NO. 13-0675

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SUPREME COURT OF APPEALS
OF WEST VIRGINIA

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

At Charleston

KING COAL CHEVROLET COMPANY, Plaintiff Below,

Petitioner

v.

GENERAL MOTORS LLC, Defendant Below,

Respondent

From the United States District Court
for the Southern District of West Virginia
(Civil Action 2:12-5992)

BRIEF OF PETITIONER KING COAL CHEVROLET, INC. ON CERTIFIED QUESTION

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I. CERTIFIED QUESTION PRESENTED

Do the circumstances in this case permit GM to avail itself of the safe harbor found in West Virginia Code section 17A-6A-12(4) or, instead, is it required to provide to King Coal the statutory notice commanded by section 17A-6A-12(2)?

II. INTRODUCTION AND RELEVANT PROCEDURAL HISTORY

Petitioner, King Coal Chevrolet Co., initiated the instant action by filing a Petition for Injunctive Relief against Respondents General Motors Co. and General Motors, LLC, (collectively "Respondents" or "GM") in the Circuit Court of Fayette County, West Virginia, on September 26, 2012. Respondents removed the underlying to the United States District Court for the Southern District of West Virginia by Notice dated September 27, 2012. (Joint Designation 1). Petitioner is a West Virginia corporation duly licensed to sell new and used automobiles in the State of West Virginia. Petitioner is also a General Motors dealer of new Chevrolet vehicles and maintains a principal place of business at 1508 East Main Street, Oak Hill, West Virginia. (Joint Designation 35 ¶ 1). Respondent General Motors Company is a corporation incorporated in the State of Delaware with a principal place of business located at 300 GM Renaissance Center, Detroit, Michigan. Respondent General Motors, LLC is a foreign limited liability corporation incorporated in the State of Michigan with a principal place of business also located at 300 GM Renaissance Center, Detroit, Michigan. Respondents are manufacturers and/or distributors of new motor vehicles, including vehicles within the line-make of Chevrolet.

On October 10, 2012, Petitioner filed a Motion For Preliminary Injunction in the United States District Court for the Southern District of West Virginia. (Joint Designation 5). In response, the Respondent filed a Motion to Dismiss Petitioner's Complaint For Injunctive Relief on October 16, 2012. (Joint Designation 7). On December 12, 2012, both parties presented

evidence in support of their respective motions during a consolidated hearing before the Honorable John T. Copenhaver, Jr., United States District Judge for the Southern District of West Virginia. (Joint Designation 43).

In a Memorandum Opinion and Order dated May 23, 2013, the Honorable Judge Copenhaver certified a question to this Court in order to determine the appropriate interpretation of the notice requirements contained in West Virginia Code § 17A-6A-12(2) and the safe harbor provision located in West Virginia Code § 17A-6A-12(4). (Joint Designation 52). In that opinion, Judge Copenhaver recognizes the respective positions of the parties on this issue. (Id.) King Coal asserts that "Crossroads' is an entirely new motor vehicle dealership solicited and created after the demise of Lewis Automotive and that its recent entry into the relevant market area constitutes the "establish[ment]" of a new motor vehicle dealer that requires GM to provide notice under section 17A-6A-129(2)." (Id. at pg. 10). Whereas, GM responds that the "circumstances surrounding Crossroads' market entry, and Lewis Automotive's departure therefrom, are more appropriately characterized as a 'reopening' under the safe harbor, to which the section 17A-6A-12 notice provision does not apply." (Id. at pg. 11). Commenting on these respective positions, Judge Copenhaver noted as follows:

> GM's assertion, however, raises a question that it fails to answer. One could posit that use of the term "relocate" and "relocation" in section 17A-6A-12(1), just three statutory subdivisions prior to the safe harbor, illustrates that the Legislature strictly confined the term "reopening" without the breadth that GM urges that it contains. In other words, the counter argument to GM's position would be that the Legislature covered the matter of a dealership that moves or changes ownership in a very circumscribed manner in section 17A-6A-12(1), even though the marketplace would be expected to change very little by the relocation of an existing dealer within the relevant market area.

