



**IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA**

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**CHARLESTON DIVISION**

WEST VIRGINIA AUTOMOBILE AND  
TRUCK DEALERS' ASSOCIATION, et al.,

Plaintiffs,

v.

CIVIL ACTION NO. 2:22-cv-00291

FORD MOTOR COMPANY,

Defendant.

**ORDER OF CERTIFICATION TO  
THE SUPREME COURT OF APPEALS OF WEST VIRGINIA**

Upon review of the parties' briefing on cross motions for summary judgment, the Court issued an *Order* (Document 99) directing the parties to file briefs detailing their positions on the propriety and scope of certifying a question to the West Virginia Supreme Court of Appeals. The Defendant filed *Ford Motor Company's Brief Regarding the Court Certifying a Question to the Supreme Court of Appeals of West Virginia* (Document 100), opposing certification based on its view that the statutory language unambiguously supports its position. The Plaintiffs filed *Plaintiffs' Memorandum of Law Regarding Certifying a Question to the West Virginia Supreme Court* (Document 101), supporting certification to resolve the disputed question of statutory interpretation. After careful consideration, the Court concludes that certification is warranted and appropriate.

With the understanding that the West Virginia Supreme Court of Appeals may reformulate the question, the Court requests that the Supreme Court of Appeals exercise its discretion to accept the following question pursuant to W.Va. Code §§ 51-1A-1 to 51-1A-13:

Does a new motor vehicle dealer's completion of renovations, improvements, or image upgrades in accordance with the requirements of an optional franchisor program or incentive provision constitute installation of image elements "required and approved by the manufacturer" such that the ten-year grandfather clause found in W.Va. Code § 17A-6A-10(1)(i) (2015) applies and the dealership must be deemed in compliance with any subsequent incentive programs that would require replacement or alteration of those renovations, signs, or image elements?

Having considered the motions for summary judgment on the issue, the Court finds that there is no controlling appellate decision, constitutional provision, or West Virginia statute that definitively answers this question, and resolution of this question will be dispositive of the question presented in the above-styled matter.

### **UNDISPUTED FACTS**

The Court has drawn the facts recounted below from the evidence submitted with the parties' motions for summary judgment, and citations are to exhibits to those briefs from the Court's docket. The facts relevant to the proposed certified question are not disputed.

The Plaintiffs, Thornhill Auto Group, Inc., Moses Ford, and Astorg Ford of Parkersburg, Inc., are each car dealers that sell Fords and Lincolns in dual dealerships. They are members of the West Virginia Automobile and Truck Dealers' Association. They named Ford Motor Company as the Defendant. Ford requires dealers who sell both Ford and Lincoln branded

vehicles to enter into separate Sales and Service Agreements (SSAs) for each brand. The Plaintiff dealerships each had SSAs for both Ford and Lincoln.

The Plaintiffs each renovated their dealerships within the past ten years through participation in the Ford Dealership Trustmark Facility Assistance Program by constructing Trustmark 3 facilities. These dual facilities house both Ford and Lincoln brands. By participating in the Facility Assistance Program, available in 2013, the dealerships received matching funds up to \$750,000 for the renovations. Their renovations were performed in compliance with the requirements of Ford's Trustmark program, which set forth "specific Trustmark Facility design requirements." (2013 Ford Dealership Trustmark Facility Assistance Program email, Feb. 20, 2013) (Pl.s' Ex. B) (Document 91-1.) Renovations were required to "meet Ford Trustmark standards and include the following: Ford Trustmark Entry Tower and Exterior Brand Wall, Reception and Greater Area, Showroom Vehicle Display Area, Sales Consultation and F&I Area, Customer Lounge and Restrooms, Service Department and Write-up Area, Required Furniture for All Customer Areas," among other things. (*Id.*) Ford provided architectural support and approved the design and details of the renovations, reviewing and approving renovation or build elements down to the furniture upholstery.

The dealerships were not required to participate in the Facility Assistance Program or to build Trustmark 3 facilities. However, if they wished to receive the matching funds to help finance a renovation of their dealership, they were required to comply with the strictures of the Trustmark Facility Assistance Program. As Ford began incentivizing Lincoln-exclusive dealerships, dealers may continue to sell both brands from dual facilities, but do not receive certain payments and incentives.

