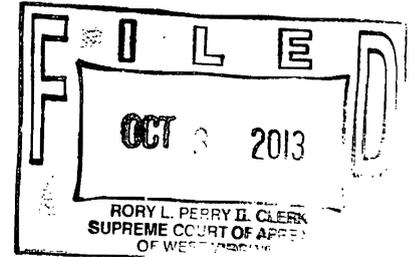


NO. 13-0675



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 RESPONDENT, GENERAL MOTORS LLC

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TABLE OF CONTENTS

	Page
I. CERTIFIED QUESTION PRESENTED	1
II. STATEMENT OF THE CASE.....	1
A. Procedural History	1
B. Statement Of Facts Relevant To Certified Question.....	2
1. Market Background	2
2. Davis Applies For The Beckley Market Chevrolet Opportunity	3
3. Crossroads Is Selected And Begins Operations.....	4
4. King Coal’s Operations And The Market.....	5
5. King Coal’s Ownership Change And Relocation Proposal	6
III. SUMMARY OF ARGUMENT	7
IV. STATEMENT REGARDING ORAL ARGUMENT AND DECISION	7
V. ARGUMENT	7
A. The Reopening Is Exempt From Notice	7
1. King Coal’s Interpretation Is Inconsistent With The Plain Language of the Act.....	8
2. The Dealer Act Should Be Construed As An Integrated Whole, Which Supports GM’s Interpretation of the Act.....	11
3. King Coal’s Interpretation, If Adopted, Would Lead To Absurd Results.....	14
4. The Legislature’s Intent And The Clear Public Policy Of West Virginia Favors GM’s Interpretation Of The Act.....	15
5. The Case Law Supports GM’s Interpretation	17
B. King Coal’s Remaining Notice Arguments Are Not Well-Taken	21
1. Lewis’ Nissan Operation.....	21
2. King Coal’s Communications.....	22
VI. CONCLUSION.....	23

TABLE OF AUTHORITIES

	Page
CASES	
<i>Bill Kelley Chevrolet, Inc. v. Calvin</i> , 322 So.2d 50 (Fla. Ct. App. 1975).....	16
<i>Clay Matthews Pontiac, Inc. v. General Motors Corporation</i> , Motor Vehicle Dealers Board of Ohio, Case No. 01-05-VMDB-258-D (May 16, 2001).....	19, 20
<i>Ewald Chrysler, Inc. et al. v. DaimlerChrysler et al.</i> , Wisconsin Div. of Hearings and Appeals, No. TR-05-0008, at 2, 5 (May 27, 2005)	17
<i>Ferman Motor Car Co., Inc. et al. v. General Motors LLC et al., Fla. Dept. of Highway Safety and Motor Vehicles</i> , No. 11-3389 (Dec. 30, 2011)	17, 18
<i>Hal Artz Lincoln-Mercury</i> , 1992 Ohio App. LEXIS 4883, at *16-*26 (Ohio Ct. App. 1992).	16
<i>McDonald Ford Sales, Inc. v. Ford Motor Co.</i> , 418 N.W.2d 716 (Mich. Ct. App. 1987)	16
<i>Passport Motorcars, Inc. v. Nissan North Am., Inc., Va. Dep't of Motor Vehicles</i> , Nos. 00531 and 01783 (Dec. 22, 2008)	17, 18, 21, 22
<i>Raines Imports, Inc. v. American Honda Motor Co.</i> , 223 W.Va. 303, 674 S.E.2d 9 (2009).....	16
<i>Speakers of Sport, Inc. v. ProServ, Inc.</i> , 178 F.3d 862 (7th Cir. 1999)	16
<i>State ex rel. City of Charleston</i> , 165 W.Va. 332, 339-40, 268 S.E.2d 590, 595 (1980).....	21
<i>Truax-Traer Coal Co. v. Compensation Com'r</i> , 123 W.Va. 621, 17 S.E.2d 330 (W.Va. 1941)	21
<i>West Virginia Human Rights Comm'n v. Garretson</i> , 196 W.Va. 118, 468 S.E.2d 733 (1996).....	14, 21
STATUTES	
Ohio Revised Code § 4517.50	20
W. Va. Code § 17A-6A-3(14).....	21
W. Va. Code § 17A-6A-7(f)	13

W. Va. Code § 17A-6A-1220, 8
W. Va. Code § 17A-6A-12(2).....1, 15
W. Va. Code § 17A-6A-12(4)..... passim

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). (Mem. Op. and Order at 13, Joint Designation of Record Materials (“JD”) 52.)

II. STATEMENT OF THE CASE

As set forth below, General Motors LLC (“GM”) is not establishing an additional new motor vehicle dealer in the Beckley market. Instead, it is reopening a Chevrolet dealer to continue the Chevrolet dealership operations that closed. Section 17A-6A-12(4) of the West Virginia Dealer Act (hereinafter “Subsection 4”) provides that notice is not required in situations where (1) a Chevrolet dealer is reopening to continue the closed operations within two years, and (2) the dealer reopens within four miles of the prior location. W. Va. Code § 17A-6A-12(4). Here, no notice is required because Crossroads Chevrolet (“Crossroads”) timely reopened within four miles of the now-closed Lewis Chevrolet dealership, maintaining the *status quo* of the market. Ironically, the current owners of Petitioner King Coal Chevrolet (“King Coal”) applied to continue the same dealer operations that they now seek to shut down, but GM selected Crossroads instead. After losing that “bid,” King Coal and its owners undertook their current efforts to eliminate Crossroads as a Chevrolet dealer.