(Id. at pg. 11).

It is on this basis that the United States District Court for the Southern District of West Virginia certified the above-referenced question to this Court. The facts of this case demonstrate that the Respondent is not entitled to avail itself of the safe harbor provision contained in West Virginia Code § 17A-6A-12(4) and is required to comply with the notice requirements outlined West Virginia Code §17A-6A-12(2). Accordingly, the certified question should be answered in the negative and this Court should remand this matter for further proceedings consistent therewith.

III. STATEMENT OF FACTS

On June 1, 2009, Respondent General Motors Company ("Old GM") filed for Chapter 11 reorganization in the United States Bankruptcy Court for the Southern District of New York. Pursuant to Section 363 of the United States Bankruptcy Code, Old GM reorganized itself as General Motors, LLC ("New GM") and chose which outstanding debts, contracts, obligations, and rights it would assume and assign to New GM. (Joint Designation 35 ¶ 2). Through correspondence dated June 1, 2009, Old GM advised Petitioner that the dealer agreement regarding Petitioner's sale of Cadillacs would be discontinued by October 31, 2010. (Joint Designation 35 ¶ 3). Through separate correspondence also dated June 1, 2009, Old GM advised Petitioner that it intended to seek bankruptcy approval of its assumption of the existing dealer agreement regarding Petitioner's sale of Chevrolet vehicles and subsequent assignment of the same to its "363 Acquirer," *i.e.* New GM. (Joint Designation 35 ¶ 2).

The second correspondence stated, in part:

> Part of GM's restructuring efforts include plans for a dealer network **consisting of fewer, stronger and more properly located dealers** which we hope will allow for higher through-put and enhanced business potential. [...] A critical part of our dealers network plan is proper channel alignment and dealer focus on the correct brands at the right location. As a result, some retained dealers may receive

> additional brands. Also, some retained dealers will continue with fewer brands than they currently operate. (emphasis added)

According to a "GM Dealer Sales and Service Agreement/Participation Agreement" included with the second correspondence, Old GM's restructuring plans would "enhance Dealer's and the 363 Acquirer's (New GM's) opportunities for success." (Joint Designation 35 ¶ 2). With regard to Old GM's plans for restructuring its dealer network, the agreement stated:

> Dealer recognizes that as part of [Old GM's] restructuring efforts, a significant number of dealers of the same line make as Dealer will be consolidated. Because this consolidation will result in fewer dealers representing the Existing Model Line (Chevy), the retained dealers, including Dealer, will have the opportunity to increase sales significantly. It is therefore vital to Dealer and [Old GM] that Dealer agree to implement additional sales and inventory requirements necessary for Dealer to be retained in [New GM's] dealer network and for Dealer's performance to be in line with such increased opportunity.

(Id). As a part of the above-referenced restructuring efforts, Old GM discontinued the Chevrolet Dealer Agreement with Lewis Automotive Group ("Lewis") in 2010 in the same manner it discontinued the Cadillac dealer agreement with Petitioner. (Joint Designation 35 ¶ 4). Lewis formerly sold, among other motor vehicles, new Chevrolet automobiles in the Beckley, West Virginia area and is still currently in business as a Nissan Dealership.

In or around November 2010, New GM sent correspondence to those identified as "potential candidates" for the possible establishment of a new Chevrolet dealership in the Beckley, West Virginia area. (Joint Designation 35 ¶ 5). The letter served as a guide for the submission of a proposal package by those "potential candidates" interested in being awarded a dealer agreement for the sale of new Chevrolet vehicles in the area. (Joint Designation 35 ¶ 5). All such proposals were to be submitted by December 6, 2010. (Joint Designation 35¶ 5). The former Lewis dealership, whose dealer agreement regarding Chevrolet sales was unilaterally terminated by GM

in 2010 under the auspices of GM's bankruptcy reorganizations, neither received a letter or information packet from the Respondents nor received an invitation to submit a proposal for the re-opening of its Chevrolet dealership in the Beckley, West Virginia area.

