No. 23-683

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/Petitioners,

v.

Ford Motor Company,

Defendant/Respondent.

Certified Question from the United States District Court for the Southern District of West Virginia
Charleston Division
Civil Action No. 2:22-CV-291

RESPONDENT'S BRIEF

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QUESTION PRESENTED

Does a new motor vehicle dealer's completion of renovations, improvements, and or image upgrades in accordance with an optional franchise 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 alterations of those renovations, signs, or image elements?

The Respondent answers "No."

I. INTRODUCTION

This Court should reject the Plaintiffs' proposed reading of the West Virginia Motor Vehicle Franchise Act (the "Dealer Act") for the simple reason that the plain language of the statute does not say what Plaintiffs would like it to say. Plaintiffs' claims concern the optional and voluntary Lincoln Commitment Program (the "LCP"). The LCP is a voluntary program under which the plaintiff automotive retailers ("Dealers") have the ability to earn funds to help them offset the costs incurred in implementing various customer-facing amenities, including constructing a Lincoln exclusive facility should they chose to do so. Here, the Plaintiff Dealers elected against building such exclusive facilities, and as such have not incurred the costs that the facility component of the LCP is designed to offset. Despite this, the Plaintiff Dealers claim they are entitled to these offset funds (even though they have incurred no costs to offset) by virtue of a "grandfather clause" in the Dealer Act.

At issue in this certified question to this Court is the scope of this "grandfather clause." Under the Dealer Act, if a West Virginia dealer made certain facility improvements that were "required and approved" by the manufacturer, then that dealer falls under a 10-year grandfather clause. If the dealer did not make such improvements that were "required and approved" by the manufacturer, then the grandfather clause does not apply.

Ford's position in this matter is straightforward: the word "required" means required. If prior facility work undertaken by a dealer was not ***required*** by Ford, then the grandfather clause does not apply. Here, it is undisputed that the Dealers performed the prior facility work voluntarily (meaning not ***required*** by Ford), and that they were each compensated up to $750,000 by Ford in exchange for those voluntary renovations. The prior facility work, therefore, was not "required" by Ford, and the grandfather clause does not apply. "Required" means required, the statute should

be enforced as written, and that should end the inquiry.

Plaintiffs engage in rhetorical gymnastics in order to make a claim for money designed to set-off expenses that they concede they have not incurred (and thus, obtain a windfall). Plaintiffs assert that this Court should either write the word "required" out of the statute, or rewrite the statute to add language the Legislature saw fit to exclude. This Court can tell all it needs to know about the veracity of Plaintiffs' arguments by the simple fact that Plaintiffs are now on their ***fourth theory*** as to why the grandfather clause should apply to prior facility improvements that were not "required." First, Plaintiffs initially attempted to simply hide the word "required" and omitted it from their discussions of the controlling statute. Second, Plaintiffs tried to rewrite the statute to change the mandatory conjunctive "and" and turn it into an "and/or." Third, Plaintiffs asserted that the absence of the word "voluntary" in the grandfather clause somehow made the word "required" mean "voluntary." Finally, in their latest briefing, Plaintiffs now cut and paste language from one part of the statute and move it into another, and argue that the phrase "agreement, program, incentive provision or otherwise" can be applied to the "required and approved" prior renovations, even though the statute expressly does not say that.

In short, every purported interpretation of the Dealer Act proposed by Plaintiffs requires this Court to either ignore the plain language of the statute or to rewrite the statute to add language it does not include. Ford's position, conversely, is simply that "required" means required. This Court should confirm that prior facility improvements undertaken voluntarily by a dealer, such as those at issue here, are not "required and approved" by the manufacturer, and do not trigger the grandfather clause.

II. STATEMENT OF THE CASE

A. Plaintiff Dealers Voluntarily Decided To Improve Their Dual Dealership Facilities Under The Ford Facility Assistance Program.

Due to the nature of the arguments made by Plaintiffs, the Court must first be aware of a ***prior*** program offered by the Ford brand known as the Ford Facility Assistance Program (colloquially, "Trustmark"). Plaintiffs Thornhill Auto Group, Inc. ("Thornhill"), Moses Ford, Inc. ("Moses"), and Astorg Ford Of Parkersburg, Inc. ("Astorg") are Ford and Lincoln dealers located in West Virginia. Each of these Plaintiffs is a party to separate dealer Sales and Service Agreements ("SSA") for each of the Ford and Lincoln brands. (JAR504-505,[1] Ex. A, McDermott Dec. ¶¶ 5-13); (JAR281, Ex. C, Astorg, P. Dep. 24:7-18); (JAR305-306, Ex. E, Moses-Waybright 20:21-21:1); (JAR330, Ex. F, Thornhill, W. Dep. 22:1-15); (JAR363-394, Ex. I, Lincoln SSA Standard Terms).

