fury without any material economic harm or risk to Chrysler. Since Fury is profitable and viable, it does not pose a risk of failure, and is capable of maintaining a quality facility, customer service, advertising, and enhancing Chrysler product goodwill.<sup>26</sup>

(b) Business Plan: A finding that the manufacturer's business plan is sound and that the manufacturer's adherence to it in respect to the subject rejection presumably should weigh in favor of not adding a dealer, as such plan and adherence to it is important to the success of the manufacturer and the repayment of the American taxpayers' money—both advancing the economic interests of Chrysler and the American taxpayers. This factor weighs in favor of not adding Fury to the network, but for reasons discussed above the favoring is modest in that some of the Plan's criteria are not compatible with Fury being terminated.

(c) Performance under the Franchise Agreement: A finding that the dealer satisfactorily performed the objectives of the franchise agreement presumably should weigh in favor of adding a dealer to the network, as the Act's legislative history informs us that the context of the obligations between the parties should be taken into account in the balancing. The more the dealer has failed in such objectives, the less enthusiasm the Act appears to have for reinstatement. This factor weighs modestly in favor of adding Fury which has largely performed under the SSA and which has never been criticized for not doing so, as discussed above.

(d.) Demographic and Geographical Characteristics of Market: A finding that the dealer's point, by reason of the demographic and geographical characteristics of its market, is not necessary to the manufacturer or its customers, seemingly weighs against adding a dealer to the network, as such a finding is consistent with neither the manufacturer nor its customers being economically harmed by not adding the dealer. It also is consistent with not harming nearby existing dealers which arguably have been strengthened by a nearby rejection. This factor weighs against adding Fury, as discussed

---

<sup>26</sup> I notice that the legislative history places particular focus on the profit from new car sales, as Chrysler suggests should be the focus. See exchange in the Senate between Senators Levin and Durbin. This emphasis underpins my discounting of some (but not all) of Fury's profitable history, as discussed earlier.

above. In my view, this was the strongest factor against Fury, and gave rise to the closeness of the competing outcomes here.

(e) Performance Against Criteria for Rejection: A finding that the dealer has positively performed in relation to the criteria used by the manufacturer to terminate the dealer presumably weighs in favor of adding the dealer, as where the manufacturer, in accordance with the requirements of the Act, has identified the criteria by which its economic interests (and in turn the interests of taxpayers) are furthered in terminating a dealer, then a dealer's positive performance in respect to such criteria seemingly means that adding a dealer is not harmful (or as harmful) to the economic interests of the manufacturer or the public. This factor weighs in favor of adding Fury as the evidence was that most of the criteria for rejection was not compatible with eliminating Fury and that in any event little of the criteria was a part of the decision.

(f) Length of the Dealer' Experience: Here the legislative history seems a bit paranoid. There are statements seemingly implying Congressional concern that long time dealers deserve more protection. On the otherhand, there are statements about the importance of state law concepts (some of which, again, deal with not terminating a dealer before the dealer has had an opportunity to recoup its investment). Because of these competing considerations, I have concluded that this factor modestly favors adding Fury given its economic interest in having an opportunity to recoup its investment—to more readily satisfy the acquisition debt.

### 3. The Balancing

Economic Interests of Chrysler: Chrysler acknowledges, in something of an understatement, that the addition of Fury to the network will not “lead to the company's immediate downfall.” In this regard, I sympathize with Chrysler's difficulty in showing that the adding of a single dealer is likely to be as economically harmful to Chrysler as not adding the dealer is harmful to such dealer. Perhaps the question should be, “What would be the threat to Chrysler's success if all dealers similarly situated to Fury were added back to the network simply because arbitrators were unable to assess in individual cases greater harm to Chrysler from a single addback, then the economic harm to the dealer from continued exclusion?” Entertaining this question, however, is difficult given Chrysler's view that the results of other arbitrations are not only irrelevant, but confidential--a view which largely keeps an arbitrator from the information necessary to make such an assessment. I do not know how many other rejected dealerships have similar characteristics to Fury, I do not know how many have sought arbitration, I do not know how many have prevailed, I do not know the “coverage” issues with respect to other dealerships compared to Fury, etc. In short, I have no way of understanding the predicate of my concern—the impact on Chrysler if similarly situated dealers were ordered back into the network.

One might say that for these purposes I should ask what result would obtain for Chrysler if all 789 rejected dealers were added, a proposition seemingly underpinning some of Chrysler's claim that “adding dealerships threatens Chrysler's very survival.”

