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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Alliance of Automobile) CIV 00-1324-PHX-PGR
Manufacturers, et al.,)
)
Plaintiffs,) **ORDER**
)
vs.)
)
)
Jane Hull, et al.,)
)
Defendants.)
)
)
_____)

This case involves a challenge to the constitutionality of Arizona House Bill 2101, codified as ARIZ.REV.STAT. § 28-4460. Plaintiffs are the Alliance of Automobile Manufacturers and the Association of International Automobile Manufacturers (hereinafter collectively referred to as "the manufacturers" or "plaintiffs"), two non-profit trade associations whose members manufacture and distribute motor vehicles. Members of these organizations include several of the world's largest automobile manufacturers, some of whom have filed declarations in support of plaintiffs' motion¹.

¹ The declarants include DaimlerChrysler Corp., Ford Motor Company, Lincoln Town Car and Lincoln Continental, General Motors Corporation, GMAC Insurance, and Toyota Motor Sales USA,

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1 Defendants are Jane Dee Hull, Governor of Arizona; Janet
2 Napolitano, Attorney General of Arizona; and Mary Peters,
3 Director of the Arizona Department of Transportation. The Court
4 permitted the Arizona Automobile Dealers' Association ("AADA")
5 to intervene as a party-defendant on August 7, 2000.
6 Additionally, the National Automobile Dealers Association
7 ("NADA") filed an amicus curiae brief with the permission of the
8 Court in support of the statute's constitutionality.

9 Plaintiffs filed their complaint on July 12, 2000 seeking
10 declaratory and permanent injunctive relief and simultaneously
11 filed a Motion for Preliminary Injunction ("Motion"). On August
12 23, 2000, NADA, as amicus curiae, and defendants, including the
13 AADA as intervenor, filed a total of four briefs including
14 exhibits, affidavits and declarations in opposition to
15 plaintiffs' Motion. On September 26, 2000, plaintiffs filed
16 their Reply in support of the Motion. Oral argument was held on
17 March 5, 2001 and the Court took the matter under advisement.

18 The present statute is not an entirely new proposition.
19 Arizona has regulated the automobile industry and the
20 relationship between manufacturers and dealers for several
21 years. Title 28 regulates the automobile manufacturers' business
22 transactions in this State, preventing the manufacturers from
23 competing with their dealer franchisees. See A.R.S. § 28-4333(A)
24 and § 28-4334(A). Such franchise laws keep the disparity of
25 power between manufacturers and dealers in check. Similar

26 _____
27 Inc.
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1 regulations exist in nearly every State. See generally, New
2 Motor Vehicle Board of California v. Orrin W. Fox Co., 439 U.S.
3 96, 99 S. Ct. 403 (1978) (recognizing State interest in
4 regulating dealer-manufacturer relationship); Tober Foreign
5 Motors, Inc. v. Reiter Oldsmobile, Inc., 381 N.E.2d 908 (Mass.
6 1978) (explaining rationale behind State regulation of dealer-
7 manufacturer relationship).

8 The statute at issue, A.R.S. § 28-4460, is an addition to
9 the existing regulatory scheme of the manufacturer-dealer
10 relationship. It is designed to further protect independent
11 dealerships from manufacturers who have a significant position
12 of power as the provider of all dealer product and the overseer
13 of all financial information. The Arizona Legislature has
14 determined that consumers are best served by independent
15 licensed automobile dealers.

16 Historically, aside from the direct sale of vehicles,
17 manufacturers have been permitted to conduct other lines of
18 business in the automobile industry, such as providing
19 financing, aftermarket accessories, extended warranties and
20 emergency road service. Here, the contested statute curtails
21 those ancillary activities. Generally, the instant statute
22 forbids manufacturers from owning or operating a dealership in
23 this State, or from directly selling vehicles, parts, services,
24 financing, or accessories directly to customers in this State.
25 It also precludes manufacturers from dictating prices or
26 otherwise discriminating against the dealerships.