A. Procedural History

King Coal filed an action in the Circuit Court of Fayette County, West Virginia, which GM removed to the United States District Court for the Southern District of West Virginia. (Notice of Removal, JD 1.) King Coal sought a preliminary injunction and a temporary restraining order. (Motion for Preliminary Injunction, JD 5; Motion for Temporary Restraining

Order, Dkt. #19, Case No. 2:12-CV-05992 (S.D. W.Va.) The District Court held multiple conferences in the matter and conducted a hearing on the motion for preliminary injunction, after which the District Court certified the pending question to this Court and denied King Coal's motion for TRO. (Prehearing conference, JD 22; Mem. Opinion & Order, JD 52; Order dated May 23, 2013, Dkt. #53, Case No. 2:12-CV-05992 (S.D. W.Va.))

B. Statement Of Facts Relevant To Certified Question

1. Market Background

GM authorizes dealers to sell and service new motor vehicles by entering into a Dealer Sales and Service Agreement ("Dealer Agreement") to operate a given linemake (e.g., Chevrolet). (Stipulations of Fact ("SOF") #1, JD 35) King Coal has had a Dealer Agreement to operate Chevrolet in Oak Hill, West Virginia for approximately 35 years. (*Id.* at SOF #1, #13.) Prior to 2010, Lewis Chevrolet Oldsmobile Cadillac ("Lewis") also conducted Chevrolet operations at One Plaza Center, Beckley, West Virginia for approximately 80 years. (*Id.* at SOF #4) Lewis was the only Chevrolet dealer in Beckley. (Transcript of Preliminary Injunction Proceedings ("Tr.") at 67:17-21, JD 43.)

On June 1, 2009, General Motors Corporation ("GMCorp") filed for bankruptcy and, in connection with those proceedings, GMCorp proposed a sale under which it would restructure its operations, including its dealer network. GMCorp offered some poorly performing dealers "Wind-Down Agreements," under which GM would make payments to the dealers and they would agree to cease operations on or before October 31, 2010. Under the dealer network plan, GM planned to consolidate some dealers and replace other poorly performing dealers with new owners in critical markets to continue the same Chevrolet dealership operations. (Tr. at 183:17-184:5, 187:10-188:4, JD 43.) As a result of Lewis's history of poor performance, GMCorp offered Lewis a Wind-Down Agreement on June 1, 2009, which Lewis executed. (Tr. at 155:2-

5, JD 43; Joint Ex. 23, JD 56.) Under the terms of that Agreement, Lewis agreed to cease operating as an authorized Chevrolet dealer on or before October 31, 2010 in exchange for a substantial monetary payment. (Tr. at 132:3-19, JD 43; SOF #4, JD 35; Joint Ex. 23, JD 56.)

In response to some of the bankruptcy proceedings, Congress passed a new law (Section 747 of the Consolidated Appropriations Act, 2010, H.R. 3288), signed by President Obama on December 16, 2009, that allowed certain dealers to file arbitration demands to seek reinstatement to GM's dealer network. (SOF #4, JD 35.) Lewis filed an arbitration demand under this federal legislation and then settled that litigation by agreement. (SOF #4, JD 35.) Pursuant to that settlement, GM paid Lewis substantial additional funds and Lewis, in turn, conveyed certain rights and assets to GM (e.g., access to customer lists) and agreed to cease its Chevrolet dealership operations in accordance with the terms of the Wind-Down Agreement on or before October 31, 2010. (SOF #4, JD 35; Joint Ex. 23; JD 56; Def. Ex. 2, JD 56; Tr. at 63:23-25; Tr. at 155:9-13, JD 43.) Pursuant to the parties' agreements, Lewis ceased its Chevrolet operations on October 31, 2010 and terminated its Dealer Agreement with GM. (Tr. at 132:3-19; 139:20-25, 155:9-13, JD 43.)

2. Davis Applies For The Beckley Market Chevrolet Opportunity

As part of its plan to replace and continue the closed Lewis dealership operations, GM went through a selection process that GM used uniformly across the country in connection with other efforts to replace poorly performing dealers in well over 50 geographic locations (the "RFP" process). (Tr. at 156:20-157:8, JD 43.) GM considered this project to be a reopening, reestablishment, or replacement of the Lewis Chevrolet dealer as GM uses those terms interchangeably to describe the replacement of a closed dealer. (Tr. at 190:23-191:2, 191:3-6, JD 43.) GM planned to replace Lewis as part of its dealer restructuring efforts given the market opportunity for Chevrolet in Beckley. (Tr. at 155:14-20, JD 43.) After Lewis closed its

Chevrolet operations, Chevrolet suffered an additional four-point degradation in market share in Beckley and adjacent markets. (Tr. at 155:21-156:3, JD 43.) On or about November 11, 2010, GM sought proposals from potential candidates to operate a Chevrolet dealership in the vicinity of Beckley. (SOF #5, JD 35; Joint Ex. 1, JD 56.)

GM received proposals from several potential candidates to continue Chevrolet operations in the Beckley market, *including the current owners of King Coal*. On or about December 3, 2010, Mr. and Mrs. Davis (collectively “Davis”) — the current owners of King Coal — submitted a proposal to GM to conduct the Chevrolet dealership operations previously conducted by Lewis in Beckley. (SOF #6, JD 35; Joint Ex. 2, JD 56; Tr. at 24:18-22; Tr. at 27:10-11; Tr. at 28:24-29:8; 157:13-16, JD 43.) In their proposal, Davis indicated: “There is a tremendous opportunity for Chevrolet in the Beckley market due to the fact that the prior established dealer in Beckley [i.e., Lewis] has been unwinding for over a year causing lost sales and that the prior established dealer was not effective even before that time.” (Joint Ex. 2 at p. 4, JD 56; Tr. at 30:16-31:2, JD 43) In their application, Davis indicated that their long-term strategic goal was to grow Chevrolet sales at the proposed Chevrolet Beckley dealership to 1,000 to 1,200 units annually. (Joint Ex. 2; JD 57 at p. 1; Tr. at 72:20-73:5; JD 43.)