However, asking this question is equally unfair to the dealer--if the arbitrator is to assume that any added dealer could bring down Chrysler, no dealer could persuade an arbitrator that its economic interests should be given more weight than the harmed economic interests of Chrysler, the American taxpayers, Chrysler employees and suppliers, etc.

In short, the assessing of Chrysler's economic interests (and those of the American taxpayer) as they hang in this balancing, is difficult. Accordingly, I am balancing the interests with an assumption that any harm to Chrysler from adding Fury will be comparable to the harm from adding a number of dealerships in circumstances like those of Fury with an attendant impact which is, while not lethal, material to the economic welfare of Chrysler. This seems to be a fair way to credit the economic harm associated with adding Fury, even though it has not been shown that this single addition would cause the harm I here assume.

Chrysler contends that the Fury location is "unnecessary." I assume this means that it is unnecessary to Chrysler and its customers, a proposition with which I largely agree and which I have strongly considered. However, that the location is unnecessary does not translate—by itself—into economic harm to Chrysler.<sup>27</sup> Chrysler then argues that adding dealers impairs the progress of the Genesis Plan and upsets the balance associated with the Genesis Plan eliminations. To some degree, any add upsets the "balance" Chrysler has obtained in the bankruptcy elimination. However, this claim assumes that the eliminations already accomplished have been consistent with the Genesis Plan and have not been overdone to take advantage of a wholesale dealer count reduction available in Chrysler's one-time bankruptcy. Here, I have no way of knowing whether the addition of Fury (and like dealers) will upset a meaningful, well-sized and appropriate dealer restructuring, or will upset an excessive, unfair, anti-competitive and consumer-harmful restructuring. The concern arises from not knowing whether the facts of this case are representative of the degree to which strict adherence to the Genesis Plan and to the written rejection criteria resulted in the existing network. Since the facts of this case do not support the proposition that Chrysler was in such adherence to the Plan or its own criteria in making its June 2009 bankruptcy rejections, I have little idea of the nature of the balance I am being asked to not upset.

---

<sup>27</sup> A note about the expert debate associated with the question of whether there are costs to a manufacturer associated with the existence of a dealer is in order. And I note that this may be a different question than whether there are such costs associated with too many dealers. I find that there are some existing and potential costs associated with too many dealers—most notably the possibility of dealer failure and associated damage to Chrysler's goodwill and image, Chrysler's costs associated with network management and distribution channeling, the potential of weakened dealers in areas which are over-dealered, related lower dealership profits and capabilities for funding advertising, new facilities, better employees, etc, lower dealership values on which Chrysler can capitalize when adding dealers, etc. However, assuming a dealership that is profitable, that is viable, that is respected for customer and sales service, that maintains quality facilities, that adds to rather than detracts from the Chrysler brand and goodwill, that is not deficient in advertising and promotion, that has and maintains necessary credit lines and that has quality and experienced management, it is difficult to see the cost or potential cost to Chrysler from the add being anything close to the funding and risk-taking on the part of the dealer for the benefit of not only the dealer, but of Chrysler and its goodwill, advertising, distribution channeling, financing of inventory, etc.

Chrysler's concern about the possible weakening of nearby continuing dealers is well-taken, is a concern identified in the legislative history of the Act and one I have considered. Of course, one of the dealers claimed to be disadvantaged by adding Fury is Fury in South St. Paul, which has apparently been the state's leading Chrysler dealer during each of the years in which Fury in Lake Elmo operated. And presumably the economic strength or weakness associated with the operation of both Fury dealerships is that of a common economic interest—namely the Leonards. As to Barnett Chrysler, there was testimony that the owner of Barnett Chrysler told Jim Leonard that the elimination of Fury was wrong and that it was hoped Fury would be reinstated. And the elimination of the Jeep dealership in Stillwater has seemingly provided market power to both the Barnett and Hudson dealerships in respect to Jeep throughput. As to White Bear Dodge, the evidence suggests some likelihood that there will be a consolidation (a single Genesis point) in White Bear such that there will be a single Chrysler, Jeep and Dodge dealership—presumably with greater market power and efficiencies. Moreover, to some degree the “stimulated competitive response” theory—espoused by Chrysler experts in “add” litigation—supposes lessened economic damage to the surrounding dealers from an add. Finally, on a macro assessment, an arbitrator should not give undue weight to the claim that adding Fury will dilute the market for existing nearby dealers, as this is a claim (i) which Chrysler can make against every rejected dealer, and (ii) which can, depending on circumstances, dampen intra-dealer competition and consumer inconvenience--to the disadvantage of the public. In short, the surrounding dealer economic interests are so entangled with competing issues in this particular setting, that it is difficult to determine how or whether there is any material damage to surrounding existing dealers.

