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)

# REPLY OF PETITIONER KING COAL CHEVROLET, INC. TO BRIEF ON BEHALF OF RESPONDENT, GENERAL MOTORS LLC

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## I. General Motor's Statement of the Case is replete with self-serving statements, mischaracterizations of fact, and statements not relevant to a determination of the certified question presented.

The question certified to this Court from the United States District Court for the Southern District of West Virginia, speaks directly to King Coal's first request for equitable relief in this matter:

> To direct General Motors to provide formal statutory notice of its intent to establish a new motor vehicle dealership within the relevant market area of King Coal Chevrolet pursuant to W.Va. Code § 17A-6A-12(2) so that King Coal may invoke its right to seek a review of the same on declaratory judgment pursuant to West Virginia Code § 17A-6A-12(3).

In response, General Motors maintains that it need not provide such formal statutory notice because, by signing a dealer agreement with Crossroads Chevrolet on September 20, 2012, it merely "reopened" Lewis Chevrolet which ceased doing business as a Chevrolet dealer on October 31, 2010 – almost two years prior to the establishment of Crossroads Chevrolet.

Nowhere in any of the countless letters, notices, and memoranda that are included in the body of evidence in this matter does General Motors ever characterize the establishment of Crossroads as a "reopening" of any kind. Rather, General Motors explains that its use of the terms "reestablishment" or "replacement" in prior correspondence should be used interchangeably with the term "reopen" because that is really what they meant to say. Indeed, GM maintains in its brief that, from the beginning, it "planned to replace Lewis as part of its dealer restructuring efforts given the market opportunity for Chevrolet in Beckley" and given Lewis history of poor performance.

GM's current position on this issue is inconsistent with the representations made to dealers at the time GM restructured its dealer network that was to consist of "fewer, stronger and more properly located dealers" which GM hoped would allow for "higher through-put and enhanced business potential." GM's current position also is belied by the "GM Dealer Sales and Service

Agreement/Participation Agreement" in place during the restructuring which represented that as part of 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.

Nowhere in the stacks of documents associated with this case is there any written disclosure of intent to close a dealership – Lewis – that had been in business for 80 years only to turn around and "replace" it with a new Chevrolet dealership.

Similarly, GM's discussion of the efforts expended to construct, stock, open, and staff the new Crossroads Chevrolet dealership is of no consequence to this Court's determination of whether GM can re-write West Virginia Code, Section 17A-6A-12(4). In this regard, it is without question that any possible disruption of new car sales (which is the only aspect of the Crossroads business that would be affected by the second request for injunctive) could have been avoided in the first instance if only GM had provided proper statutory notice. Instead, as the record clearly demonstrates, the executives and representatives at GM consistently and repeatedly made false representations to William DeAth, King Coal's former owner, and Ernie Davis, King Coal's current owner, as to the likelihood of Crossroads ever opening its doors. In this regard, multiple representations were made that the Crossroads dealership was "far from being a done deal" and that there were "many hoops" to jump through, thereby suggesting that the dealership may not ever see the light of day.

The truth was revealed at the evidentiary hearing held by Judge Copenhaver when Mr. Hudgens of GM testified that he has never seen one of these deals not go through to completion. This testimony stands in stark contrast to the story that GM used to string King Coal along as long

as it could. GM's slight of hand continues in its current brief in opposition to the pending certified question:

- GM continues to maintain that "Crossroads merely replaced Lewis and that "no new dealers" were ever added to the market. Here, the term "replacement" (as in "replacement dealers") is a term of art used routinely in statutes dealing with new motor vehicle dealers. What is problematic for GM is that the West Virginia state legislature, though cognizant of the existence of this term, chose not to include it in the statute which set forth circumstances under which notice is required. Moreover, it is incorrect to state that "no new dealers" were added to the market when it is undisputed that from October 2010 to September/October 2012, King Coal was the only Chevrolet dealership located within its own relevant market area. When GM added Crossroads to King Coal's relevant market area, that was one more dealership than had existed in the previous two years. GM's willingness to ignore this obvious fact is not surprising in light of its willingness to thumb its nose at the statutory obligations imposed upon it under West Virginia law.

- The fact that Ernie Davis and his wife applied for the Chevrolet dealership opportunity in November 2010 under a "one rooftop" enterprise is of no consequence to the fact that GM formed an intent to actually open a new dealership in October 2011, yet failed to provide proper statutory notice to King Coal Chevrolet. Even if the Davis' proposal had been adopted and the project completed (as opposed to Crossroads being the winning candidate), GM still would have been required to provide written statutory notice of its intent to open a new Chevrolet dealership within King Coal's relevant market area. Thus, the Davis' application and subsequent discussions with GM is simply a red-herring in relation to the issues presented in the instant matter.