The Ford Facility Assistance Program permitted dealers to voluntarily elect to remodel their stores to fit within certain facility design standards known as Trustmark 1 and Trustmark 3. (JAR506, Ex. A, McDermott Dec. ¶¶ 14-17); (JAR275-276, Ex. B, McDermott Dep. 33:13-34:8). A Trustmark 1 is a Ford-only store, and a Trustmark 3 is a Ford-Lincoln dualed store that lacks certain separate client touchpoints between the two brands. (JAR506, Ex. A, McDermott Dec. ¶¶ 15-16); (JAR274-275, Ex. B, McDermott Dep. 32:21-33:6.) The Ford Facility Assistance Program was a voluntary program for Ford dealers that offered a partial dollar-for-dollar match ***up to $750,000*** if a Ford dealer ***elected*** to build one of the eligible Trustmark facilities. (JAR507, Ex.

[1] The exhibits to Ford's Motion for Summary Judgment and Exhibit A to Ford's Opposition to Plaintiffs' Motion for Summary Judgment (the Declaration of Shawn McDermott cited above) were inadvertently omitted from the Appendix, and were provided to the Court in a supplemental filing.

A, McDermott Dec. ¶ 23); (JAR275-276, Ex. B, McDermott Dep. 33:13-34:8.)

Dealers were not required participate in the Ford Facility Assistance Program or build Trustmark facilities. (JAR507, Ex. A, McDermott Dec. ¶ 24); (JAR277-278, Ex. B, McDermott Dep. 66:22-67:2). In fact, only around 900 of the 3,100 Ford stores nationwide (roughly ***29%***) elected to build a Trustmark store. (JAR278, Ex. B, McDermott Dep. 67:3-9.) Between 2013 and 2016, Plaintiff Dealers chose to build Trustmark 3 stores under the Ford Facility Assistance Program. (JAR507, Ex. A, McDermott Dec. ¶¶ 24-30.) The Plaintiff Dealers were not required to do so by Ford; instead each elected to do so voluntarily. (JAR507, Ex. A, McDermott Dec. ¶ 28-30.)

Plaintiffs assert that the voluntary improvements made under the Ford Facility Assistance program render them eligible to rely on the "grandfather clause" in the Dealer Act. That provision, however, concerns only prior improvements ***required*** by the manufacturer. Here it is undisputed that the improvements undertaken by the Plaintiff Dealers under the Ford Facility Assistance / Trustmark program were not required by Ford, but were instead voluntary actions chosen by Plaintiffs.

Astorg concedes through its corporate representative that it performed voluntary renovations on its store in approximately 2015, which were not required by Ford:

> Q. [I]n roughly 2015, why did Astorg Ford Lincoln decide to participate in the Trustmark program?
>
> A. Because Ford had a program to subsidize I think it was $750,000 towards doing so.
>
> * * *
>
> Q. Again, 2015, did anyone at Ford or Lincoln tell that store, Ford Lincoln, that it had to participate in the Trustmark program?
>
> A. No.

(JAR283-284, Ex. C, Astorg, P. Dep. 28:6-29:5.)

Moses also concedes through its corporate representative that it performed voluntary renovations on its store in approximately 2013, which were not required by Ford:

> Q. Now, you indicated the store was purchased sometime in the mid '90s. I know we don't know the exact date. At some point in time after that, do you know if there was a remodel of that, that facility?
>
> A. Yes.
>
> Q. When was that?
>
> A. I believe there's been two, but the most recent one was completed in 2013.
>
> * * *
>
> Q And was that, if you know, part of what's referred to as the Ford TrustMark Program?
>
> ·A. Yes
>
> ***
>
> Q. [W]as Moses Ford Lincoln required to build the TrustMark Store?
>
> A. It was a choice.
>
> Q. Okay. A choice made by Moses Ford Lincoln, correct?
>
> A. Yes.
>
> * *
>
> Q. So, Ford Lincoln -- Ford Motor Company did not say to Moses, "You must build this renovated store," correct?
>
> A. Yeah, it's -- yeah, yeah, that's fair.