3. Crossroads Is Selected And Begins Operations.

After completing the review process, on April 8, 2011, GM selected Crossroads (also known as Mid-State Automotive in the record) as the candidate to continue Chevrolet operations in the Beckley market. (SOF #7, JD 35.) At the same time, GM also informed Davis that they were not selected for the opportunity. (Joint Ex. 5, JD 56.) Mr. Davis already knew that the final selection appeared to be between Davis and Crossroads (i.e., Mid-State) and, after learning they did not prevail in the selection process, Davis had a “good feeling” that Crossroads was the

successful candidate. (Tr. at 81:3-17; *see also* Tr. at 158:18-21, 81:24-82:2; SOF #6, JD 35, Tr. at 83:19—84:8, JD 43.)

On October 6, 2011, GM sent Rodney L. LeRose II at Crossroads a Letter of Intent indicating that GM had accepted the proposal made by Crossroads (the dealer company), Mr. LeRose (the dealer operator), and Paul E. White and Gregory Tucker (financial investors) to operate at a site located at Robert C. Byrd Dr. & Route 19 in the Beckley area. (SOF #7, JD 35; Joint Ex. 25, JD 56.) A “Future Home of Crossroads” sign was erected at this site in the January 2012 timeframe in connection with the Crossroads dealership. (Tr. at 158:9-13, JD 43; Def. Ex. 1, JD 56.) On August 31, 2012, the State of West Virginia Department of Motor Vehicles issued a license to Crossroads to operate as a Chevrolet dealer. (SOF #8, JD 35.) On September 20, 2012, Crossroads signed a Dealer Agreement with GM to operate as a Chevrolet dealer. (SOF #8, JD 35; Joint Ex. 22, JD 56.)

Since September 20, 2012, Crossroads has sold and serviced Chevrolet vehicles and sold parts and accessories to customers as an operating Chevrolet dealer. (Tr. at 149:14-18; 150:8-13, JD 43; Joint Ex. 20, JD 56; Tr. at 152:6-21; 153:3-8, JD 43.) (Tr. at 154:3-5, JD 43.) Notably, Crossroads invested approximately \$8 million in the dealership project, built a new facility for consumers in the market, and hired employees to operate the dealership. (Tr. at 150:11-13; 152:25-153:2; 154:6-14, JD 43.) Crossroads originally hired 50 employees, although that number has likely grown since that time. (Tr. at 154:6-14, JD 43.) Crossroads offers access to sales, warranty service, and parts, which all parties agreed benefits the public interest. (Tr. at 93:3-23, 154:15-20, JD 43.)

4. King Coal’s Operations And The Market

King Coal is profitable today, just as it was when Lewis Chevrolet was in operation. King Coal has reported nearly \$2 million of profit over the last four years and there is ample

opportunity in the market for both King Coal and Crossroads. (SOF #12, JD 35; Tr. at 160:9-11, JD 43.) In fact, Davis' own application to operate the Beckley Chevrolet dealership acknowledged the "tremendous opportunity" for Chevrolet to replace the Lewis Chevrolet operations in the Beckley market. (Joint Ex. 2, at p. 4, JD 56.) Having another Chevrolet dealer in a marketplace can also help improve the sales of surrounding Chevrolet dealers because of the increased exposure for the Chevrolet brand. (Tr. at 161:11-21, JD 43; *see also id.* at 160:17-24.) Crossroads advertises the Chevrolet brand, offers test drives, and offers additional visibility (Tr. at 161:22-162:2, JD 43), and that visibility can also benefit King Coal as well. Other markets have historically seen increased market performance in analogous circumstances. (Tr. at 162:3-163:2, JD 43.) Indeed, after Crossroads began selling and servicing new Chevrolet vehicles, King Coal's sales also increased. (Tr. at 162:3-163:14; Tr. at 96:15-98:7; Tr. at 150:2-7, JD 43; Joint Ex. 28, JD 56.) While Crossroads' existence does not harm—and in fact benefits—King Coal, closing Crossroads would be devastating to Chevrolet and would disrupt Chevrolet service and sales for customers. (Tr. at 164:10-165:9, JD 43.)

5. King Coal's Ownership Change And Relocation Proposal

In 2012—after Davis unsuccessfully applied to continue Chevrolet dealership operations in Beckley—Davis and another investor asked GM's approval to acquire and become the new owners/operators of King Coal Chevrolet in Oak Hill pursuant to a stock purchase agreement entered into on May 21, 2012 (amended June 8, 2012). (SOF #14, JD 35; Tr. at 158:22-25, JD 43.) After GM approved that request, Davis and another investor became the owners/operators of King Coal Chevrolet. (SOF #14, JD 35; Tr. at 43:6-10, JD 43.) King Coal signed a Chevrolet Dealer Agreement on July 12, 2012. (SOF #14, JD 35; Joint Ex. 10, JD 56.) Thus, *Davis acquired King Coal with full knowledge that GM planned to replace Lewis with Crossroads as the Chevrolet dealer in the Beckley market.*

III. SUMMARY OF ARGUMENT

As the record makes clear, GM is not establishing an *additional* new motor vehicle dealer. GM is merely reopening a Chevrolet dealer within two years of the Chevrolet dealer that was closed or sold, within the meaning of Subsection 4, so that such Chevrolet dealership operations can continue in the market as they have for 80 years. Every mode of statutory analysis favors this construction, including (1) the plain language of the statute, (2) the need to construe the Act as an integrated whole, (3) the legislative history of the statute and the public policy of West Virginia, (4) common sense principles that take into consideration the absurd results that would occur under King Coal's interpretation of the statute, and (5) the applicable case law. Under settled principles of statutory construction, it is clear that manufacturers can replace and continue the same linemake dealership operations of dealers that closed, were terminated, or sold so long as the reopening complies with the temporal and geographic restrictions in the statute.

IV. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

GM defers to the Court with respect to the need for oral argument but, given the issues presented, GM believes that oral argument would be appropriate and should be granted under Rev. R.A.P. Rule 17(b)(3), Rule 20, and/or Rule 19.