- GM seems to take the position that King Coal had an affirmative duty to either "object" or "take formal action" long before the construction of Crossroads' was completed. Again, this statement is indicative of GM's attitude that it above the law of West Virginia but that others must take on additional duties above that which is required under the law. Here, there is no affirmative duty on King Coal to make an objection as to any dealers' possible plans for expansion. Notwithstanding this fact, King Coal, by and through its current and previous owners, made routine inquiry into the status of the "potential" project and voiced its concerns regarding the location and management of the dealership. Although GM knew full well that no such similar project had ever failed to make it to completion, GM constantly led King Coal to believe that the project was "far from being a done deal." Certainly, King Coal was prepared to take "formal action" once GM provided the notice required by statute, but the same was never forthcoming. To be sure, the underlying petition for injunctive relief was filed just six days *after* GM secretly inked a dealer agreement with Crossroads and weeks before Crossroads officially opened for business to the public.

- GM's representations as to the profitability and competitiveness of King Coal as

well as its record of sales are not supported by the evidence. GM points to a single month (October 2012) to demonstrate that King Coal is profitable and can compete. Indeed, by so doing, GM ignores the evidence of sales in each month of 2012 when King Coal had a crushing loss in sales over the previous year. This trend continued until new management takes over King Coal's operations in June/July 2012 and infuses a lot of money into the project including advertisements. It is at that time that King Coal starts to show a significant positive increase in sales over the previous year until, that is, Crossroads opens for business. Once Crossroads opens for business half way through the month of October, King Coal's sales drop precipitously.

- Unless the certified question is answered in the negative and injunctive relief is granted, King Coal will irreparably be harmed as there is no adequate remedy at law. Without the injunctive relief requested, King Coal will be forever barred from challenging GM's decision to open a new Chevrolet dealership in the Beckley area. The West Virginia Legislature provided a right of a competing car dealer like King Coal to mount a challenge to a manufacturer's decision to establish a direct competitor within that car dealer's relevant market area. Here, GM has done (and is continuing to do) everything it can to frustrate King Coal's exercise of that statutory right. The entire conduct of GM upon which this litigation is based is untenable and should not receive the approval of this Court.

## II. General Motors was statutorily required to provide written notice to King Coal Chevrolet of its intent to establish a new dealer in the Beckley area before entering into a Dealer Agreement with Crossroads Chevrolet.

Even now before this Court, GM continues to maintain that it is not establishing an "additional" new motor vehicle dealer, notwithstanding the fact that, at the time Crossroads opened, there was only one Chevrolet dealer in the relevant market and now there are two. GM goes on to explain that it is merely "reopening" the Chevrolet dealership that closed within the preceding two years. What is telling is that a statement like that is not as easy for GM to make as it should be if truly a previous dealership was simply being "reopened." Indeed, GM's explanation is so tenuous that it must seek substitute words expressed parenthetically (*i.e.*, "re-established" or "replaced") for its position to even begin to reflect any degree of credulity. The fact that GM must parenthetically rewrite the statute underscores the fact that its interpretation of the provision can be correct *only* when one infuses it with meaning that the Legislature intentionally left out.

On this point, let us be reminded as to what this Court has previously said about such matters:

> "The primary object in construing a statute is to ascertain and give effect to the intent of the Legislature." Syllabus Point 1, Smith v. State Workmen's Compensation Com'r, 159 W.Va. 108, 219 S.E.2d 361 (1975). "Once the legislative intent underlying a particular statute has been ascertained, we proceed to consider the precise language thereof." State ex rel. McGraw v. Combs Services, 206 W.Va. 512, 518, 526 S.E.2d 34, 40 (1999). Moreover, when we interpret a statutory provision, this Court is bound to apply, and not construe, the enactment's plain language. We have held that "[a] statutory provision which is clear and unambiguous and plainly expresses the legislative intent will not be interpreted by the courts but will be given full force and effect." Syllabus Point 2, State v. Epperly, 135 W.Va. 877, 65 S.E.2d 488 (1951), see also Martin v. Randolph County Bd. Of Educ., 195 W.Va. 297, 312 S.E.2d 399, 414 (1995) (quoting Connecticut Nat'l Bank v. Germain, 503, U.S. 249, 253-54, 112 S. Ct. 1146, 1149, 117 L.Ed 2d 391, 397 (1992) ("Courts must presume that a legislature says in a statute what it means and means in a statute what it says there.").