(JAR307-309, Ex. E, Moses-Waybright Dep. 22:9-22; 32:10-33:2.)

Additionally, Thornhill concedes through its corporate representative that it voluntarily moved its store into a new building approximately 2016, and that this was not required by Ford:

> Q. So let's talk for a minute about the facility that Thornhill Auto is in currently . . . when was that constructed?
>
> A. We moved in '16, '16, I think was the day, '16 or '17. We've been there seven years approximately right now.
>
> Q. Okay. And if you know, was that part of the Ford TrustMark program?
>
> A. Yes.
>
> ***
>
> Q. So the question I asked was why did you decide to build that store in 2000, I think you said '16?
>
> A. Yeah. Well, I didn't own the property. I was in -- it was a leased property. I'd put it on my Own property.
>
> ***
>
> Q. It's a different question. The question I'm asking is did Ford tell you had to leave your existing store and build with a new store?
>
> A. No.

(JAR336-337, Ex. F, Thornhill, W. Dep. 35:5-14, 37:1-6, 37:21-24.)

B. Lincoln Updates Its Annual Lincoln Commitment Program In 2020 To Include Funds To Help Offset The Costs Of Exclusive Lincoln Facilities.

The LCP is a Lincoln program unrelated to the Ford brand's former Ford Facility Assistance / Trustmark Program. (JAR507, Ex. A, McDermott Dec. ¶ 31.) The LCP began in 2011, and is modified to varying degrees on an annual basis. (JAR507-508, Ex. A, McDermott Dec ¶¶ 37-41.) The LCP is not a part of any dealer's SSA with Ford or Lincoln. (JAR507, Ex. A, McDermott Dec ¶ 33.) Instead, the LCP is an optional program that a Lincoln dealer can elect to participate in if it so chooses. (JAR507, 509, Ex. A, McDermott Dec ¶¶ 32, 48.) The LCP is available to all Lincoln dealers and is the same for all dealers. (JAR511, Ex. A, McDermott Dec. ¶ 59.)

The LCP sets in place a series of customer-facing amenities such as car washes and loaner vehicles, and provides a financial offset to participating Lincoln dealers to help the participating dealer cover the costs of these amenities. (JAR508, Ex. A, McDermott Dec ¶¶ 34-36.) Lincoln dealers are not required to provide any of these amenities. (JAR508, 510, Ex. A, McDermott Dec ¶¶ 32, 49-51.) If a Lincoln dealer chooses to voluntarily provide them, the LCP provides Lincoln with a framework to provide a participating dealer with funds designed to help offset those costs. (JAR508, Ex. A, McDermott Dec ¶¶ 34-37.)

Beginning in 2020, the LCP added an optional facility element. (JAR509, Ex. A, McDermott Dec ¶ 47.) Dealerships that incurred costs in investing in a Lincoln-exclusive store, or committed to build a new Lincoln exclusive store known as a "Vitrine," have the opportunity to receive offsets on some of those costs. (JAR506, 511, Ex. A, McDermott Dec ¶¶ 18, 19, 56-57.) The offsets under the LCP associated with the facility portion are calculated based upon 1-2.75% of the Manufacturer's Suggested Retail Price ("MSRP") based on new vehicle sales to retail customers, depending on the applicable yearly iteration of the LCP. (JAR509, 511, Ex. A, McDermott Dec. ¶¶ 47, 56-57.) The LCP does not change the price at which a vehicle is sold to dealers. (JAR508-509, Ex. A, McDermott Dec. ¶¶ 42-44.) Further, the MSRP is not the price a dealer pays when it buys a vehicle from Lincoln. (JAR508, Ex. A, McDermott Dec. ¶ 43.) The LCP simply uses the MSRP as a basis for calculating the offset amounts. (JAR508-509, Ex. A, McDermott Dec. ¶¶ 42-44.) Lincoln dealers are not required to build an exclusive "Vitrine" facility, and dualed dealers such as Plaintiffs are free to continue using their current dualed facilities. (JAR506, 511, Ex. A, McDermott Dec. ¶¶ 19, 60-61.)