The Lincoln Commitment Program (LCP) was launched in 2011 and renewed, in different iterations, annually. Ford could cease offering the program at the end of each yearly iteration. It sets standards and offers incentives or offsets to Lincoln dealers. Phase One of the 2020 LCP ran from January 2020 through June 2020 and Phase II ran from July 1, 2020 through January 4, 2021. The LCP is not part of dealerships' SSAs with Ford or Lincoln, and dealerships may continue to sell Lincoln vehicles without participating in the LCP. The 2020 LCP established incentives and/or required various services dedicated exclusively to the Lincoln dealerships. For example, "All Dual Dealers will be required to have a Lincoln-only Dedicated Sales & Service staff," based on sales and service volume. (LCP Summary at 2) (Pls.' Ex. F) (Document 91-1.) Certain incentives apply to provision of the Connected Client Experience, which requires dealers to offer a car wash, loaner vehicle, pick-up and delivery, and modem activation. Phase II established an incentive of up to 2.75% of vehicle MSRP for "Brand Exclusivity – Facility Exclusivity Design Standard." (*Id.* at 1.) The full 2.75% is available to "[d]ealers that are currently in Brand Exclusive facilities (Gallery or newer) or have elected to upgrade to a Vitrine facility and submitted the Dealer Design Enrollment prior to April 1, 2020." (*Id.* at 3.) Dealers that currently have Trustmark 3 facilities, like the Plaintiffs, "would have to comply with the Lincoln Exclusive definition" to "move up to the next category." (*Id.* at 4.) The 2023 LCP likewise offers a 2.75% payment for dealers that build and operate a Lincoln exclusive facility. Dealerships may participate in portions of the LCP—for example, receiving payments associated with the Connected Client Experience—without participating in the Brand Exclusivity portion of the program.

The Plaintiff Dealerships' Trustmark 3 facilities, updated in accordance with the Facility Assistance Program between 2013 and 2016, do not meet the LCP Facility Exclusivity Design Standard, and they do not receive the 2.75% MSRP incentive under the 2023 LCP. Under the LCPs in effect between July 1, 2020 and December 31, 2022, they received 1% of MSRP, while dealers who had or agreed to construct Lincoln exclusive Vitrine facilities received 2.75% of MSRP for each Lincoln vehicle sold. The Plaintiffs' expert, Tasha R. Sinclair, prepared a report finding that Thornhill suffered losses totaling \$68,886.89 as of February 23, 2023, Moses suffered losses totaling \$223,947.83 as of February 23, 2023, and Astorg suffered losses totaling \$118,210.75 as of February 23, 2023.<sup>1</sup>

### LEGAL BACKGROUND

The Plaintiffs seek relief pursuant to the West Virginia Motor Vehicle Franchise Act.

W. Va. Code § 17A-6A-1 (2015)<sup>2</sup> provides:

A manufacturer or distributor may not require any new motor vehicle dealer in this state to do any of the following...

- (i) To coerce or require any dealer, whether by agreement, program, incentive provision or otherwise, to construct improvements to its facilities or to install new signs or other franchisor image elements that replace or substantially alter those improvements, signs or franchisor image elements completed within the proceeding ten years that were required and approved by the manufacturer, factory branch, distributor or distributor branch or one of its affiliates. If a manufacturer, factory branch, distributor or distributor branch offers incentives or other payments to a consumer or dealer paid on individual vehicle sales under a program offered after the effective date of this subdivision and

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<sup>1</sup> Ford contests the premise that the Plaintiff dealerships are entitled to the payments but does not contest the mathematical calculations in the Plaintiffs' expert report.

<sup>2</sup> The Court cites to the version in effect for purposes of this litigation. An updated version was passed in 2022, codified at W.Va. Code § 17A-6A-10(a)(9). The updated version extends the grandfather clause from ten years to fifteen years, but is otherwise identical, and interpretation of the 2015 version of the statute would be equally applicable to the current version.

available to more than one dealer in the state that are premised, wholly or in part, on dealer facility improvements or installation of franchiser image elements required by and approved by the manufacturer, factory branch, distributor or distributor branch and completed within ten years preceding the program shall be deemed to be in compliance with the program requirements pertaining to construction of facilities or installation of signs or other franchisor image elements that would replace or substantially alter those previously constructed or installed with that ten year period. This subdivision shall not apply to a program that is in effect with more than one dealer in the state on the effective date of this subsection, nor to any renewal of such program, nor to a modification that is not a substantial modification of a material term or condition of such program.