V. ARGUMENT

A. The Reopening Is Exempt From Notice

The Crossroads dealership merely reopened—i.e., restarted, re-established, or replaced—the Chevrolet dealership that closed “within the preceding two years,” and it is undisputed that Crossroads is within four miles of Lewis (i.e., less than three miles). *See* W. Va. Code § 17A-6A-12(4). (SOF #9, JD 35) Lewis ceased Chevrolet operations on October 31, 2010. (Tr. at 132:3-19; 139:20-25, JD 43.) As a result, King Coal Chevrolet was not entitled to statutory

notice of the reopening. King Coal argues that there must be some undefined “association” between Lewis and King Coal (Pet. Br. at 7; *see also id.* at 12, 13), but no such requirement exists in Subsection 4. The statute was meant to address the “reopening” of “a” Chevrolet dealer that closed or was sold, not the “reopening” of the *same* dealer with the *same* owner or an owner in privity. *See* W.Va. Code § 17A-6A-12(4).

1. King Coal’s Interpretation Is Inconsistent With The Plain Language of the Act.

At the very outset, the plain language of the statute makes clear that the statute was designed to address “*additional*” dealers—a word that appears three times in § 17A-6A-12—not the circumstances where the number of dealers in the marketplace *stays the same*. The word “additional” frames the entire statutory provision and King Coal largely ignores it. In fact, that is the title of the entire Section at issue:

§ 17A-6A-12. Establishment and relocation or establishment of additional dealers.

* * *

(2) 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.

* * *

(4) 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.

(5) In determining whether good cause exists for establishing or relocating an additional new motor vehicle dealer for the same line-make, the court shall take into consideration the existing circumstances, including, but not limited to, the following:

Simply stated, under the statute, other dealers can protest the establishment of “additional” dealers, but they cannot protest the continuation of dealership operations that were already in the market. By allowing the continuation of such operations within temporal and geographic limitations for the dealer that is “reopening” a “dealer” that “has been closed” or “sold,” Subsection 4 is designed to distinguish between those circumstances where *dealers are “added” to the market* and those circumstances where *they are not*. See W. Va. Code § 17A-6A-12(4). When no new dealers are “added” and the geographic and temporal limitations are met, the exception in Subsection 4 applies. *See id.*

Notably, the Legislature chose to say that the exception applies to the reopening of “a” new motor vehicle dealer that operated in the market, not “the same dealer” with the “same owner” that previously operated. *See id.* The Legislature could have easily said that the reopening or replacement must be by the same owner or in privity with the same owner. The Legislature chose not to do so. Indeed, the Legislature did just the opposite. The exception was crafted to apply whenever a dealer reopened to continue the operations of “a” dealer that previously “closed” or was “sold”—language that makes clear that *different* owners or *different* dealers can do the “reopening” at *different* locations. *See id.*

The simple definition of “reopen” includes “to take up again” or “to begin again” or “to open again.” (Webster’s Third New International Dictionary, 1981 edition). The use of the term “a dealer” refers to “dealer” in the generic sense – i.e., “a dealer” that enters into a dealer agreement with an established place of business to continue the same linemake operations previously conducted by the dealer that “closed” or was “sold.” The dealer that does the

“reopening” does not have to be the same “dealer” that previously operated the dealership that closed or sold. The plain language of the Act makes that clear. As a matter of grammatical construction, the Act itself refers to a dealer that was closed *or sold*. Obviously, if the dealership is sold, *a new “dealer” with a new Dealer Agreement, new owner, and new dealer operator will do the “reopening.”* Thus, it is clear that “reopening” includes “reopening” by a “dealer” that is different than the “dealer” that previously operated.

Moreover, the very use of the phrase “has been closed” in Subsection 4 also supports GM’s interpretation of the statute. Dealers that have been “closed” are most likely those dealers that have terminated for statutory reasons, poor performance, or other violations of their obligation as dealers. By design, these “closed” dealers are unlikely to have any association with the dealers that are appointed to replace and continue their closed operations. Requiring an “association” with the previous dealer in these circumstances makes little sense and Subsection 4 contains no such requirement. The Legislature certainly knows how to say the reopening must be by the same owner or an owner in privity and chose not to do so.

King Coal argues that Section 17A-6A-12(1) supports its interpretation because “relocations” are also excluded where 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.” (Pet. Br. at 12). But just the opposite is true. The language of Subsection 1 contradicts King Coal’s argument. As the outset, Subsection 1 clearly illustrates – beyond any doubt – that the Legislature knows how to define dealers that “sell or transfer” to a “new owner” and the Legislature opted not to use any such language in Subsection 4. The Legislature did so precisely because Subsection 4 was designed to cover circumstances broader than Subsection 1 – e.g., those circumstances where a dealer is terminated under the expedited provisions of Section 17A-

6A-7 and the manufacturer needs to reopen the same linemake dealership operations very quickly to replace and continue the dealership operations that closed. Indeed, the plain language of the statute makes clear that the Legislature constructed Subsection 1 (describing exempt relocations) and Subsection 4 (describing exempt reopenings) as two different exemptions. The Legislature said "x" is exempt under Subsection 1 and "y" is exempt under Subsection 4. The construction of both exemptions is consistent with the overarching purpose of the statute, which is merely designed to create protest rights when "additional" dealers are added to the market.

King Coal's argument, if adopted, would effectively conflate Subsection 1 and Subsection 4 to mean the same thing and render the language of Subsection 4 largely meaningless. GM's interpretation of the statute, in contrast, gives both sections the meaning that was intended. In discussing the "relocation" of ongoing operations – which often involve continuous operations without any closure – the Legislature described the relocation using terms applicable to such circumstances. The Legislature specifically added Subsection 4 to cover a broader set of circumstances and opted to use different language for that exemption to account for those circumstances where a dealer "has been closed" – including terminations permitted by the statute – and the manufacturer needs to reopen a dealer quickly to replace and continue the dealership operations that were terminated.

