No. 23-683

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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

West Virginia Automobile and Truck Dealers' Association, Thornhill Auto Group, Inc., Moses Ford, Inc., and Astorg Ford of Parkersburg, Inc.,

Plaintiffs,

v.

Ford Motor Company,

Defendant.

On Certified Question from the United States District Court for the Southern District of West Virginia Charleston Division Civil Action No. 2:22-cv-00291

PETITIONERS' REPLY BRIEF

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Ford's reply brief continues the manufacturer's campaign to muddy the meaning of the subject statutory language by creating a false dichotomy between manufacturer incentive programs that are voluntary or optional and those that would be "required." Ford continues to advance a statutory interpretation which posits that the words "required" and "approved" operate to mean that the grandfather clause found at W. Va. Code §17A-6A-10(1)(i) is only triggered if a vehicle manufacturer forces its dealership to make improvements or participate in facilities programs under the threat of franchise termination. This is not what the statute holds.

The statutory language instead uses the words "required and approved" to describe an industry term of art: franchiser image elements. This is plain to see when one zooms out from the solitary word "required" to review the statutory provision in its entirety. When viewed in full, the language is clear. The words "required" and "approved" do not describe the undertaking of the construction project itself. The statute also makes no distinction between voluntary, optional, or mandatory programs. Instead, the language states that it applies if a manufacturer offers any incentive program based at least in part on facilities and uses the words "required" and "approved" only to describe the types of franchiser image elements that are utilized in the modification of the facilities. (JAR011-012 and JAR438-441) Petitioners' interpretation of the law upholds the plain language of the statute and is fully supported by the Legislators' intent in drafting the statute. Therefore, Petitioners respectfully request this Honorable Court to answer the certified question before it in the affirmative.

1. Petitioners' position as to the application of W.Va. Code §17A-6A-10(l)(i) has consistently been that it governs the installation of franchiser required signs or image elements, regardless of whether the facility improvements were voluntary or optional.

Ford's Brief accuses the Petitioners of "rhetorical gymnastics,"[1] and attempts to support its claim by misinterpreting the arguments that Petitioners have consistently set forth from the outset of this litigation. The bottom line is that the Petitioners only ask that this Honorable Court apply the language of the subject statute as written, not as Ford claims it is written.

The language of the statute reads:

> "If a manufacturer… 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… that are premised, wholly or in part, on dealer facility improvements ***or installation of franchiser image elements required by and approved by the manufacturer***… and completed within ten years preceding the ***program*** shall be determined to be in compliance with the ***program requirements*** pertaining to construction of facilities or installation of signs or other franchiser image elements that would replace or substantially alter those previously constructed or installed within that ten year period."

W. Va. Code § 17A-6A-10(1)(i) (***emphasis added***). Thus, the plain language of the act contemplates that its ten year "grandfather clause" applies to any incentive or other payment offered by a manufacturer program premised, wholly or in part, on installation of franchiser required image elements where a dealer has previously installed franchiser required image elements within the preceding 10 years.

[1] See Respondent's Brief page 2.

The statute does not say what Ford claims it says. The statute does not say that it only applies to "prior factory projects that were ***both*** required ***and*** approved by the manufacturer."[2] The words "prior factory projects" do not appear in this section of code. Instead, the words "franchiser image elements" are the words that are modified by the phrase "required and approved by the manufacturer." Ford asks this Court to apply the statute as written without adding or changing any words while its argument adds the words "prior factory projects," and changes "franchiser image elements" from something required and approved by a manufacturer to something included in a prior facility project.[3]

Ford's main argument is best summarized on page 11 of its brief, wherein Ford argues that the subject grandfather clause "provides that dealers that previously undertook facility improvements ***required by the manufacturer***, including required image elements, can obtain certain program payments for ten years following those improvements."[4] From this flawed premise, Ford hangs its fate.

Petitioners do not attempt to argue that any "prior facility project" was required by Ford. Petitioners have consistently argued that the statutory language protects Franchisee investments in "franchiser image elements required and approved by the manufacturer," via its ten-year grandfather clause. The grandfather clause never states that it only applies to "dealers that previously undertook facility improvements required by the manufacturer." Instead, the statutory language contemplates the "installation of franchiser image elements required by and approved by the manufacturer." W. Va. Code § 17A-6A-10(1)(i). Thus, the grandfather clause applies to Ford's

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[2] See Respondent's Brief page 9 (***emphasis in original***).
[3] See Respondent's Brief pg. 11-12.
[4] See Respondent's Brief pg. 11 (***emphasis in original***).

new LCP facility program because the new LCP facility program offers monies based on the changing of the franchiser image elements required and approved by Ford.