27 Plaintiffs allege various provisions of A.R.S. § 28-4460
28 violate the United States Constitution and the Arizona

1 constitution; specifically, the Commerce, Due Process, First
2 Amendment Free Speech, Equal Protection, Fifth Amendment Takings
3 and Supremacy clauses. Plaintiffs contend that the statute "as
4 a whole" as well as each section standing alone violates the
5 aforementioned constitutional provisions.

6 Because the constitutional claims allegedly impact the
7 parties in a variety of different ways and have varying degrees
8 of strength on the merits, the Court will address each provision
9 of the statute separately with regard to the applicable standard
10 for injunctive relief. Those claims raising the most significant
11 constitutional questions will be dealt with first. All other
12 constitutional claims not discussed at length in this order need
13 not be reviewed.

14 DISCUSSION

15 I. Preliminary Issues

16 A. Article III

17 Defendants Napolitano and Peters, in their Opposition to
18 Motion for Preliminary Injunction, briefly raise an Article III
19 "case or controversy" challenge to the manufacturers' complaint.
20 Under Article III of the Constitution, a federal court lacks
21 jurisdiction unless the plaintiffs present an actual "case or
22 controversy." Allen v. Wright, 468 U.S. 737, 750, 104 S. Ct.
23 3315 (1984). To satisfy this requirement, plaintiffs must have,
24 inter alia, standing. See American-Arab Anti-Discrimination
25 Comm. v. Thornburgh, 970 F.2d 501, 506 (9th Cir. 1991).

26 A violation of § 28-4460 by a manufacturer carries with it
27 the threat of criminal sanctions. See A.R.S. § 28-4591. In order
28 to challenge the constitutionality of § 28-4460, it is not

1 necessary that the manufacturers first expose themselves to
2 "actual arrest or prosecution" in order to establish standing.
3 Babbitt v. United Farm Workers Nat'l Union, 442 U.S. 289, 298,
4 99 S. Ct. 2301 (1979), quoting Steffel v. Thompson, 415 U.S.
5 452, 94 S. Ct. 1209 (1974). Rather, to establish "a dispute
6 susceptible to resolution by a federal court," plaintiffs must
7 allege that they have been "threatened with prosecution, that a
8 prosecution is likely, or even that a prosecution is remotely
9 possible." Babbitt, 442 U.S. at 299, 94 S. Ct. at 2309, quoting
10 Younger v. Harris, 401 U.S. 37, 42, 91 S. Ct. 746 (1971); see
11 also Ecological Rights Found. v. Pacific Lumber Co., 230 F.3d
12 1141 (9th Cir. 2000) (explaining standing requirements for
13 organizations on behalf of their members).

14 In the instant matter, plaintiffs have sufficiently alleged
15 the manufacturers are engaging in conduct which may be
16 prohibited under § 28-4460 to satisfy the Article III "case or
17 controversy" requirement.

18 **B. Presumption that Statute is Constitutional**

19 The Court must interpret a state statute in a way that
20 renders it constitutional with any uncertainties being resolved
21 in favor of constitutionality. In re Aircrash in Bali, 684 F.2d
22 1301 (9th Cir. 1982), Anderson v. Mullaney, 191 F.2d 123, 135 (9th
23 Cir. 1951), KZPZ Broadcasting, Inc. v. Black Canyon City
24 Concerned Citizens, 13 P.3d 772 (Ariz. App. 2000); State v.
25 Gilfillan, 196 Ariz. 396, 998 P.2d 1069 (2000). The issue of the
26 statute's constitutionality is before the Court for the purpose
27 of determining whether injunctive relief is warranted. The party
28 alleging a statute's unconstitutionality bears the burden of

1 persuasion. Jackson v. Tangreen, 2000 Ariz. App. LEXIS 183 (App.
2 2000).

3 **C. Severability**

4 To avoid future confusion over interpretation of this law,
5 the Court finds a severability clause present in this statute.
6 What is currently codified in the Arizona Revised Statutes as
7 §28-4460 is in fact "Section 5" of H.B. 2101 as signed by the
8 Governor. H.B. 2101 contained several pieces of legislation in
9 addition to "Section 5" or § 28-4460. One of those components
10 was "Section 6," which is a severability clause applicable to
11 every other section of H.B. 2101, including "Section 5" or § 28-
12 4460.