2. The Dealer Act Should Be Construed As An Integrated Whole, Which Supports GM's Interpretation of the Act.

The Act at issue must be construed as an integrated whole, including the termination provisions set forth in § 17A-6A-7 of the Act. Notably, those termination provisions provide that manufacturers can terminate dealers under certain circumstances after giving 120 days' notice and complying with various provisions, but, importantly, they also provide for

“expedited” terminations upon *thirty* days’ notice under certain circumstances. Those circumstances include:

(c) Notwithstanding subdivision (a) of this subsection, notice shall be made not less than thirty days prior to the effective date of the termination, cancellation, nonrenewal or discontinuance for any of the following reasons:

(1) Insolvency of the new motor vehicle dealer or the filing of any petition by or against the new motor vehicle dealer under any bankruptcy or receivership law;

(2) Failure of the new motor vehicle dealer to conduct his or her customary sales and service operations during his or her customary business hours for seven consecutive business days;

(3) Conviction of the new motor vehicle dealer or its principal owners of a crime, but only if the crime is punishable by imprisonment in excess of one year under the law under which the dealer was convicted or the crime involved theft, dishonesty or false statement regardless of the punishment;

(4) Revocation of a motor vehicle dealership license in accordance with section eighteen [§ 17A-6-18], article six of this chapter, or

(5) A fraudulent misrepresentation by the new motor vehicle dealer to the manufacturer or distributor, which is material to the dealer agreement.

Thus, the Legislature clearly determined that there may be particularly important circumstances—involving criminal conduct, fraudulent conduct, the revocation of a license, bankruptcy, and so on—where termination may be warranted on an expedited basis. The Legislature also expressly allowed manufacturers to replace a terminated dealer after the termination takes effect pursuant to the statute. Under Section 7(f), manufacturers are required to provide notice before terminating, cancelling, or not renewing a dealer, but they cannot *replace* the dealer until the appeals are over. That section provides:

No replacement dealer shall be named for this point or location to engage in business and the dealer's agreement shall remain in effect until a final judgment is entered after all appeals are exhausted: *Provided*, [various conditions are met].

Stated differently, the Legislature clearly contemplated that a closed dealer can be “replace[d]” with a dealer to continue such dealership operations in the market when such terminations may be required under an expedited schedule in certain egregious circumstances. *See* W. Va. Code § 17A-6A-7(f). Thus, Section 17A-6A-12(4) fits hand in glove with § 17A-6A-7(f). Manufacturers can “replace” terminated dealers with a dealer to continue the operations that were closed or sold. Subsection 4 is the provision that allows them to “reopen” such dealerships. Manufacturers cannot “replace” terminated dealers until certain appeals are exhausted, but they can “replace” them once the appeals are exhausted. Of course, that only makes sense. If a dealer committed serious crimes under West Virginia or federal law and a tribunal found the dealer should be terminated, the manufacturer would need to replace that dealer quickly for consumers in the area. Construing 17A-6A-12(4) and § 17A-6A-7(f) together, the manufacturer can replace the dealer within two years and within four miles of the dealer that “closed” whether or not there is privity. Indeed, it would make no sense to require “privity” when the dealer was terminated for committing serious crimes and the closed dealer may have no interest or ability to sell anything.

King Coal uses Section 7(f) to argue that the use of the word “replacement” in that provision supports its argument because the Legislature could have used that word in Subsection 4. (Pet. Br. at 14.) But the Legislature had no need to use the word “replacement” since “reopening” serves that purpose. The manufacturer can reopen a dealer to replace and continue the same linemake operations that closed. What King Coal fails to address, however, is the critical point: Sections 17A-6A-7(f) and 17A-6A-12(4) should be read as an integrated

whole. See *West Virginia Human Rights Comm'n v. Garretson*, 196 W.Va. 118, 123, 468 S.E.2d 733, 738 (1996) (“[a] statute must be construed to give effect to all of its provisions, and not to diminish any of them”). Here, they complement each other if properly construed. The same cannot be said for King Coal’s proposed construction. It would make no sense for the Legislature to acknowledge the need for replacement dealers under expedited termination provisions on the one hand and then prohibit manufacturers from doing so without potentially years of litigation and appeals on the other hand. Construing the Act together as a whole, a manufacturer can terminate and replace (or “reopen”) a dealer to continue the same linemake operations so long as (1) the reopening occurs within two years of when the prior dealership closed or sold, and (2) the location is within four miles of the prior dealership’s location. W. Va. Code § 17A-6A-12(4).¹

3. King Coal’s Interpretation, If Adopted, Would Lead To Absurd Results

Adopting King Coal’s interpretation would lead to results that cannot withstand analysis. Consider the following hypothetical: A Chevrolet dealer operator passes away and his estate closes the dealership and terminates its Dealer Agreement. The manufacturer makes arrangements to continue such dealership operations at a nearby rental facility, but there is no

¹ Ironically, even if some “association” requirement were imposed under the Act, this transaction would still qualify as an exempt transaction. King Coal never articulates the statutory source of its purported “association” requirement and therefore has no standard by which to apply it. Presumably, any such “association” would include indirect sales (e.g., a sale to x who then sells to y) as well partial sales (e.g., the purchase of goodwill, but not parts). In this case, GM *paid* substantial funds to Lewis to relinquish its Dealer Agreement and Lewis, in turn, gave GM the “right to use Dealer’s customer lists and service records for the Subject Dealer Operations.” (Wind-Down Agreement at § 2(b), Joint Exhibit 23, JD 56; see also *id.* at § 3 (acknowledging Dealer’s transfer “of a non-exclusive right to use the customer lists and service records.) The Agreement also obligated Lewis to “deliver to GM or the 363 Acquirer, as applicable, digital computer files containing copies of such lists and records” upon request and gave GM “the right to communicate with and solicit business and information from customers identified in such lists and records and to assign such non-exclusive right to third parties without thereby relinquishing its own right of use.” *Id.* After purchasing those rights from Lewis, GM then entered into a Dealer Agreement with Crossroads to solicit and service those very customers in the Beckley market. Simply stated, Lewis in effect “sold” certain Chevrolet dealership rights to GM and GM in turn conveyed those rights to Crossroads. Thus, even if some ill-defined “association” were otherwise required, it would exist here.