Pursuant to the submission process noted above, a new dealer agreement regarding the sale of Chevrolets in the Beckley, West Virginia area was awarded to the principals of new Mid-State Chevrolet a.k.a. Crossroads Chevrolet. (Joint Designation 35 ¶ 7). On September 20, 2012, Crossroads Chevrolet ("Crossroads") signed a dealer agreement with GM to operate as a Chevrolet dealer at 191 Crossroads Drive, Mt. Hope, West Virginia. (Joint Designation 35 ¶ 8). The newly established Crossroads location is within the "relevant market area" of King Coal Chevrolet as that term is defined in the Vest Virginia Dealers Act, W. Va. Code § 17A-6A-3(14). (Joint Designation 35 ¶ 9). The location of this new Crossroads Chevrolet dealership is approximately 10.23 air miles away from Petitioner's location at 1508 East Main Street, Oak Hill, West Virginia. (Joint Designation 35 ¶ 9).

At no time did Old GM or New GM provide Petitioner with any form of notice whatsoever regarding its intent to establish this additional dealer within the relevant market area of Petitioner, notwithstanding the fact that GM had a statutory obligation to do so under West Virginia Code Section 17A-6A-12(2). As evidenced by GM's "Letter of Intent" sent to Rodney L. LeRose II on October 6, 2011, GM formed the intent to establish Crossroads as a new motor vehicle dealer of Chevrolet vehicles within the relevant market area of Petitioner almost a year earlier. (Joint Designation 35 ¶ 7). In written correspondence dated September 10, 2012, Petitioner demanded that Respondents provide proper notice pursuant to W. Va. Code § 17A-6A-12(2) so that Petitioner could exercise its statutory rights and protect its interests under the West Virginia Motor Vehicle Dealers, Distributors, Wholesalers and Manufacturers Act (hereinafter referred to as the

"West Virginia Dealers Act"), codified as W. Va. Code § 17A-6A-1 *et seq.*. (Joint Designation 35 ¶ 10).

In correspondence dated September 14, 2012, Respondents replied by implicitly recognizing their obligation to comply with the aforementioned statutory notice requirements but maintained that they were exempt from providing such notice because Respondents were simply "re-opening" by "replacing" a new motor vehicle dealership that was closed within the preceding two years. (Joint Designation 35 ¶ 10). Respondents rely on W. Va. Code § 17A-6A-12(4) in support of their response and specifically identified the aforementioned Lewis dealership as the recently "closed" dealer, despite the fact that Lewis never closed its doors and is, in fact, still doing business as a new motor vehicle dealer. GM is now attempting to re-establish its Chevrolet brand in the Beckley, West Virginia area by "re-opening by replacing" a new motor vehicle dealer (Crossroads) which is not, in any way, associated with the Lewis dealership.

IV. SUMMARY OF ARGUMENT

Respondent violated the clear and unambiguous statutory notice requirement of W. Va. Code § 17A-6A-12(2) when Respondent entered into a new dealer agreement with Crossroads. The West Virginia Dealers Act, specifically W. Va. Code § 17A-6A-12(2), requires that, prior to entering into a dealer agreement establishing or relocating a new motor vehicle dealer within a relevant market area where the same line-make is represented, the manufacturer shall give written notice to each new motor vehicle dealer of the same line-make in the relevant market area of its intention to establish an additional dealer in the relevant market area. *W. Va. Code* § 17A-6A-12(2). Respondent provided no notice whatsoever to Petitioner, prior to or after, entering into a new dealer agreement with Crossroads, a new car dealer within the relevant market area of Petitioner and dealer of the same line-make as Petitioner.

Respondent attempts to argue that it was exempt from the mandatory notice requirement by relying on the safe harbor provision located in W. Va. Code §17A-6A-12(4). To satisfy this exemption, Respondent must be reopening in a relevant market area a new motor vehicle dealer that has been closed or sold within the preceding two years if the established place of business of the new motor vehicle dealer is within four miles of the previously closed or sold dealer. *See W. Va. Code* §17A-6A-12(4). Crossroads is a new motor vehicle dealer located within the relevant market area of Petitioner. Crossroads has no association whatsoever with Lewis, the previously closed dealer, and Crossroads did not buy Lewis. Further, Crossroads is a new motor vehicle dealer of the same line-make as Petitioner. The safe harbor provision, by its clear and unambiguous language, does not exempt Respondent from complying with the mandatory notice requirement contained in W. Va. Code § 17A-6A-12(2).

V. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

The issue presented is a discrete issue of law involving interpretation of a statute. The facts and legal arguments are adequately presented in the briefs and record on appeal, and the decisional process would not be significantly aided by oral argument. Oral argument under Rev. R.A.P 18(a) is not necessary unless the Court determines that other issues arising upon the record should be addressed. Should the Court determine that oral argument is necessary, this case may be appropriate for hearing under Rev. R.A.P. 19(a)(4) because the case involves a very narrow issue of law and statutory interpretation.

VI. ARGUMENT

A. STANDARD OF REVIEW

The issue presented for review was certified by United States District Court for the Southern District of West Virginia. Plenary, or *de novo*, review is employed by an Appellate Court when analyzing the issues presented by certified question from a federal district or appellant court. *See* Syl. Pt. 1 *Bragg v. United States*, 741 S.E.2d 90 (W. Va. 2013). The interpretation of a statute or an administrative rule or regulations presents a purely legal question subject to *de novo* review. Syl. Pt. 2, *Tribeca Lending Corp. v. McCormick*, 2013 W. Va. LEXIS 721 (W. Va. 2013).

B. RESPONDENT WAS REQUIRED TO GIVE STATUTORY NOTICE PURSUANT TO W. VA. CODE § 17A-6A-2(2) OF ITS INTENT TO OPEN A NEW MOTOR VEHICLE DEALER

The West Virginia Dealers Act, codified as West Virginia Code § 17A-6A-1 *et seq.*, governs the relationship between "new motor vehicle dealers" *i.e.* Petitioner, and "distributors, manufacturers" such as Respondents. The purpose of the West Virginia Dealers Act is to "regulate motor vehicle dealers, manufacturers, distributors, and representatives of vehicle manufacturers and distributors doing business in this state in order to avoid undue control of the independent new motor vehicle dealer by the vehicle manufacturer or distributor [...]." *W. Va. Code* § 17A-6A-1. The West Virginia Dealers Act governs the entire relationship and life cycle of a dealership, from the establishment of a new dealership by the manufacturer to the cancellation of a dealer agreement by a manufacturer. Pursuant to the West Virginia Dealers Act W. Va. Code §17A-6A-12(2), Respondent had a statutory duty to provide written notice to Petitioner of its intent to enter into a new dealer agreement with Crossroads.

C. THE PLAIN MEANING OF W. VA. CODE § 17A-6A-12(2) REQUIRED RESPONDENT TO PROVIDE WRITTEN NOTICE TO PETITION PRIOR TO ENTERING A DEALER AGREEMENT WITH CROSSROADS

The statutory requirement that Respondent must provide written notice to Petitioner of its intent to enter into a new dealer agreement with Crossroads is clear and unambiguous. Pursuant to Section 12(2) of the West Virginia Dealers Act:

> Before a manufacturer or distributor enters into a dealer agreement establishing or relocating a new motor vehicle dealer within a relevant market area where the same line-make is represented, **the manufacturer or distributor shall give written notice to each new motor vehicle dealer of the same line-make in the relevant market area of its intention to establish an additional dealer** or to relocate an existing dealer within that relevant market area.

W. Va. Code §17A-6A-12(2) (emphasis added). West Virginia Code Section 17A-6A-3(14) defines "relevant market area" as "the area located within a twenty air-mile radius around an existing same line-make [dealer] [...]." *W. Va. Code* § 17A-6A-3(14). Moreover, this Court has stated that "where the language of a statute is clear and without ambiguity the plain meaning is to be accepted without resorting to rules of interpretation. Syl. Pt. 3, *Tribeca Lending Corp. v. McCormick*, 2013 W. Va. LEXIS 721 (W. Va. 2013). The language of W.Va. Code § 17A-6A-12(2) is clear and unambiguous.