13 Because H.B. 2101 contains no provision for specifically
14 codifying Section 6 in the Arizona Revised Statutes, however,
15 the severability clause does not appear anywhere in the statute
16 and can only be found by examining the original session law. For
17 the Court's purposes, it suffices that it was signed by the
18 Governor.

19 Due to the existence of a severability clause, plaintiffs
20 must meet their burden for injunctive relief on each provision
21 and the Court must analyze each provision of this statute
22 separately. Plaintiffs are not entitled to an order enjoining
23 the State from enforcing the statute in its entirety merely by
24 demonstrating a need for such relief based on a single
25 application of one subsection.

26 **II. Motion for Preliminary Injunction**

27 To obtain a preliminary injunction in the Ninth Circuit, the
28 moving parties must show:

1 ...either (1) a combination of probable success on the
2 merits and the possibility of irreparable injury, or (2)
3 that serious questions are raised and the balance of
4 hardships tips sharply in its favor. These formulations are
not different tests but represent two points on a sliding
scale in which the degree of irreparable harm increases as
the probability of success on the merits decreases."

5 Big Country Foods, Inc. v. Board of Educ., 868 F.2d 1085, 1088
6 (9th Cir. 1989).

7 **A. § 28-4460(B)(3): Influencing and Controlling Provision**
8 **and the First Amendment**

9 The essence of plaintiffs' First Amendment challenge is that
10 the operative effect of subsections (B)(3) and (C)(1) taken
11 together prevents vehicle manufacturers from publishing pricing
12 information about vehicles and other products on their Internet
13 websites. Subsection (B)(3) of the statute states in relevant
14 part that vehicle manufacturers are prohibited from:

15 controlling any aspect of the final amount charged, the
16 final sales price or the final lease price for any of the
17 vehicles or products, trade-ins, services or financing
offered, offered for sale or offered for lease to retail
consumers in a dealer's area of responsibility without the
written consent of the dealer.

18 A.R.S. § 28-4460(B)(3). The statute permits certain enumerated
19 exceptions to the manufacturers' ability to "control" the retail
20 prices of vehicles, including the establishment "from time to
21 time" of "reasonable sales, lease or financing promotions of
22 reasonable and limited duration." § 28-4460(B)(3)(b).

23 In subsection (C)(1), the statute defines "controlling" as
24 used in subsection (B)(3) to mean "dictating, limiting,
25 establishing, setting or influencing through any means." § 28-
26 4460(C)(1). The statute thus forbids a manufacturer from
27 "influencing by any means" the final retail sales or lease price
28 that a dealer charges to consumers for "vehicles or products,

1 trade-ins, services or financing" within the dealer's area of
2 responsibility. Plaintiffs' challenge is to the provision's
3 language referring to "influencing by any means" as it allegedly
4 applies to the communication of pricing information to
5 consumers, which in turn has an impact on final retail prices
6 charged by dealers.

7 When considering a request for preliminary injunctive relief
8 in the area of free speech, "[the] loss of First Amendment
9 freedoms, for even minimal periods of time, unquestionably
10 constitutes irreparable injury." Gentala v. City of Tucson, 213
11 F.3d 1055, 1061 (9th Cir. 2000); S.O.C., Inc. v. County of Clark,
12 152 F.3d 1136, 1148 (9th Cir. 1998), quoting Elrod v. Burns, 427
13 U.S. 347, 373, 96 S. Ct. 2673 (1976).

14 The presumption of irreparable injury in a motion for
15 preliminary injunction undoubtedly extends to expression of
16 purely commercial information, which is entitled to vigorous
17 First Amendment protection. Virginia State Bd. of Pharmacy v.
18 Virginia Citizens Consumer Council, 425 U.S. 748, 96 S. Ct. 1817
19 (1976), 44 Liquormart v. Rhode Island, 517 U.S. 484, 497, 115 S.
20 Ct. 1495 (1996), Greater New Orleans Broad. Ass'n v. United
21 States, 527 U.S. 173, 194, 119 S. Ct. 1923 (1999); see also
22 North Olmsted Chamber of Commerce v. City of North Olmsted, 86
23 F. Supp. 2d 755, 770, n.10 (N.D. Ohio 2000) (noting increasingly
24 heightened scrutiny of regulations of commercial speech).