“privity” (i.e., association or affiliation) with the prior owner. Under King Coal’s view, such replacement operations *could be shut down for potentially years* while the surrounding dealers litigate whether there is good cause for such dealership operations. GM would be required to provide notice and an opportunity for other dealers to litigate and appeal such continued operations *before* GM could even simply replace the dealer that passed away and terminated operations, even though the number of dealers in the market never changed.

Alternatively, GM could terminate a dealer for fraud or other serious crimes to protect consumers. Obviously, such a termination would have nothing to do with the market and GM may need to replace and continue the closed operations with a dealer that has no “association” with the prior dealer. Under King Coal’s strained interpretation, the manufacturer could not reopen the dealership to continue such operations without years of potential litigation over whether the dealer could be replaced at all. Such results are counterintuitive and anti-competitive. They would, in effect, turn the entire statute on its head—transforming a statute that was designed to serve as a “check” against “additional” dealers in the marketplace into a “club” used to destroy existing competition.

4. The Legislature’s Intent And The Clear Public Policy Of West Virginia Favors GM’s Interpretation Of The Act.

King Coal’s interpretation requiring notice is contrary to the Legislature’s intent and the public policy of West Virginia. The Legislature enacted Subsection 4 so that dealers would have an opportunity to protest where manufacturers plan to “establish an *additional dealer*” in a preexisting dealer’s relevant market area. W. Va. Code § 17A-6A-12(2) (emphasis added). “The intent of [Section 17A-6A-12(2)] and the language embodying such intent is plain: a manufacturer or distributor must give statutory notice to a preexisting dealer before establishing or relocating a new motor vehicle dealer of the same line-make within the preexisting dealer’s

relevant market area.” *Raines Imports, Inc. v. American Honda Motor Co.*, 223 W.Va. 303, 310, 674 S.E.2d 9, 16 (2009).

The public policy of West Virginia favors ordinary competition and should be construed with such objectives in mind. The statute was not designed to allow dealers to destroy or displace competitors in the market by shutting them down or prohibiting their prompt replacement when events require their termination. Other provisions in the statute make clear that the Legislature never intended to give dealers this anticompetitive power. For example, Section 17A-6A-1, entitled “Legislative finding,” states that the statute’s purpose is to “*avoid undue control*” over dealers. (Emphasis added.) Subsection 12(5)(e) provides that, even where an additional dealership or a relocation is proposed, one factor to be considered is “[w]hether the establishment or relocation of the new motor vehicle dealer would *promote competition*,” because West Virginia, like other states, recognizes the many benefits that flow from healthy competition.² (Emphasis added.)

In this case, West Virginia’s public policy is designed to serve as a check on oversaturating a market by adding more dealers. King Coal cannot credibly claim that the playing field is unfair when Lewis previously operated for 80 years, King Coal competed with Lewis for at least 35 years, and Crossroads replaced Lewis to continue the same linemake operations within two years as required. (SOF #4, #8, #13, JD 35.) No new dealers were added to the market. King Coal must simply continue to compete with the same number of dealers that

² The United States Court of Appeals for the Seventh Circuit reiterated that competition is not a tort, but a privilege to the tort of improper interference, finding that competition “is the cornerstone of our highly successful economic system.” *Speakers of Sport, Inc. v. ProServ, Inc.*, 178 F.3d 862, 865 (7th Cir. 1999). Ordinary competition is not only allowed, but encouraged under federal and state antitrust laws, precisely because such competition ultimately benefits consumers. *See generally McDonald Ford Sales, Inc. v. Ford Motor Co.*, 418 N.W.2d 716, 718-20 (Mich. Ct. App. 1987) (discussing benefits of competition and additional opportunity for consuming public “to comparison shop and make an informed decision when purchasing a new vehicle”); *Bill Kelley Chevrolet, Inc. v. Calvin*, 322 So.2d 50, 52 (Fla. Ct. App. 1975) (statute’s purpose “is not to foster combinations to prevent the introduction of dealer competition which is reasonably justified in terms of market potential. Antitrust laws have proscribed such combinations since 1890....”); *Hal Artz Lincoln-Mercury*, 1992 Ohio App. LEXIS 4883, at *16-*26 (Ohio Ct. App. 1992).

it has for 35 years. If anything, King Coal's interpretation would give King Coal an unfair "club" to shut down ordinary competition in the marketplace that existed for 80 years.

If the notice statute upon which King Coal relies could somehow be read to prohibit the mere re-establishment of previously existing dealership operations, such an anti-competitive interpretation would unfairly block competition between existing dealers and replacement dealerships, and essentially allow an existing dealer to "shut down" a competitor simply based on a lack of privity between the replacement dealer and the dealer that closed. There is no principled reason for distinguishing between a replacement dealer that has privity with the dealership that closes and a replacement dealer that does not. Accordingly, the Court should decline to adopt King Coal's anti-competitive construction of the statute to this case.

5. The Case Law Supports GM's Interpretation.

Multiple tribunals have construed similar statutes to allow the replacement of terminated, sold, or closed dealers, finding that it makes no sense to construe such statutes as extending "protest" rights to surrounding dealers when no new dealers are being added to the market. *See Ewald Chrysler, Inc. et al. v. DaimlerChrysler et al.*, Wisconsin Div. of Hearings and Appeals, No. TR-05-0008, at 2, 5 (May 27, 2005) (dismissing a protest of a replacement dealership, which is exempt from notice under Wisconsin law); *Ferman Motor Car Co., Inc. et al. v. General Motors LLC et al.*, Fla. Dept. of Highway Safety and Motor Vehicles, No. 11-3389 (Dec. 30, 2011) (GM was not required to provide notice of a dealership because it was less than two miles from a closed dealership); *Passport Motorcars, Inc. v. Nissan North Am., Inc.*, Va. Dep't of Motor Vehicles, Nos. 00531 and 01783 (Dec. 22, 2008) (finding that a dealer lacked standing to request a formal hearing because notice is not required where a dealership replaces a terminated dealership) (decisions previously submitted by GM. *See* GM's Mem. in Opp. to Motion for Preliminary Injunction, JD 9.)