Plaintiffs concede that building an exclusive store or Vitrine would be an expensive project involving at least a $1 million investment. (JAR293-294, Ex. C, Astorg, P. Dep. 46:20- 47:6.);

(JAR319, Ex. E, Moses – Waybright, C. Dep. 49:12-17.); (JAR333-334, Ex. F, Thornhill, W. Dep. 31:20-32:2). Plaintiffs concede they have the opportunity to build an exclusive store if they choose to do so. (JAR293-294, Ex. C, Astorg, P. Dep. 46:20- 47:6); (JAR317-318, Ex. E, Moses – Waybright, C. Dep. 47:23, 48:1); (JAR332-333, Ex. F, Thornhill, W. Dep. 30:22-31:3). Plaintiffs concede they have chosen to not incur the expense of building an exclusive Lincoln store. (JAR294, Ex. C, Astorg, P. Dep. 47:3-6); (JAR302, Ex. D, Astorg – Price, E. Dep. 36:11-14); (JAR320, Ex. E, Moses – Waybright, C. Dep. 50:5-8); (JAR332-333, Ex. F, Thornhill, W. Dep. 30:22-31:3).

III. SUMMARY OF ARGUMENT

The resolution of this certified question merely involves the Court confirming that the word "required" as used in W. Va. Code 17A-6A-10-(1)(i)[2] means "required." The statutory language at issue expressly states that the grandfather clause that Plaintiffs seek to invoke here is applicable only to "[f]acility improvements or installation of franchiser image elements ***required by and approved by*** the manufacturer." W. Va. Code 17A-6A-10-(1)(i) (emphasis added). Ford asserts that the statute simply means what it says: the only prior improvements or installations of image elements that fall under the grandfather clause are those ***both required and approved by Ford***. Here, Plaintiffs concede that they all undertook their prior facility projects voluntarily (and were compensated by Ford up to $750,000 each for the same). The voluntary nature of these prior facility projects precludes the application of W. Va. Code 17A-6A-10-(1)(i) to this dispute, because these prior facility projects were not required by Ford.

[2] W. Va. Code 17A-6A-10-(1)(i) is now located at W. Va. Code 17A-6A-10(a)(9). The statute has been revised, but not in any manner that implicates this Certified Question.

Plaintiffs have presented no fewer than four different proposed interpretations of this statute in an effort to render the word "required" meaningless. That Plaintiffs have pivoted from one theory to another multiple times should provide the Court with some insight into the merits of Plaintiffs' position. Plaintiffs first ignored the word "required." Plaintiffs then attempted to rewrite the mandatory conjunctive "and" in the statute into an "and/or." Plaintiffs then attempted to argue that "required" could be read to mean "voluntary"—but as this Court knows, "voluntary" is an antonym of "required." Finally, Plaintiffs attempt to apply the phrase "by agreement, program, incentive provision or otherwise" which is applicable only to the current program (i.e., the LCP) to the prior renovations—but the statute does not say that either. The ***only*** prior facility renovations covered by the grandfather clause are ***only*** those "required and approved" by the manufacturer, and not those that may have been voluntarily agreed to under any prior program, agreement, or incentive program.

Ford's position is simple: "required" means required, and any other reading is gamesmanship by Plaintiffs that are trying to contort the statute so they can receive funds they concede they have not earned. Plaintiffs have not identified any West Virginia authority that would support their efforts to rewrite the statute to say what they apparently wish it said. Ford's position, however, is supported by numerous maxims of statutory interpretation in West Virginia:

- ***A Statute's Plain Meaning Prevails:*** The statute expressly limits the grandfather clause to "[f]acility improvements or installation of franchiser image elements ***required by and approved*** by the manufacturer." That West Virginia principle should be applied here, and leads to the conclusion that the plain language of the statue limits its application to prior facility projects that were ***both*** required ***and*** approved by the manufacturer, and not any prior facility work that was voluntarily undertaken by a dealer. "In determining how a specific statute should be applied, [West Virginia courts] look first to the statute's language. If the text, given its plain meaning, answers the interpretive question, the language must prevail and ***further inquiry is foreclosed***." *Ancient Energy, Ltd. v. Ferguson*, 806 S.E.2d 154, 157 (W.Va. 2017) (internal quotations omitted).

- ***Interpretation Not Permitted In The Absence Of Ambiguity.*** There is nothing ambiguous in the phrase "[f]acility improvements or installation of franchiser image elements required by and approved by the manufacturer." The statute should be enforced as written, with its application limited to prior projects both required and approved by the manufacturer, and no further interpretation is required. "[W]here the language of a statute is free from ambiguity, its plain meaning is to be accepted and applied without resort to interpretation." *Ancient Energy, Ltd.*, 806 S.E.2d at 157.