State of West Virginia v. Myers, 214 W.Va. 324, ___, 589 S.E.2d 55, ___ (2003). In writing the West Virginia Dealer's Act, the Legislature makes reference in other provisions to the concept of "replacement dealers". See, *e.g.*, 17A-6A-7(f). But when it came to writing West Virginia Code, Section 17A-6A-12, the Legislature chose not to include "replacement dealers" as an exemption to the notice requirement of that Section. Again, this Court must presume that the legislature says in a statute what it means and means in a statute what it says there. See id. Thus, when the Legislature excludes by omission "replacement dealers" from a provision which provides a manufacturer an exemption to providing notice, then it must be presumed that the Legislature intended manufacturers to provide statutory notice when the manufacturer decides to re-establish or replace a dealer, as opposed to reopening one that had been previously closed.

The American Heritage Dictionary defines "re-open" as "to open or take up again; to start over, resume." This is to be distinguished from the definition of "replace" which means "to take or fill the place of; supplant or supersede; to be or provide a substitute for." In this case, there is no

dispute that Lewis Chevrolet stopped operating as a new Chevrolet dealer (though it continues in existence – and has never closed – as a new Nissan dealer). It is equally undisputed that Lewis is not opening up again or taking up the Chevrolet business again. Nor is Lewis "starting over" or "resuming" its previous operations. Thus, it cannot be said that Lewis is reopening in any way. GM recognizes this flaw in its logic and thus seeks to use the substitute words of "re-establish" and "replace" to give a meaning to the statute not originally intended by the Legislature. GM's own identification in the weakness of their position based solely on the words chosen by the Legislature itself is what prompts it to now argue that Crossroads is "taking over the place of" and is serving as a "substitute" for Lewis as the Chevrolet dealer in Beckley and, therefore, should be considered a re-opening, though technically it is not.

The language of the statute is clear. It is not ambiguous. This Court need not engage in a rewriting of the statute to make it more understandable. If a manufacturer establishes a new motor vehicle dealer within the relevant market area of an existing new motor vehicle dealer, written notice must be provided so that the already existing dealer may have an opportunity to challenge the manufacturer's business decision by way of declaratory judgment. If a manufacturer "reopens" a "new motor vehicle dealer that has been closed or sold within the previous two years," no such written notice is required. It is clear under the statute that what is being "re-opened" is a "new motor vehicle dealer that has been closed or sold within the preceding two years." In this case,

> Was Lewis a "new motor vehicle dealer that has been closed or sold within the preceding two years?" The answer is, "yes."

The next question:

> Is Lewis being re-opened? The answer is, "no."

Let us now pose these same questions with regards to Crossroads:

Was Crossroads a "new motor vehicle dealer that has been closed or sold within the preceding two years? The answer is, "no."

The next question:

Can Crossroads be re-opened? The answer: "Of course not."

Then what is Crossroads? It is the establishment of a new motor vehicle dealership for which notice is required. GM never seriously contends that Crossroads is a re-opening of Lewis. This is why GM discounts the fact that Lewis is still in existence as a new motor vehicle dealer and seeks to diminish the significance of the fact that Lewis has no corporate affiliation or asset sales history with Crossroads. Instead, whenever GM's representative referred to Crossroads at the hearing as a re-opening of Lewis, he did so in terms of the re-opening of a "point" or re-establishment of the Chevrolet brand – terms of art that go to GM's "presence" as opposed to a particular dealer's' "existence." If the Legislature wanted to provide an exemption for the re-opening of a "point" or re-establishment of a "brand" then it could easily have done so. But it did not. Thus, because GM cannot make its case under the West Virginia statute, it points to decisions in foreign jurisdictions which are based upon state statutes that are different from the West Virginia statute in that they specifically include "successors in interest" and "replacement dealers" within the list of exemptions to notice. Again, something that the West Virginia Legislature could have done, but chose not to.

In its most current brief before this Court, GM discusses these cases once again, yet fails to appreciate the fact that the statutes are quite different from the West Virginia statute. Again, GM ignores the case out of Ohio in which (1) a statute that is similar to West Virginia's is discussed; (2) the facts and arguments at issue are almost identical to the case at hand; (3) the tribunal found that the manufacturer was required to provide notice to the existing dealer; and (4) the current Columbus counsel for GM was the legal counsel of record. See Clay Matthews Pontiac, Inc. v.

General Motors Corporation, Before the Motor Vehicle Dealers Board of Ohio, Case No. 01-05-MVDB-258-D (May 16, 2001).