In order for an affected dealer to protect its rights, within sixty days of receiving the notice required under Section 17A-6A-12(2), an affected dealer may bring a declaratory judgment action against the manufacturer or distributor regarding its proposal. *W. Va. Code* § 17A-6A-12(3). West Virginia case law makes clear that the declaratory judgment action provided by Section 17A-6A-12(3) may not be brought until the statutory notice required by Section 17A-6A-12(2) is received. *See Raines Imports, Inc. v. American Honda Motor Co.*, 674 S.E.2d 9, 17 (W. Va. 2009) (holding that "the plain language of W. Va. Code § 17A-6A-12(2) requires statutory notice

before a manufacturer or distributor enters into a dealer agreement to establish an additional new dealer or relocate an existing dealer of the same line-make within a preexisting dealer's 'relevant market area.'").

The newly-established Chevrolet dealership, Crossroads, is located approximately 10.23 air miles away from Petitioner's location at 1508 East Main Street, Oak Hill, West Virginia and is within the relevant market area of Petitioner. (Joint Designation ¶ 9). Respondent entered into a dealer agreement with Crossroads on September 20, 2012, in order to establish Crossroads as a dealer of new Chevrolet automobiles, the same line-make as Petitioner, in the Beckley, West Virginia area. By the plain terms of the West Virginia Dealers Act Section 12(2), Respondent was required to provide Petitioner written notice of Respondent's **intent** to enter into a dealer agreement with Crossroads **prior** to entering into such a dealer agreement establishing a dealer of new Chevrolet vehicles within Petitioner's relevant market area. However, at no time did Respondent provide the required written notice of its intent to establish Crossroads as a new Chevrolet dealer. (Joint Designation 35 ¶ 10).

West Virginia law makes clear that written notice should have been provided before the Respondent entered into a dealer agreement with the principals of Crossroads. Respondents have entered into said dealer agreement regarding the sale of new Chevrolet vehicles with the principals of Crossroads and, in fact, Crossroads is currently open and selling new Chevrolet vehicles in the Beckley, West Virginia area. Petitioner was never afforded an opportunity to pursue its statutory rights to seek a declaratory judgment due to the fact that Respondent blatantly failed to comply with the plain language of Section 17A-6A-12(2) and provide written notice to Petitioner of Respondent's intent to form a dealer agreement with Crossroads.

D. CROSSROADS IS NOT A REOPENING OF A PREVIOUSLY CLOSED OR SOLD DEALERSHIP AND RESPONDENT IS NOT ENTITLED TO AVOID THE NOTICE REQUIREMENT BY RELYING ON THE SAFE HARBOR PROVISION OF W. VA. CODE 17A-6A-12(4).

In an effort to avoid the consequences of its failure to adhere to its statutory obligations, Respondent takes the position that the establishment of Crossroads was not a "new enterprise" but rather a "re-opening" by "replacing" a previously closed Chevrolet dealer, namely, Lewis Chevrolet. In reaching this flawed conclusion, Respondent misconstrues the plain and unambiguous language of the notice safe harbor found in Section 17A-6A-12(4). Section 17A-6A-12(4) states:

> This section does not apply to the **reopening** in a relevant market area of a new motor vehicle dealer that has been closed or sold within the preceding two years if the established place of business of the new motor vehicle dealer is within four miles of the established place of business of the closed or sold new motor vehicle dealer.

W. Va. Code § 17A-6A-12(4)(emphasis added). The exemption provided in Section § 17A-6A-12(4) does not apply because Crossroads is a new dealership that is incapable of "re-opening." Respondent has conceded that the West Virginia Supreme Court of Appeals has clearly stated that, "where the language of a statutory provision is plain, its terms should be applied as written and not construed." *DeVane v. Kennedy*, 519 S.E.2d 622, 632 (1999). Yet, Respondent attempts to construe Section 17A-6A-12(4) by identifying the following as the first element to be satisfied in order to be exempt from notice:

> (1) ***replace*** a new motor vehicle dealer[.]