25 Nonetheless, before the "extraordinary writ" of injunctive
26 relief can be imposed upon an act of a State legislature, Gunn
27 v. University Committee to End War, 399 U.S. 383, 389, 90 S. Ct.
28 2013 (1970), the movant must meet its burden of persuasion with

1 respect to the fundamental factual premises of the alleged
2 constitutional violation.

3 In this case, the Court notes as an initial matter that
4 plaintiffs have not presented a facial First Amendment challenge
5 to the statute for purposes of preliminary injunctive relief.
6 For a statute to be facially invalid, it must reach a
7 "substantial amount of constitutionally protected conduct" and
8 be "invalid in toto - and therefore incapable of any valid
9 application." Hoffman Estates v. Flipside, Hoffman Estates,
10 Inc., 455 U.S. 489, 494, 102 S. Ct. 1186 (1982). In their
11 motion, plaintiffs do not allege and present no evidence showing
12 that the operative effect of subsections (B)(3) and (C)(1)
13 reaches a "substantial amount" of protected conduct, or that it
14 is "incapable of any valid application." The Court thus
15 construes plaintiffs' First Amendment complaint as an "as-
16 applied" challenge for purposes of this motion.

17 In an as-applied First Amendment challenge, plaintiffs must
18 bear the burden of sufficiently identifying the speech they
19 allege is being infringed and how the challenged application of
20 a statute will affect that speech. While the Court is keenly
21 aware of the complexity of the issues underlying this case and
22 the corresponding difficulty of organizing the facts giving rise
23 to this complaint, in order to succeed on a motion for
24 preliminary injunction plaintiffs must, at a bare minimum,
25 specify with reasonable precision the speech they wish the Court
26 to enjoin the State from burdening.

27 In particular, the Court finds little guidance from
28 plaintiffs' motion on the actual substantive content of the

1 manufacturers' speech on their websites; what information the
2 speech conveys; whether the information is derived from
3 confidential financial records belonging to the dealers; and how
4 Arizona consumers receive and eventually utilize the
5 information. Without presenting sufficient evidence to
6 establish a factual foundation for plaintiffs' challenge, the
7 Court is unable to delve into the serious free speech issues
8 before it at this initial stage of the proceedings.

9
10 **B. § 28-4460(B)(4): The Low-Price Provision and the**
11 **Commerce Clause**

12 Subsection (B)(4) of the statute provides in relevant part
13 that no vehicle manufacturer shall:

14 refus[e] to unconditionally offer and provide to its same
15 line-make dealers all models or series manufactured and
16 publicly advertised for that line-make at prices that are
[no] greater than any other dealer in the United States
would pay for the same model vehicle that is similarly
equipped.

17 A.R.S. §28-4460(B)(4). Significant exceptions to this
18 requirement are permitted for, inter alia, "reasonable sales,
19 lease or financing promotions of reasonable and limited
20 duration." § 28-4460(B)(4)(b). The provision thus prevents a
21 manufacturer from lowering the price it offers for its vehicles
22 to dealers outside Arizona below the price it is offering to
23 Arizona dealers, subject to the limited exceptions in subsection
24 (B)(4)(b). Conversely, a manufacturer may not raise its price
25 for a vehicle in Arizona to anything above the highest price it
26 is offering in any other part of the United States, even if
27 market conditions favor such a price increase.

28 **1. Probable Success on the Merits**

1 The United States Constitution states "Congress shall have
2 Power [to] regulate Commerce [among] the several States." U.S.
3 Const. Art. I, § 8, cl. 3. The Supreme Court has interpreted
4 this provision to prohibit State legislation that burdens
5 interstate commerce even in the absence of express Congressional
6 action, thus leading to its modern identity as the "dormant
7 Commerce Clause." See C & A Carbone v. Town of Clarkstown, 511
8 U.S. 383, 401, 114 S. Ct. 1677 (1994) (O'Connor, J., concurring)
9 ("The scope of the dormant Commerce Clause is a judicial
10 creation").