When one thinks about it, the remedy afforded by the Legislature in Section 12 to independent dealers is quite extraordinary and radical. One is hard-pressed to think of another industry wherein a statutory right is given to a small West Virginia retailer to challenge the business decision of a large multinational corporation when that decision directly affects that retailer's bottom line. It is obvious that GM is not accustomed to being told what to do. The Legislature recognized this when it wrote and enacted Section 12. It should come as no surprise that Section 12 was written to protect the West Virginia dealer and to attempt to level the playing field so that the manufacturer does not use its political clout and economic power to strong-arm those not strong enough to fight. In this case, GM wants nothing more than to conduct its operations in any manner it sees fit without dealers or courts of law second-guessing its business decisions. In order to achieve this objective of non-interference, GM has kept secret for almost a year its intent to see through to completion a new Chevrolet dealership in the Beckley area; has misrepresented to King Coal and its principals the likelihood that the new dealership was going to be established; has led King Coal to believe that it would be protected under the law by receiving statutory notice (though the testimony does conflict on this issue, this Court may weigh the credibility of the witnesses and evidence in support of the same); has infused the applicable statute with words that do not exist in the same; has cited foreign case law based on statutes than can be distinguished from that at issue here; and has ignored foreign case law based on statutes that are similar to that at issue here.

## III. GM's Construction of the Statute in Question Nullifies the Legislative Intent to Level the Playing Field and Afford Protection to Small Local Dealers from National Manufacturers.

Borrowing from its government bail-out "too big to fail" strategy of 2009, GM has stacked the deck in this litigation to ensure that its business decisions are not second-guessed. GM has written much about the effect that an adverse decision by this Court would have on it and Crossroads – and Crossroads has separately submitted a motion to file an amicus curiae brief outlining the same detrimental effects on its business. If the certified question is answered in the negative, then the question below will be whether, as of the date GM formed the intent to establish Crossroads as a new motor vehicle dealer within the relevant market area of King Coal, did "good cause" exist to do so? GM cannot and does not offer any argument that "good cause" existed in the time period between when GM was required to give notice to King Coal (October, 2011) and the date by which King Coal, and its principals, Ernie B. Davis, Jr. and Tracy Warren Hylton, II, would have been required to file a declaratory judgment action (December, 2011). GM knows that if a "good cause" analysis is performed as of that date then GM's business decisions can be second guessed. GM also knows that if it can string King Coal along long enough through false representations calling into doubt as to whether Crossroads will ever see the light of day and making false promises of giving King Coal a fair opportunity to be heard, after notice and a hearing, then it can get the new dealership up and running and change the dynamic of the debate. The "GM way" of doing things, then, is to ignore its statutory obligations; induce third-party investors into establishing a new dealership; officially authorizing the same only after the investment has been made (here, September 20, 2012); and get the cars on the lot and the doors open before anyone has time to complain.

In this way, GM can then argue to the court that the real issue is not one of "good cause" at the time the good cause determination should have legitimately been made, but rather whether an existing operation should be shut down (which is not even the specific relief requested in the petition for injunctive relief). Again, let the obvious admonishment not escape our thoughts: If GM is permitted to make an end-run around the statute in this manner, then the "GM way" will be

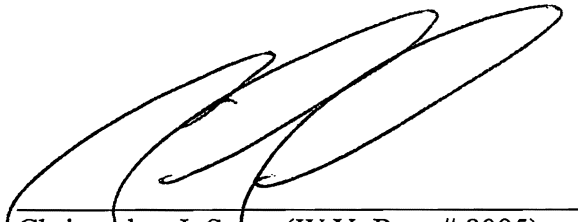
established as a blueprint for all manufacturers and distributors to the detriment of local, independent dealers who are the class for whom the Legislature crafted such protections. Simply put, GM's construction of the statute serves only to harm local, independent dealers and should be rejected as poor public policy.

## IV. Conclusion

The position that GM wants this Court to take undermines the public policy of this State and frustrates the intent of the Legislature. The public has a strong interest in maintaining the balance of power created by the West Virginia Legislature between manufacturers/distributors and new car dealers. GM seeks to permanently upset that balance of power.

**KING COAL CHEVROLET COMPANY,**

**By Counsel.**



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## CERTIFICATE OF SERVICE

I, Christopher J. Sears/William R. Slicer, do hereby certify that true and exact copies of the foregoing **REPLY OF PETITIONER KING COAL CHEVROLET, INC. TO BRIEF ON BEHALF OF RESPONDENT, GENERAL MOTORS LLC** 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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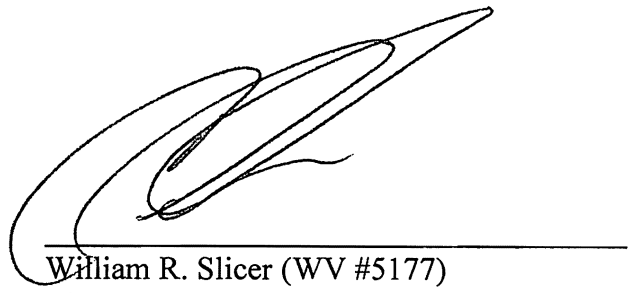

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