- ***The Use Of The Conjunctive "And" Mandates That The Prior Improvements Must Be Both Required And Approved.*** The statute's usage of the conjunctive "and" means that the plain language of the statute mandates that the prior facility projects must have been both required ***and*** approved. Under West Virginia law both elements are needed, and Plaintiffs' efforts to convert the "and" into an "and/or" is improper. *See Damron v. State Comp. Comm'r*, 109 W. Va. 343, 350, 155 S.E. 119 (1930) (examining a statute with elements separated by "and" and concluding "[b]oth elements must concur. The statute uses the conjunctive and not the disjunctive."); *State v. Saunders*, 219 W. Va. 570, 576, 638 S.E.2d 173 (2006); *see also U.S. v. Diaz*, 865 F.3d 168, 174 (4th Cir. 2017) ("this is a straightforward question of statutory interpretation with a clear answer—conjunctive.").

- ***Statutory Language Cannot Be Rendered Nugatory***. The statute's usage of "required" must mean that the prior facility projects were actually "required." Any other interpretation would necessarily remove the word "required" from the statute, leaving only "approved." A West Virginia court cannot interpret a statute in such a manner that words become superfluous or nugatory. *See, e.g. Ringel-Williams v. W. Va. Consol. Pub. R. Bd.*, 237 W. Va. 702, 707, 790 S.E.2d 806 (2016).

- ***The Expression Of One Thing Is The Exclusion Of Another***. West Virginia courts follow the maxim of *expressio unius est exclusio alterius*, i.e., the express mention of one thing implies the exclusion of another. Here, the statute is expressly limited to prior facility projects that were both "required" and "approved." West Virginia law compels the conclusion that the express limitation of the statute's applicability to required and approved projects necessarily requires the *exclusion* of voluntary projects in exchange for compensation such as those undertaken by the Plaintiffs. *Progressive Max Ins. Co. v. Brehm*, 246 W. Va. 328, 334 (W. Va. 2022).

- ***The Court Cannot Add Language Into The Statute***. Similar to the maxim of *expressio unius est exclusio alterius*, a West Virginia court cannot add words into a statute. *Progressive Max Ins. Co.*, 246 W. Va. at 334 ("Just as courts are not to eliminate through judicial interpretation words that were purposely included, we are obliged not to add to statutes something the Legislature purposely omitted[.]"). The modifier "by agreement, program, incentive provision or otherwise" (now) relied upon by Plaintiffs expressly concerns only the *current* program (LCP) and not the prior renovations. The only language applicable to the prior renovations mandates that they were "required and approved by the manufacturer." This Court cannot rewrite the statute in such a manner.

In short, the plain language of the statute is unambiguous, and it does not require interpretation. Moreover, even if the statute did require some level of interpretation, the maxims of statutory interpretation used in West Virginia support Ford's position. The statute is not applicable to Plaintiffs' claims, and the Court should answer "No" to the certified question.

IV. STATEMENT REGARDING ORAL ARGUMENT AND DECISION.

Ford believes the Court may benefit from oral argument in this matter under Rule 19 and requests that the Court schedule the same, although the matter could also be resolved on a memorandum decision.

V. ARGUMENT

A. Under Its Plain Language, W. Va. Code 17A-6A-10(1)(I) Is Only Implicated When Prior Facility Improvements Were Required By The Manufacturer.

Under its plain language, W. Va. Code 17A-6A-10(1)(i) expressly is limited to prior facility improvements, including image elements and renovations that were ***required*** by the manufacturer, and all three Plaintiff Dealers concede that their prior facility improvements were ***voluntary and not required by Ford***.

Under W. Va. Code 17A-6A-10(1)(i), it is unlawful 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*** *[sic]* ***ten years that were required*** and approved ***by the manufacturer***, factory branch, distributor or distributor branch or one of its affiliates. …

W. Va. Code 17A-6A-10(1)(i) (emphasis added). As noted by Plaintiffs, the statute further contains what they identify as a "grandfather clause," which 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:

> [F]acility improvements or installation of franchiser image elements ***required by and approved*** by the manufacturer . . . 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.