Chrysler also states that adding Fury would force Chrysler to support a fragmented network, provide administrative training and network resources, and divert marketing dollars. These claims were not substantiated by the evidence, and there has been no showing that any such costs are anywhere close to the benefits Chrysler obtains from viable and good dealers annually adding to Chrysler's gross margins by financing and purchasing hundreds of vehicles as well as parts, and providing advertising, customer service, facilities and a presence which adds positively to Chrysler's goodwill in the St Croix River Valley. And this balancing assessment is independent of whether or not the “stimulated competitive response” would result in greater Chrysler sales in the area.<sup>28</sup>

The claimed harms to Chrysler and assumed compounded harms as discussed above, would be afforded considerably more weight if this was a rejection of an excess point (or presumed multiple excess points) having a poor performing dealer with questionable viability in a substandard and dated facility providing poor customer service in a dying rural trade zone without prospects of population and employment growth. But such is not the case here, as Fury (and any dealers presumed to be similarly situated), while certainly not among the top performing dealers, has been (as reflected in Chrysler's own scoring) profitable when many others were not, has had greater throughput than half of Chrysler's dealers, has clear future viability, has well-experienced and successful owners, has relatively new and quality facilities from which it has

---

<sup>28</sup> While the cause and effect issues are unclear, it is noted that Chrysler's market share in the area has gone down with the elimination of Fury.

given exemplary customer service—and in turn enhanced Chrysler’s goodwill and brand, and is a dealer which Chrysler has scored—based on all criteria--within the top 29% to 47% of all dealers in the local and national markets during the two years prior to the reject decision. It simply is not consistent with the evidence that this add (or an assumed add of similarly situated dealers) would result in any meaningful harm to Chrysler.

**Economic Interests of the Public at Large:** The interests of the public which stand to be harmed by a decision to add Fury are largely the interests of the American taxpayers associated with the federal governments large investment in Chrysler, and the welfare of the employees of Chrysler and Chrysler’s suppliers. The potential harm to these interests is essentially comparable to the interests of Chrysler as discussed above. Since I have found that Chrysler is not subject to any meaningful economic harm by adding Fury (or presumed other similarly situated dealers), these public interests are likewise not subject to meaningful harm. The public interest to Fury’s constituents, namely Fury’s employees, the citizens of Lake Elmo reliant on the business and tax revenues from Fury, and the like, stand to be economically harmed if Fury fails. However, as Fury has been profitable as a used car dealer, I find it not probable that such failure will result from not adding Fury, although the number of jobs at Fury is dependent on the add. In short, I do not find that the public interest is materially affected by a decision to add or a decision to not add Fury to the Chrysler dealer network. Finally, I do not find any material public interest associated with the convenience of having, or the inconvenience of not having, a dealership in Lake Elmo.

**Economic Interests of Fury:** There are economic harms to Fury from not being added, but they are not overwhelming. I do not believe that Fury will fail to survive if Chrysler does not add the Chrysler Dodge lines to its dealership—however there certainly is greater vulnerability. In addition to this greater vulnerability, the other harms to Fury are (i) a degree of gross profit contribution to the dealership from new car sales, parts sales, warranty work and new car trade-ins will not be available, (ii) the ability to service the acquisition debt will be lessened, (iii) the profitability and attendant capacity to fund facility improvements, advertising, top personnel and the like will be lessened, and (iv) the jobs of employees Fury has kept in anticipation of getting the lines back will be eliminated. Moreover, Fury will suffer under the stigma of being only a “used car” dealer with no new car flag, and its owners will be disappointed in a number of their reasonable expectations (some promoted by Chrysler) in acquiring the dealership (with Chrysler’s consent) just a few years ago. While again these harms may not be overwhelming, they are not trivial and are greater than any meaningful economic harms to Chrysler—which I find (even under my enhanced-harm assumption) to be largely non-existent.

**In conclusion,** my view is not terribly unlike that of a knowledgeable Chrysler executive in the Denver Business Group who, in respect to the 2009 “dealer count reduction” and any related determination to keep or eliminate Fury, stated that, “This is a tough one.” Ex. C-27. It is a tough one, but Congress commands that the arbitration determination is limited to adding or not adding the dealer to the manufacturer’s network. For all the reasons discussed above, as mixed as some of them are, I have found that the balancing of the economic interests of Chrysler, Fury and the public, after considering the seven factors enumerated by Congress, favors adding Fury to the Chrysler network and renewing its Sales and Service Agreements as required by the Act.

Dated: June 25, 2010.

**Richard B. Solum**  
Arbitrator