11 For "dormant" commerce clause purposes, State economic
12 regulations generally fall into one of two categories: (1)
13 regulation that "directly regulates or discriminates against
14 interstate commerce," which has a strong presumption of
15 unconstitutionality; or (2) regulation that has only "indirect
16 effects on interstate commerce," which is valid only where the
17 State's interest is legitimate and the burden on interstate
18 commerce does not clearly exceed the local benefits of the
19 regulation. Brown-Forman Distillers v. New York Liquor Auth.,
20 476 U.S. 573, 579, 106 S. Ct. 2080 (1986).

21 In Healy v. The Beer Institute, 491 U.S. 324, 335-37, 109
22 S. Ct. 2491 (1989), the Supreme Court used a three-part test to
23 examine whether an economic regulation, in that case a direct
24 regulation of interstate commerce, violated the Commerce Clause
25 by asking (1) whether the statute controls commerce that takes
26 place "wholly outside of the State's borders" by establishing a
27 de facto "scale of prices for use in other States," even if the
28 commerce also had effects within the State; (2) whether the

1 practical effect of the statute is to directly control conduct
2 beyond the boundaries of the State; and (3) what effects could
3 conceivably arise if "not one, but many [States] or every State
4 adopted similar legislation" to the challenged statute.

5 The Court separately held in Part IV of its opinion that
6 even if a statute satisfies the three-part test, if the
7 statute's language facially discriminates against entities
8 engaging in interstate commerce in favor of those which engage
9 purely in intrastate activities, the statute is invalid on its
10 face. Id. at 340-41, citing New Energy Co. of Indiana v.
11 Limbach, 486 U.S. 269, 108 S. Ct. 1803 (1988); Sporhase v.
12 Nebraska ex rel. Douglas, 458 U.S. 941, 102 S. Ct. 3456 (1982).

13 Under either standard, plaintiffs face two immediate and
14 related problems in their challenge to this provision: (1) the
15 record is incomplete and the Court is unable to evaluate from
16 the evidence presented thus far the precise nature of the
17 manufacturers' pricing programs; and (2) due to the absence of
18 a comprehensive factual record on this issue, the Court is
19 unable to determine the tangible "practical effect" of the
20 statute on commerce outside Arizona.

21 The Court concludes that plaintiffs have not shown a
22 "probability of success" on the merits of their Commerce Clause
23 claim with respect to Healy, 491 U.S. at 335-37. Plaintiffs
24 briefly raise the potentially valid argument that subsection
25 (B)(4) may have a facially discriminatory effect on interstate
26 commerce in favor of intrastate commerce. Id. at 340-41.
27 However, the Court finds plaintiffs' briefs insufficient to
28

1 support a finding of "probable success on the merits" on these
2 issues at this time.

3 **2. Irreparable Harm**

4 Plaintiffs do not point to any alleged harm based
5 specifically on subsection (B)(4), focusing instead on their
6 other constitutional challenges in the motion. The Court finds
7 no evidence showing that if subsection (B)(4) were permitted to
8 go into effect, the manufacturers would have to change their
9 current national, regional or local pricing programs in any
10 manner. The existence of various exceptions to the "low price"
11 requirement further reinforces the absence of irreparable harm.
12 The explicit allowance in subsection (B)(4)(b) for "reasonable
13 sales, lease or financing promotions of reasonable and limited
14 duration" appears to preclude plaintiffs from making a
15 successful argument, for purposes of this motion, that their
16 pricing programs will be affected.

17 Plaintiffs argue that violations of constitutional rights
18 can by themselves constitute irreparable injury. Topanga Press,
19 Inc. v. City of Los Angeles, 989 F.2d 1524, 1528 (9th Cir.
20 1993), Gentala v. City of Tucson, 213 F.3d 1055, 1061 (9th Cir.
21 2000). However, each case cited by plaintiffs supporting this
22 principle was based on a violation of an individual
23 constitutional right, and none of the cases presumed irreparable
24 harm based on an alleged violation of the "dormant" Commerce
25 Clause. Nor do plaintiffs make a persuasive argument in favor of
26 placing violations of the Commerce Clause in the same category
27 as the set of fundamental constitutional rights ordinarily
28 afforded such protection, such as the Free Speech,

1 Establishment, and Due Process Clauses. See, e.g., Gentala, 213
2 F.3d at 1061 (free speech), Doe v. Duncanville Indep. Sch.
3 Dist., 994 F.2d 160, 166 (5th Cir. 1993) (establishment clause),
4 Able v. United States, 847 F. Supp. 1038, 1043 (E.D.N.Y. 1994)
5 (due process and free speech).