W. Va. Code 17A-6A-10(1)(i) (emphasis added).

Plaintiffs concede that their prior facilities improvements and installation of image elements were undertaken voluntarily, and were not required by Ford. (JAR283-284, Ex. C, Astorg, P. Dep. 28:6-29:5); (JAR307-309, Ex. E, Moses-Waybright Dep. 22:9-22; 32:10-33:2); (JAR336-337, Ex. F, Thornhill, W. Dep. 35:5-14, 37:1-6, 37:21-24). Indeed, Plaintiffs were each compensated up to $750,000 by Ford as part of Plaintiffs' decisions to build these facilities. (JAR507, Ex. A, McDermott Dec. ¶ 23.)

As all of the prior work, including any image elements, performed by the Plaintiffs at their facilities within the ten year period was voluntary, rather than ***required*** by Ford, the "grandfather clause" does not apply. Such a conclusion is straightforward and consistent with basic principles of statutory interpretation in West Virginia. "In determining how a specific statute should be applied, [West Virginia courts] look first to the statute's language. If the text, given its plain meaning, answers the interpretive question, the language must prevail and further inquiry is foreclosed." *Ancient Energy, Ltd. v. Ferguson*, 806 S.E.2d 154, 157 (W.Va. 2017) (internal quotations omitted). "In other words where the language of a statute is free from ambiguity, its plain meaning is to be accepted and applied without resort to interpretation." *Id.*

Here, the plain language of the statute limits the application of the "grandfather clause" to "facility improvements or installation of franchiser image elements ***required by and approved*** by the manufacturer . . . and completed within ten years [.]" W. Va. Code 17A-6A-10(1)(i). Plaintiffs

concede that ***none*** of the renovations or improvements at their facilities in the last ten years were ***required*** by Ford. (JAR283-284, Ex. C, Astorg, P. Dep. 28:6-29:5); (JAR307-309, Ex. E, Moses-Waybright Dep. 22:9-22; 32:10-33:2); (JAR336-337, Ex. F, Thornhill, W. Dep. 35:5-14, 37:1-6, 37:21-24). Each elected to install the same voluntarily. (*Id.*) Thus, under the plain and unambiguous language of the statute, the "grandfather clause" does not apply and Ford has not violated the statute.

B. Plaintiffs Disregard That The Use Of The Conjunctive "And" Means The Prior Facility Work Must Have Been Required By Ford.

In Plaintiffs' affirmative motion for summary judgment, they routinely omitted the word "required" from their purported summaries of the statute.[3] (*See* JAR050-051, 056-057, Ps' Br. p. 5, 6, 11, 12.) Plaintiffs, perhaps realizing they could no longer hide the word "required," then pivoted in their Response to Ford's Motion for Summary Judgment and pretended the statute said something else entirely. In the text of their Response, Plaintiffs inaccurately "summarized" the statute as follows:

> The statute applies to ***all*** programs offered by the manufacturer that award incentives based on facility wherein the incentive provision rewards the replacement or substantial alteration of improvements, signs, or franchiser image elements that were previously ***required and/or approved*** by the manufacturer.

(JAR099, Ps' Opp. p. 6 (emphasis added).) The statute, however, does not say "required and/or approved"—it says "required by ***and*** approved by the manufacturer." Plaintiffs' effort to insert an

[3] In fact, Plaintiffs still occasionally use the tactic of strategically omitting the word "required" in their briefing before this Court: "The plain language of the Act explicitly says that any facility improvements or changes to facility imagine elements completed by the dealer and approved by the manufacturer within the preceding ten years shall be determined to be in compliance…" (Ps' Brief pp. 3-4.) This is untrue. The statute does not say only "approved by the manufacturer," it says "required and approved by the manufacturer."

"or" into the statute where none exists runs afoul of basic statutory construction rules: if the statute uses "and" then ***both*** elements are needed; meaning "required" is required. *See Damron v. State Comp. Comm'r*, 109 W. Va. 343, 350, 155 S.E. 119 (1930) (examining a statute with elements separated by "and" and concluding "[b]oth elements must concur. The statute uses the conjunctive and not the disjunctive."); *State v. Saunders*, 219 W. Va. 570, 576, 638 S.E.2d 173 (2006) ("Only by disregarding the fact that the . . . offense is described in the disjunctive (willfully or negligently) whereas the [other] offense is expressly denoted in the conjunctive (knowingly and willfully), can Appellant make the argument that there is no difference between the elements of these two offenses . . . Appellant's position flies in the face of established rules of statutory construction."); *see also U.S. v. Diaz*, 865 F.3d 168, 174 (4th Cir. 2017) ("this is a straightforward question of statutory interpretation with a clear answer—conjunctive.")