(Joint Designation 9 pg. 10). There is not one instance in Section 12 where the word "replace," or any form thereof, is used. Rather, the re-opening exemption under Section 12(4) applies only where there is a "reopening in a relevant market area of a new motor vehicle dealer that has been

closed or sold within the preceding two years if the established place of business of the [new dealer] is within four miles of the established place of business of the closed or sold [dealer]." *W. Va. Code* §17A-6A-12(4). This exemption is consistent with Section 12(1) which excludes from the definition of the terms "relocate" and "relocation" the relocation of a new dealer within four miles of its established place of business, or when an existing dealer sells the dealership to a new owner who then relocates said dealership within four miles of the former owner's last location. *W. Va. Code* § 17A-6A-12(1).

While there is no dispute that Crossroads is currently located within four miles of where Lewis is currently located, Respondent has not produced one *iota* of factual evidence that Crossroads is merely a "re-opening" of Lewis. (Joint Designation 35 ¶ 9). Indeed, Respondent concedes that Crossroads did not exist prior to September 2012. Equally as important is that Respondent concedes that Crossroads was not created out of a sale from Lewis. In fact, the overwhelming evidence of record aptly demonstrates that Crossroads serves as a "newly established" Chevrolet dealership rather than a re-opening of one that has been previously closed.

First, Lewis Chevrolet has **never** closed its doors as a "new motor vehicle dealer" in the State of West Virginia. (Joint Designation 43). As defined by the Act, a "new motor vehicle dealer" means a "person who holds a dealer agreement granted by a manufacturer or distributor for the sale of its motor vehicles...who has an established place of business in this state and is licensed by the division of motor vehicles." *W. Va. Code* §17-A-6A-3(11). Here, Respondent may have terminated its dealer agreement with Lewis on or about October 31, 2010, but, both before and after that date, Lewis had an active and continuing agreement with Nissan, maintained an established place of business which still exists to this day, and possesses a license from the West Virginia division of motor vehicles to sell new automobiles. Lewis may have taken down the

Chevrolet sign on or about October 31, 2010, but, as a new motor vehicle dealer in the State of West Virginia, Lewis has never closed its doors. Accordingly, Respondents cannot "re-open" that which has never been "closed."

Second, according to the current President of Lewis Chevrolet Company, A. David Abrams, Jr., except for contact under the provisions of the Wind-Down Agreement entered into when Respondent canceled Lewis' dealer agreement for the sale of Chevrolet vehicles, Lewis had no contact with Respondent at all regarding continued Chevrolet operations. (Joint Designation 43 at pgs 133:25; 134:1-2). Importantly, Lewis was never given an opportunity to submit a proposal to be selected as a dealer for the new "establishment" of the Chevrolet brand in the Beckley, West Virginia area, (Joint Designation 43 at pgs. 133:23-25; 134:1-2), and was not even made aware by Respondent that it was seeking proposals to establish a new Chevrolet dealer in the Beckley, West Virginia area. (Joint Designation 42 at 132:21-25). Certainly, Lewis has not "reopened" its Chevrolet operations. Similarly, Lewis never sold any assets to Crossroads or the principals of Mid-State, the Tucker Family, or the LeRose family, the operators of Crossroads. (Joint Designation 43 at 134:3-6). No officer or stakeholder in Lewis has any ownership interest in either Crossroads or Mid-State and neither Lewis nor any of its d/b/a's have any corporate affiliation with Crossroads or Mid-State. (Joint Designation 43 at pgs 23-25).

Third, Respondent's own actions and related written correspondence regarding the closing of Lewis and the establishment of a new "point" in Beckley belies the characterization of Crossroads as merely a "re-opening" of Lewis. For instance, on June 1, 2009, Respondent sent several letters to Petitioner terminating Petitioner's Cadillac dealership and reaffirming its Chevrolet dealership. (Joint Designation 5 Exh. 1 and 2). While these letters reference Respondent's strategy to restructure its dealer network consisting of fewer, stronger and more

properly located Chevrolet dealers, specifically, Respondent makes no mention of the possibility that it may seek to re-open any of those terminated dealers the month after the effective date of the wind-down period. (Joint Designation 43 at 194:3-10).