6 **C. § 28-4460(B)(2): Aftermarket Services Provision**

7 Subsection (B)(2) prohibits manufacturers from "selling,
8 leasing or providing, or offering to sell, lease or provide
9 products, services or financing to any retail consumer or lead,"
10 with certain enumerated exceptions. Plaintiffs assert the
11 statute's ban on direct sales of financing, services and
12 products by the manufacturers violates the Commerce Clause by
13 "unduly burdening the manufacturers' and their affiliates'
14 ability to conduct commercial activities on a national and
15 global basis, via the Internet and through more traditional
16 means." Plaintiffs also assert this provision offends the Equal
17 Protection Clause because it treats the manufacturers
18 differently than others providing the same services.

19 **1. Commerce Clause**

20 Defendants deny plaintiffs have shown any burden on
21 interstate commerce, suggesting the proposed ban on aftermarket
22 services is analogous to the existing ban on direct sales of
23 vehicles. Defendants cite Exxon Corp. v. Governor of Md., 437
24 U.S. 117, 98 S.Ct. 2207 (1978) to support that proposition. In
25 Exxon, the U.S. Supreme Court upheld a Maryland law which
26 prohibited refiners of petroleum from owning retail gas
27 stations. The Court ordered that Exxon divest itself of 36
28 retail gas stations, and held that a shift in sales from out of

1 state refiners to independent dealers did not impose an
2 impermissible burden on interstate commerce.

3 The instant statute prohibits manufacturers from selling
4 services in competition with dealers. Plaintiffs do not contest,
5 and understandably so in light of Exxon, that manufacturers
6 cannot sell vehicles directly to consumers. Construing Exxon
7 with regard to the realities of the automobile industry, this
8 Court fails to find a distinction between the sale of vehicles
9 and the sale of aftermarket parts and services relating to those
10 vehicles. In both instances, the manufacturer is competing with
11 the dealer.

12 The Exxon holding was predicated on the disparity of power
13 between the refiner and the retail owners of gas stations. The
14 Supreme Court concluded direct ownership by the refiner was
15 legitimately prohibited and not unduly burdensome on interstate
16 commerce. Here, plaintiffs have not shown a distinction exists
17 between the favorable position the manufacturer wields over the
18 dealer, and the disparate power of the refiner in Exxon to
19 distinguish Exxon from these facts. This Court finds Exxon
20 instructive here. Plaintiffs have failed to show a likelihood of
21 success on the claim that this provision of the statute
22 impermissibly impedes upon interstate commerce.

23 2. Equal Protection

24 Plaintiffs additionally argue Exxon is distinguishable from
25 these facts since the refiner in Exxon was the sole source for
26 that product. In contrast, the manufacturers here are not the
27 sole source of the products and services prohibited by this
28 provision. For instance, the provision bans direct financing by

1 the manufacturer, but does not prohibit a bank or credit union
2 from financing a vehicle purchased through a dealer. Plaintiffs
3 believe they are being singled out and treated dissimilarly in
4 violation of the Equal Protection Clause. They miss one
5 important detail. There exists an underlying agreement, the
6 automobile franchise regulations, which controls the
7 manufacturer-dealer relationship and protects dealers from
8 competitive business practices by the manufacturers. The
9 manufacturers are not similarly situated to a bank, a credit
10 union, an extended warranty company, or a used parts facility.
11 None of those entities are bound by an agreement to not compete
12 with the dealers, nor are those entities in a disparately
13 powerful position over the dealers.