The Plaintiffs contend that W.Va. Code § 17A-6A-10(1)(i) applies to require Ford to provide them with incentives related to Lincoln-exclusive Vitrine facilities, first offered in 2020 as a component of the pre-existing Lincoln Commitment Program, during the 10-year period following their construction of Trustmark 3 facilities. Because the Trustmark 3 facilities, which combine Ford and Lincoln branded dealerships, were built pursuant to the requirements of the Ford Dealership Trustmark Facility Assistance Program and were approved by Ford, they contend Ford's implementation of incentives for Lincoln-exclusive dealerships violates § 17A-61-10(1)(i).

Ford contends that § 17A-61-10(1)(i) is not applicable because both the Facility Assistance Program and the Lincoln Commitment Program are voluntary programs, and the Trustmark 3 facilities that the Plaintiff dealerships invested in were not "required" by Ford as specified by the statute. It further argues that the contested Brand Exclusivity incentive, which provides 2.75% of vehicle MSRP to dealerships that are constructing or agree to construct Lincoln-exclusive Vitrine facilities, is designed to offset the cost of the optional new facilities for dealers that choose to

construct them, and the statute does not entitle the Plaintiff dealers to offset costs they have not incurred.

As the parties note, there are no prior court decisions addressing interpretation of the provision or its successor at W.Va. Code § 17A-6A-10(a)(9). The Court finds that the statutory language does not clearly resolve the question presented. The initial phrase indicates that a dealer may be “required” to construct improvements or install signs or franchisor image elements by “agreement, program, incentive provision or otherwise.” If facility improvements, signs, and franchisor image elements installed and approved pursuant to the requirements of an incentive program, are “required and approved by the manufacturer,” then the Plaintiff dealerships would be entitled to the 2.75% MSRP payments for the Facility Exclusivity portion of the Lincoln Commitment Program during the ten-year period following their construction of the Trustmark 3 facilities.<sup>3</sup> If, however, such improvements are not “required” by the manufacturer within the meaning of the statute where they were made pursuant to a voluntary incentive program, then the Plaintiff dealerships would not be entitled to those portions of the Lincoln Commitment Program that provide benefits in return for construction of a new Lincoln Exclusive facility.

The issue herein presents a question of first impression as to the proper interpretation of this provision of the West Virginia Motor Vehicle Franchise Act, and the answer to the question stated above would be determinative of an issue in this pending case, pursuant to W. Va. Code § 51-1A-3. The Court acknowledges, and the parties recognized in their briefs, that the Supreme Court of Appeals may reformulate the question, pursuant to W.Va. Code § 51-1A-4.

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<sup>3</sup> Ford also contends that the provision would not apply because the Lincoln Commitment Program was in effect with more than one dealer in the state on the effective date of the subsection. However, the Court finds that the addition of a significant financial incentive of 2.75% MSRP per vehicle for construction of an entirely new facility constitutes a substantial modification of a material term or condition of the program.

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The Court **DIRECTS** the Clerk to send a copy of this Order to the Clerk of the Supreme Court of Appeals of West Virginia, to counsel of record and to any unrepresented party.

ENTER: November 21, 2023

A handwritten signature in blue ink that reads "Irene C. Berger". The signature is written in a cursive style with a horizontal line underneath the name.

IRENE C. BERGER  
UNITED STATES DISTRICT JUDGE  
SOUTHERN DISTRICT OF WEST VIRGINIA

West Virginia Supreme Court of Appeals  
1900 Kanawha Blvd E # E317  
Charleston, WV 25305

## CONCLUSION

Wherefore, after thorough review and careful consideration, the Court **ORDERS** that the following question be **CERTIFIED** to the Supreme Court of Appeals of West Virginia:

Does a new motor vehicle dealer's completion of renovations, improvements, or image upgrades in accordance with the requirements of an optional franchisor program or incentive provision constitute installation of image elements "required and approved by the manufacturer" such that the ten-year grandfather clause found at W.Va. Code § 17A-6A-10(1)(i) (2015) applies and the dealership must be deemed in compliance with any subsequent incentive program that would require replacement or alteration of those renovations, signs or image elements?

The Court **ORDERS** that the Clerk of this Court forward to the Supreme Court of Appeals of West Virginia a copy of this order, and, upon request, the record in this case or any part thereof. The Court further **ORDERS** that this matter be **STAYED** and removed from the active docket of the Court.

The names and addresses of counsel of record for the parties are:

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