As other tribunals have noted, these types of dealer statutes were designed to check historical abuses associated with “adding” dealers to the market, not continuing operations that were already in operation for decades. In *Ferman*, for instance, Daniels Chevrolet was appointed to replace the dealer that had closed. (*Ferman*, Rec. at p. 2). The prior dealer, University Chevrolet, filed articles of dissolution with the state and its Dealer Agreement with GM was terminated after a wind-down agreement was signed. *See id.* at p. 4, 6. GM later approved the appointment of Daniels Chevrolet. *See id.* at p. 4. The Florida statute provided that “[t]he opening or reopening of the same or a successor dealer” is not considered the establishment of an additional motor vehicle dealer if certain terms and conditions are met and the tribunal therefore approved the reopening to replace the Chevrolet dealer that had closed. (*Id.* at 17). The same reasoning applies here.

Similarly, in *Ewald*, a Chrysler dealer ceased operations, but Chrysler re-established operations within two years by allowing a dealer to operate from a temporary facility (initially). Wisc. Div. of Hearing Appeals, No. TR-05-0008 at 2. Other dealers (“Ewald”) challenged the second dealership’s operations. Ewald asserted that the temporary facility was within its relevant market area and that, as a result, Ewald should have been allowed notice and an opportunity to protest. The reviewing tribunal rejected that argument, finding, among other things, the dealer was simply replacing a dealership that had closed. *See id.* at 3 (citation omitted).

Although King Coal ignores both *Ferman* and *Passport*, King Coal tries to distinguish *Ewald* because the Wisconsin statute references “reopening or replacement of a dealership” that has been closed less than two years. (Pet. Br. at 15.) A close reading of *Ewald*, however, does not support King Coal’s argument. The tribunal noted that the Schlossman Auto Group (“Schlossman”) “intend[ed] to open” a dealership, and determined the issue was whether the new

dealer “constitutes the reopening and relocation of an existing franchise.” *Id.* at 2. The prior dealership’s (“EVS”) “franchise” agreement had been terminated and subsequently awarded to Schlossman. *See id.* Schlossman planned to operate the dealership in temporary facilities and then relocate it to new facilities to a different town. *See id.* The tribunal noted that Schlossman’s ultimate goal was “to reopen and relocate the former EVS Chrysler-Jeep dealership” to the proposed permanent location. *See id.* at 3. The tribunal also noted “[t]he reopening of a dealership” and “Schlossmann’s reopening of the EVS Chrysler-Jeep dealership” (*id.* at p. 4). The *Ewald* tribunal specially found that “[p]resumably the legislative intent underlying the two year window within the exception for reopening or relocating closed dealerships is to not allow protests of actions that will not affect the *status quo* of the market.” (*Id.*) *Ewald* makes clear that reopening and replacement mean the same thing – a dealer “reopens” to replace the operations that were in operation. The same reasoning applies here.

In contrast, King Coal cites just one case that arose out of very different statutory language where the dealer ultimately *lost at trial on the merits* and there was no subsequent appeal analyzing the argument that King Coal purports to cite. *See Clay Matthews Pontiac, Inc. v. General Motors Corporation*, Motor Vehicle Dealers Board of Ohio, Case No. 01-05-VMDB-258-D (May 16, 2001). In that case, Clay Matthews Pontiac, Inc. (“Clay Matthews”) filed a protest with the Ohio Motor Vehicle Dealer’s Board (“the Board”), claiming that GM should have provided it with notice that GM planned to permit Classic Oldsmobile (“Classic”) to operate in Clay Matthews’ relevant market area. Case No. 01-05-MVDB-258-D, at *1. In Ohio, the statute was constructed very differently than the statute at issue here. The legislature drew a distinction between closures that resulted from natural disasters (which allowed one year to

reopen) and other closures (which only allowed 45 days to reopen). Ohio Revised Code Section 4517.50 provided in part:

If a new motor vehicle dealership has ceased to operate as a new motor vehicle dealership due to fire, flood, or other natural disaster, the reopening in a relevant market area of the new motor vehicle dealership **by the same owner** within one year of the date on which the dealership ceased to operate shall not be considered to be the establishment of an additional new motor vehicle dealership.

(Emphasis added). Section (D)(2) expressly requires that the “reopening” must involve “the same owner” whereas other provisions did not. *Id.* The ALJ determined that the “same owner” requirement should apply to any reopenings described by the statute and therefore required the “same owner” or someone in privity with the owner in construing the statute. *Clay Matthews* is not analogous to this case.

Here, Subsection 4 of the West Virginia statute is more closely analogous to the statutes in Florida, Wisconsin, and Virginia—all of which provide protest provisions that seek to check “additional” dealers—i.e., where dealers are being added to the marketplace. They do not apply where the *status quo* is maintained. There is no language in the West Virginia statute that requires the reopening must be by “the same owner.” Thus, the caselaw likewise supports GM’s construction of the statute and rejects King Coal’s position or arguments analogous to it.