Notwithstanding these substantial short-comings, Respondent nonetheless attempts to argue that "Crossroads is reopening to ***replace*** Lewis." Here, the emphasis is on the word "replace." Respondent's entire defense for its failure to provide Petitioner the required statutory written notice hinges on whether Section 12(4) includes "replacement dealers" within the exemption. Unfortunately for Respondent, that phrase is nowhere to be found in Section 17A-6A-12, generally, or in Section 12(4), specifically. The lack of inclusion of "replacement dealers" cannot be explained by arguing that the West Virginia Legislature was unaware of the phrase because Section 17A-6A-7(f) specifically refers to "replacement dealers."

Section 7 of the West Virginia Dealers Act establishes other notice requirements placed upon manufactures and distributors of new motor vehicles in West Virginia, particularly the requirement that manufacturers provide written notice of their intent to discontinue, cancel, or not renew a dealer agreement. W. Va. Code § 17A-6A-7. Section 7(e) allows a dealer that has received notice of a manufacturer's intent to discontinue, cancel, or not renew a dealer agreement may file a complaint or petition for a determination of whether such an action is unfair or prohibited. Section 7(f) mandates that the manufacturer cannot name a ***replacement dealer*** until a final judgment is entered in such an action and all appeals are exhausted.

Importantly, the use of the term "replacement dealer" in Section 7(f) shows that the West Virginia Legislature was clearly cognizant of not only the words, but the idea that a manufacturer, like Respondent, could replace one dealership with another new dealership in the same market area. However, it is equally as significant that the Legislature did not use the words "replacement

dealer" or any form thereof when drafting Section 12(4). It could have, but it did not. It is clear, then, that the West Virginia Legislature, having fully comprehended and understood the concept of "replacement dealers" chose not to include such entities within the scope of the exemption set forth in Section 17A-6A-12(4). However, Respondent has maintained throughout the course of the proceedings that any interpretation or construction of Section 12(4) that does not include an exemption for "replacement dealers" is **"wholly unsupported"** and also **"inconsistent with multiple decisions addressing similar statutory exemptions."** Respondent is unfounded in these assertions.

First, none of the decisions Respondent has relied upon to support its position involve statutory exemptions that are similar to that of West Virginia's Section 12(4). For instance, Respondent relies heavily on *Ewald Chrysler, Inc. et al. v. DaimlerChrysler et al.*, Wisconsin Div. of Hearings and Appeals, Case No. TR-05-0008, for the proposition that notice is not required where a manufacturer designates a replacement dealer to "reopen and relocate" an unassociated dealer that had previously closed. Respondent's reliance on this opinion is misplaced as the Wisconsin statute at issue in that case specifically contemplated the "reopening or **replacement** of a dealership or outlet" that had been previously closed. Wisc. Stat. §218.0016(7)(d)1m (emphasis added). Here, the West Virginia statute only makes mention of a reopening and does not provide an exemption for a replacement.

Secondly, Respondent has represented incorrectly the notion that Section 12(4)'s exemption does not include "replacement dealers" is ***"wholly unsupported,"*** however, Respondent's own counsel should know that such an interpretation is not only correct but supported by decisional authority. *See Clay Matthews Pontiac, Inc. v. General Motors Corp.*, before the Motor Vehicle Dealers Board of Ohio, Case No. 01-05-MVDB-258-D (May 16, 2011).

In *Clay*, the Pontiac dealership filed a protest with the motor vehicle board regarding the proposed establishment by GM of a dealership in Eastlake, Ohio, which was within the relevant market area of the dealership. As in the case at hand, GM refused to provide the dealership with statutory notice of its intent to open this new dealership. As a consequence, GM's failure to provide notice foreclosed the ability of the dealership to file a protest with the Board, as was its right under Ohio's Revised Code, Section 4517.50.