Petitioners do not argue that either the Trustmark dual facility, or the new Lincoln Vitrine were facility projects that were required by Ford. Petitioners do argue, and urge this Honorable Court to find, that both the Trustmark facility and the new Lincoln Vitrine facility are products of Ford's design team and feature numerous franchise image elements that are ***both*** required ***and*** approved by Ford. Moreover, the prior voluntary facility projects undertaken by each of the Petitioner dealers featured many franchise image elements that were ***both*** required ***and*** approved by Ford. Because Ford offered an incentive based on franchiser image elements, Petitioner dealers are statutorily entitled to receive that incentive wherein the incentive is paid for the alteration of franchise image elements required and approved by Ford within the previous ten years. *See*, W. Va. Code § 17A-6A-10(1)(i).

As Petitioners stated in their initial brief, the language used in the statute mimics the language used by manufacturers such as Ford when they refer to dealership facility construction projects. The Trustmark facilities included required franchisor image elements, such as a Ford Trustmark entry tower and exterior brand wall, Ford specified reception and greater area, Ford specified showroom area, Ford specified sales consultation and F&I area, Ford specified customer lounge and restrooms, Ford specified service department and write-up area, and Ford specified furniture for all customer areas. (JAR113-177) All of these real and tangible design decisions are delineated by Ford in their materials as required image elements. (JAR113-177) When Petitioner dealers constructed those required image elements, Ford approved them. (JAR113-177)

These required and approved franchiser image elements must be changed substantially for a dealer to qualify for the facility incentive offered in the new LCP. The Lincoln Vitrine designs feature many franchiser image elements that are distinct from and mutually exclusive to the franchiser image elements required for a Trustmark facility. Shawn McDermott testified that many design elements are controlled by Ford and that Ford has final decision over its franchisor image elements in the Lincoln Vitrine.[5]

Thus, the franchiser image elements required and approved by Ford for the Trustmark 3 facilities must be modified by a dealer that builds a Lincoln Vitrine with distinct and mutually exclusive franchise image elements. The facilities incentive in the new LCP is premised on the modification of franchise image elements in dual-branded facilities in such a manner that the facilities are no longer dual-branded. The statutory language in question is precisely intended to protect the Petitioners by requiring Ford to deem them in compliance with the facility provision of the 2020 LCP for the remainder of the applicable ten-year time frame set forth in the grandfather clause.

Petitioners do not attempt "to render the word 'required' meaningless," as is suggested by Ford.[6] Petitioners simply ask that this Honorable Court recognize that the statutory language does not reference "required construction projects" or "required incentive programs," and instead contemplates the replacement or substantial alteration of franchise image elements required by and approved by Ford.

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[5] *See*, Deposition Transcript of Shawn McDermott, JAR 438-441.

[6] *See*, Respondent Brief pg. 18.

Petitioners agree with Ford that the subject statute should be enforced as written. As written, the statute holds that Petitioner dealers are to be deemed in compliance with the facility provision of the 2020 LCP through the end of the ten-year period after the dealers last made changes to required franchise image elements approved by Ford. In this case, none of the Petitioner dealers were deemed in compliance with the 2020 LCP even though they each previously constructed or installed franchise image elements required and approved by Ford within the ten years preceding the 2020 LCP. Therefore, Ford is in violation of the grandfather provision of the Act and Petitioners urge this Honorable Court to answer the Certified Question in the affirmative.

2. Ford's distinction between "voluntary" and "required" is misplaced.

Ford argues that Petitioners want this Honorable Court to believe that the words "voluntary" and "required" have the same meaning. This argument is preposterous. Petitioners do not attempt to convince this Court that the words are synonyms. Instead, Petitioners simply set forth the ways in which the language of the statute interacts with the practical realities of manufacturer incentive programs.

It is important to reiterate what is set forth above. The statutory language regarding what is required and approved does not pertain to the incentive programs. It does not pertain to prior construction. The subject statutory language does not pertain to any of the other things Ford points to as voluntary or optional. Instead, the statutory language regarding what is required and approved by a manufacturer pertains only to the items that Ford admits are required and approved by Ford: franchise image elements. This is a foundational premise to the ten-year grandfather clause.