Notably, King Coal also fails to mention that GM *won* the *Clay Matthews* case on the merits and the case was dismissed in favor of GM without any further appeals after the trial on the merits. (GM’s Reply in Support of Motion to Dismiss (with Attachments 1-2, JD 30.) Had GM lost on the merits, it could have argued the ALJ’s interpretation of the Ohio statute as error before an Ohio appellate court after an adverse judgment. GM never got a chance to do so on appeal after trial because GM won at the trial level. *Clay Matthews Pontiac, Inc. v. General Motors*, Ohio Motor Vehicle Dealer Board of Ohio, Case No. 01-05-MVDB-258-D, Hearing

Examiner's Report and Recommendation, at 20–21 (September 18, 2001) (finding in favor of GM), approved by the Ohio Motor Vehicle Dealer Board, October 22, 2001. Thus, ironically, King Coal's only apparent authority is a decision in which the protesting dealer lost and the replacement was approved.³

B. King Coal's Remaining Notice Arguments Are Not Well-Taken

1. Lewis' Nissan Operation

King Coal also claims that the statutory exemption provision does not apply because “Lewis Chevrolet has *never* closed its doors as a ‘new motor vehicle dealer’ in the State of West Virginia.” (Pet. Br. at 12; *see also id.* at 4, 6, 13.) King Coal argues that the Lewis enterprise currently operates a *Nissan* dealership—even though King Coal acknowledges that Lewis' *Chevrolet* Dealer Agreement was terminated and its Chevrolet sign was taken down years ago. (Pet. Br. at 4, 12-13.) Lewis' *Nissan* operations have nothing to do with this dispute. Nissan and Chevrolet are different linemakes. Linemakes are what matter under the statute. The West Virginia Dealer Act defines the “relevant market area” as “the area located within a twenty air-mile radius around an existing *same line-make* new motor vehicle dealership.” W. Va. Code § 17A-6A-3(14) (emphasis added). Crossroads is a *Chevrolet dealership*. Lewis closed its doors as a *Chevrolet dealership*. (SOF #4, 13, JD 35; Tr. at 132:3-19; 139:20-25, JD 43; Pet. Br. at 4,

³ The District Court also stated that, depending on this Court's ruling on the notice issue, the Court might also address certain constitutional issues. (Mem. Op. and Order at 13, JD 52.) GM did not want to brief those issues without some indication from this Court that GM should do so. If the Court takes up those matters, GM would request leave to present the constitutional issues. As the record indicates, GM contends that King Coal's interpretation of the statute raises multiple constitutional infirmities and the statute should be interpreted to avoid such constitutional concerns. As this Court previously noted, “we must interpret the law to avoid constitutional conflicts, if the language of the law will reasonably permit such an avoidance.” *West Virginia Human Rights Comm'n v. Garretson*, 196 W.Va. 118, 124, 468 S.E.2d 733, 739 (1996). *Cf. Truax-Traer Coal Co. v. Compensation Com'r*, 123 W.Va. 621, 17 S.E.2d 330, 334 (W.Va. 1941) (finding a statute to be unconstitutional under Article 6, Section 39 of the West Virginia Constitution). Here, the special legislation clause, among other things, “is an equal protection clause” and “serves to prevent the arbitrary creation of special classes, and the unequal conferring of statutory benefits.” *State ex rel. City of Charleston*, 165 W.Va. 332, 339-40, 268 S.E.2d 590, 595 (1980). GM respectfully submits that King Coal's arbitrary interpretation of the statute violates precisely those principles.

12-13.) It is completely irrelevant whether Lewis is still conducting business as a *Nissan* dealership.

King Coal's *Nissan* argument is also factually incorrect. "Lewis Nissan" is not operated by the same corporate entity that operated Lewis' former Chevrolet dealership. Lewis Chevrolet Company conducted business under the trade name "Lewis Chevrolet/Oldsmobile/Cadillac" and terminated that trade name on December 16, 2010, after it ceased Chevrolet operations on October 31, 2010. Lewis Chevrolet Company conducted business as "Lewis Automotive Group" thereafter. (Pl. Ex. 4, JD 56.) A second corporation, Lewis One Plaza Center Corporation, has done business under the trade name "Lewis Nissan" from September 9, 1991, to the present. (Pl. Ex. 5, JD 56.) A representative of Lewis Chevrolet Company confirmed that "Lewis Nissan" is operated by Lewis One Plaza Center Corporation, which is a wholly-owned subsidiary of Lewis Chevrolet Company. (Tr. at 132:3-11; 137:23, 138:16, JD 43.) Thus, the continued operation of "Lewis Nissan" is wholly irrelevant to this proceeding.

2. King Coal's Communications

King Coal also points to letters that do not use the phrase "re-open" in support of its argument that GM is not really re-opening or replacing Lewis. (Pet. Br. at 13-14.) That argument does not withstand scrutiny. As Timothy Hudgens (from GM) testified without contradiction, GM's RFP process uses standard form letters, and GM has used such letters when reopening or replacing an operation that previously closed. (Tr. at 190:8-22, JD 43.) GM Corp communicated with dealers across the country by way of form letters at the time of the bankruptcy filing. (Tr. at 186:17-187:9, JD 43.) GM uses the terms reopening, re-establishment, and replacement interchangeably and, regardless of the letters' language, GM considered Crossroads to be a re-establishment or reopening of the Chevrolet dealer that closed. (Tr. at

190:23-191:6; JD 43.) In any event, the construction of the statute as properly construed exempts such reopenings.

VI. CONCLUSION

For the foregoing reasons, the certified question should be answered in the affirmative.

GENERAL MOTORS LLC,

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NO. 13-0675

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AT CHARLESTON

KING COAL CHEVROLET COMPANY,

Petitioner,

v.

GENERAL MOTORS LLC,

Respondent.

CERTIFICATE OF SERVICE

I hereby certify that on the 3rd day of October, 2013, I served the foregoing **Brief of Respondent, General Motors LLC** upon William R. Slicer, Christopher J. Sears, and Brett N. Mayes, attorneys for petitioner, by depositing a true copy thereof in the United States mail, postage prepaid, in an envelope addressed to them at Shuman, McCuskey, & Slicer, PLLC, Post Office Box 3953, Charleston, West Virginia, 25339.

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