14 **3. Harm**

15 Because the Court finds the aftermarket sales ban does not
16 present a constitutional violation, plaintiffs' burden of harm
17 is increased. Big Country Foods, 868 F.2d at 1088 ("the degree
18 of irreparable harm increases as the probability of success of
19 the merit decreases"). Plaintiffs allege that compliance with
20 the aftermarket provision will force them to terminate or
21 completely reorganize their operations to exclude existing means
22 for consumers to obtain aftermarket services. That will require
23 significant alterations to their internationally accessed
24 websites, simply to accommodate this state's ban. Additionally,
25 they purport consumers would experience a disruption in service.
26 For instance, those consumers enjoying extended service
27 warranties or roadside assistance would be either temporarily or
28

1 permanently deprived that service if the manufacturer is
2 required to discontinue providing the service.

3 Defendants deny the manufacturers will be forced to cease
4 operations. They point out that roadside assistance, extended
5 warranties and provision of financing information will still be
6 available through the manufacturer. The statute only requires
7 that the service be initially sold through the dealer, "Once a
8 manufacturer's roadside assistance program has been sold by the
9 dealer, the statute does not prohibit the manufacturer from
10 honoring its contract and following through on its commitment to
11 the consumer."

12 When the Court weighs the respective harms surrounding this
13 provision, it cannot conclude the balance decisively tips in
14 plaintiffs' favor. On one hand, there are privately-owned
15 dealerships who have invested a great deal of money in a brick
16 and mortar establishment and are completely at the mercy of the
17 manufacturer for product. On the other hand, the manufacturers
18 are being prohibited from engaging in sales and services to
19 increase business and profit. Weighing in defendants' favor is
20 that the manufacturers' harm is speculative and premature to
21 assess. Some of plaintiffs' claims deal with products and
22 services that are not presently offered by the manufacturers. In
23 other instances, the manufacturers are not facing a complete
24 shut-down of operations, but instead are required to allow the
25 dealerships to consummate the initial transaction. The dealers
26 describe it as "structuring the retail market" rather than
27 prohibiting the activities altogether. That appears to have been
28 the legislative purpose of this statute, to further structure

1 and regulate the automobile industry, and the Court must presume
2 that is constitutional unless plaintiff demonstrates otherwise.
3 Gilfillan, 196 Ariz. 396, 998 P.2d 1069.

4 **D. § 28-4460(B)(5): "Leads" Forwarding Provision**

5 Subsection (B)(5) provides that when a lead of a prospective
6 retail customer is discovered, the manufacturer must forward
7 that lead to a dealer within the same geographic area as the
8 prospective customer. Plaintiffs claim this provision violates
9 the Commerce Clause and the Fifth Amendment Takings Clause.

10 **1. Takings Clause**

11 With respect to the Takings Clause challenge, plaintiffs
12 assert the forwarding requirement deprives them of "property"
13 without just compensation. Citing Ruckelshaus v. Monsanto Co.,
14 467 U.S. 986, 104 S. Ct. 2862 (1984), plaintiffs argue leads are
15 intellectual "property" for purposes of the Takings Clause. The
16 test for determining whether commercial data such as leads
17 constitute property requires examination of "existing rules or
18 understandings that stem from an independent source such as
19 state law." Id. at 1001. Plaintiffs do not cite a single source
20 of law to support the claim that leads constitute property and
21 thereby fail to satisfy their burden of persuasion as to the
22 Takings Clause.

23 **2. Commerce Clause**

24 While courts must be alert to "the evils of economic
25 isolation and protectionism," they must also recognize that
26 "incidental burdens on interstate commerce may be unavoidable
27 when a State legislates to safeguard the health and safety of
28 its people." City of Philadelphia v. New Jersey, 437 U.S. 617,

1 623, 98 S. Ct. 2531 (1978). While laws that "overtly block the
2 flow of interstate commerce at a State's borders" are
3 presumptively invalid, laws based on legitimate legislative
4 objectives where there is "no patent discrimination" against
5 interstate trade are viewed with a much more flexible approach.
6 Id.; Pike v. Bruce Church, Inc., 397 U.S. 137, 90 S. Ct. 844
7 (1970). The crucial inquiry is whether the law is essentially a
8 "protectionist measure" or can fairly be viewed as directed to
9 "legitimate local concerns, with effects upon interstate
10 commerce that are only incidental." City of Philadelphia, 437
11 U.S. at 623.