The statutory provision at issue provided that an additional new motor vehicle dealership was established where there was a "reopening" in a relevant market area of a new motor vehicle dealership that has ceased to operate as a new motor vehicle dealership for a period of forty-five days or longer. *See* R.C. 4517.50(D)(1). Under the facts of the case, the new proposed "replacement" dealership was opening within 45 days of the closing of the old dealership. Consequently, GM filed a motion to dismiss arguing that, *inter alia*, its replacement of one dealership with another does not constitute the establishment of an additional dealer in the relevant market area. GM contended it was not "adding" an "additional" dealer because it terminated one and replaced it with another dealer within the 45 day period for "reopening" the dealership under the statute. In essence, Respondent is making the same arguments in the case at hand.

In examining the issues, the Hearing Examiner noted that the Ohio General Assembly did not add the word "replacement" dealer to the provision regarding the reopening of a closed dealership. "Instead, it merely modified the previous language in stating that it applies to the 'reopening...of a new motor vehicle dealership that has ceased to operate..." Based upon this, the Hearing Examiner concluded that this would "imply that only a new motor vehicle dealer 'that has ceased to operate' can take advantage of division (D)(1)' which provides for reopening. The Hearing Examiner also took note that there was no connection or privity between the closing or

terminated dealer and the proposed replacement dealer. Accordingly, the Hearing Examiner found that the General Assembly did not intend for the facts presented in *Clay* to be included within the exemption for a reopening and, thus, denied GM's motion to dismiss finding that the proposed "replacement" dealer could not reopen the closed dealership and, thus, was the establishment of a new motor vehicle dealer for which notice was required.

If anything, these decisions reinforce that state legislatures seeking to create the exception that Respondent would have this Court create through W. Va. Code §17A-6A-12(4) specifically use language regarding replacement or successor dealerships. The West Virginia Legislature chose not to include language regarding replacement or successor dealerships, despite its availability to them. The plain language of Section 12(4), as well as common sense, dictate that for this exception to apply, the dealership that is ***reopening*** must be the same dealership that was closed or sold. As noted and conceded by Respondent, Crossroads has no association whatsoever with Lewis Chevrolet and, by no stretch of the imagination, can it be considered a "reopening" of a closed dealership. Respondent's attempt to "reopen by replacing" Lewis with Crossroads does not qualify for the safe harbor provision contained in Section 12(4). Accordingly, Respondent has failed to comply with its express statutory duty to provide written notice to Petitioner of its intent to establish Crossroads within Petitioner's relevant market area and prevented Petitioner from pursuing its statutory rights.

VII. CONCLUSION

For the foregoing reasons, W. Va. Code §17A-6A-12(4) should not be interpreted to extend the safe harbor to manufacturers that close an existing dealership, solicit proposals for the establishment of an entirely new dealership, and open an entirely new, unrelated dealership. Any other interpretation is contrary to the express language of the statute and the clear purpose of the

statute. Therefore, the Petitioner respectfully asks this Court to answer the certified question in the negative and remand this matter for further proceedings consistent therewith.

KING COAL CHEVROLET COMPANY,
By Counsel.

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APPEAL NO. 13-0675

IN THE SUPREME COURT OF APPEALS, WEST VIRGINIA

KING COAL CHEVROLET COMPANY, Plaintiff Below,

Petitioner

v.

GENERAL MOTORS LLC, Defendant Below,

Respondent

CERTIFICATE OF SERVICE

I, Christopher J. Sears/William R. Slicer, do hereby certify that true and exact copies of the foregoing **"Brief of Petitioner King Coal Chevrolet, Inc. on Certified Question"** has this day been forwarded to opposing counsel of record by depositing same in the United States Mail, first class postage prepaid, and addressed as follows:

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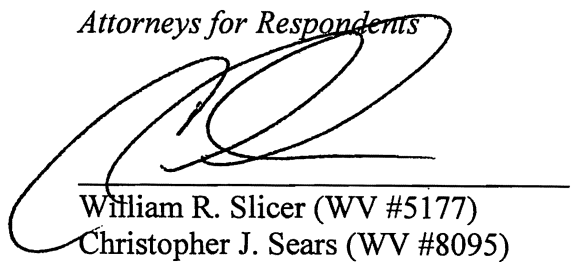

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