12 Plaintiffs cite a single case, Brown-Forman Distillers v.
13 New York Liquor Authority, 476 U.S. 573, 579, 106 S.Ct. 2080
14 (1986), in support of their theory that the statute's lead-
15 forwarding requirement constitutes discrimination against
16 interstate commerce. On this authority alone, plaintiffs have
17 failed to satisfy their burden of showing that the provision
18 "patently discriminates" against dealers in other States, or
19 that even if discrimination exists it is not merely "incidental"
20 to Arizona's legitimate purpose of preventing manufacturers from
21 undermining the efforts of dealers.

22 Without having demonstrated a probability of success on the
23 merits, the burden on plaintiffs to demonstrate irreparable harm
24 increases. Big Country Foods, 868 F.2d at 1088 ("the degree of
25 irreparable harm increases as the probability of success on the
26 merits decreases"). While plaintiffs assert that the requirement
27 to forward leads to dealers will constitute irreparable harm for
28 a number of reasons, they have not shown how it will change

1 existing practices with respect to the flow of commercial
2 information between dealers and manufacturers. Without a more
3 complete factual record, the Court finds plaintiffs have not
4 satisfied their heightened burden for irreparable harm as set
5 forth in Big Country Foods.

6 **E. § 28-4460(A): Anti-Competition Provision**

7 Subsection (A), seemingly an umbrella provision encompassing
8 subsection (B) of this statute, broadly prohibits car
9 manufacturers from "directly or indirectly compet[ing]" with car
10 dealerships. The provision purports to define what "competition"
11 means by stating, "[competition] includes any one of the
12 following," with reference to subsection (B). Plaintiffs contend
13 that definition is unconstitutionally vague since it implies
14 that "competition" may cover more than what is enumerated in
15 subsection (B). Accordingly, plaintiffs allege the prohibition
16 on manufacturers "indirectly competing" with dealerships is void
17 for vagueness pursuant to the Due Process Clause.

18 **1. Vagueness**

19 Plaintiffs raise a legitimate concern regarding defendants'
20 interpretations of the applicability of the statute, alleging
21 defendants construe some provisions beyond the plain language.
22 Because plaintiffs cannot determine what conduct is permitted or
23 prohibited, they claim subsection (A) is void for vagueness.

24 During oral arguments and throughout the papers, defendants
25 made representations as to the boundaries or applicability of
26 several aspects of the statute. Defendants' proffered
27 representations make some of the provisions less ambiguous and
28 more palpable for plaintiffs. The Court understands plaintiffs'

1 An injunctive order is an "extraordinary writ" which federal
2 courts must exercise restraint in issuing. Gunn, 399 U.S. at
3 389.

4 Plaintiffs have failed to make the requisite showing to
5 support injunctive relief. Notwithstanding any reservations this
6 Court may have regarding the legislative wisdom of this statute
7 or the clarity of the language contained therein, the Court is
8 not in the position to reject any provision short of blatant
9 constitutional violation. While plaintiffs have presented
10 arguments that may hold merit upon the development of a more
11 comprehensive factual record, they have not met their burden at
12 this stage of the proceedings, due, in large part, to their
13 failure in proving the balance of hardships tips decidedly in
14 their favor or that any irreparable harm would result from
15 denial of an injunction. Plaintiffs admit that the measure of
16 their injury is not easily quantifiable, but a showing of
17 imminent threat of injury is required nonetheless. Gilder v. PGA
18 Tour, Inc., 936 F.2d 417, 423 (9th Cir. 1991).

19 Contemporaneous with this Order, the Court will enter its
20 Scheduling Order to guide the parties through discovery.
21 Plaintiffs may be able to supplement the record with clearer
22 evidence to support the merits of their claims or offer more
23 concrete proof of irreparable harm or imbalance during that
24 process.

25 ...

26 ..

27 IT IS HEREBY ORDERED that Plaintiffs' Motion for Preliminary
28 Injunction (Doc.#2) is DENIED.

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DATED this 30th day of March, 2001.

Paul G. Rosenblatt
United States District Judge