Put simply, the conjunctive use of "and" means that "required" is a necessary prerequisite as it concerns the prior facility improvements and any associated installation of image elements. Plaintiffs cannot avoid this result by pretending the statute also says "or." If the prior work was ***not required*** (and it was not required here), then the "grandfather clause" does not apply.

C. Plaintiffs Argue That "Required" Means "Voluntary," Despite These Words Being Antonyms, And Ask This Court To Render The Word "Required" Meaningless.

In addition to pretending "and" means "and/or," Plaintiffs also argue, without citation to any authority or evidence, that the word "required" actually means "voluntary." Specifically, Plaintiffs claim that their voluntary actions somehow morphed into "requirements" after they voluntarily agreed to do them in exchange for compensation. Given that "required" and

"voluntary" are antonyms,[4] Plaintiffs' assertion hardly warrants comment, but Ford nevertheless is constrained to respond.

To support their position that "required" means "voluntary," Plaintiffs note that the word "voluntary" appears in carve-out language in other provisions within the Dealer Act, and then suggest that the absence of any express reference to "voluntary actions" in W. Va. Code 17A-6A-10(1)(i) somehow means that voluntary actions are not excluded. Plaintiffs' position is smoke and mirrors: Plaintiffs focus on ***the absence of express exclusions*** while completely ignoring ***the presence of limited express inclusions***. The statute, by its express terms, is limited to "required" improvements—and that limitation, by itself, is the reference to "voluntary" that Plaintiffs pretend is not there. Put simply, something that is "required," by definition, cannot be "voluntary." As noted above, "voluntary" is an antonym for "required."[5] Thus, by expressly ***limiting*** the application of the "grandfather clause" to only prior facility changes "required by and approved by" the manufacturer in the last ten years, the statute necessarily ***excludes*** any voluntary facility changes undertaken by the Plaintiffs in that time period.

Plaintiffs also try to misdirect the Court by pretending that there is no such thing as a "required" facility modification. In short, Plaintiffs suggest that "required" must mean "voluntary" because "Ford is prohibited from 'requiring' a dealer to alter its facilities to begin with." (Ps' Br. p. 5.) This is not true. The Dealer Act expressly permits Ford to require facility modifications in certain instances. *See. e.g.* West Virginia Code § 17A-6A-10(1)(f) (permitting a manufacturer to

[4] *See* https://www.thesaurus.com/browse/required "ANTONYMS for *required*: optional, ***voluntary***, inessential"; *see also* https://www.merriam-webster.com/thesaurus/required "Antonyms & Near Antonyms [for *required*] optional, ***voluntary***, elective, discretionary."

[5] *See* note 4, *supra*.

mandate "facility ***requirements***" concerning exclusive facilities if the manufacturer can show "reasonable business considerations" for the same).[6]

A court cannot interpret a statute in such a manner that words become superfluous or nugatory. *Ringel-Williams v. W. Va. Consol. Pub. R. Bd.*, 237 W. Va. 702, 707, 790 S.E.2d 806 (2016) ("a cardinal rule of statutory construction is that significance and effect must, if possible, be given to every section, clause, word or part of the statute. To embrace petitioner's interpretation would render the term [at issue] superfluous." (internal quotations omitted)); *State v. Harden*, 62 W. Va. 313, 347, 58 S.E. 715 (1907) ("A statute ought to be construed as a whole, and each section should be so construed, that, if possible, no clause, sentence or word should be superfluous, void or insignificant."); *Airfacts, Inc. v. Amezaga*, 30 F.4th 359, 368 (4th Cir. 2022) ("statutory interpretation begins with looking to the normal, plain meaning of the language of the statute, reading the statute as a whole to ensure that no word, clause, sentence or phrase is rendered surplusage, superfluous, meaningless or nugatory." (internal quotations omitted)).

If a voluntary act becomes a "required" act as soon as it is agreed to, then ***everything*** is required, and if everything is required, then the word "required" is meaningless and serves no purpose in the statute. Indeed, if the statute applied to all facility improvements and all installations of image elements approved by the manufacturer, regardless of whether they were actually ***required*** in the first place, then the statute could instead just read "approved by the manufacturer"—because the word "required" would not change anything. The Court should not interpret the statute in such a manner that the word "required" serves no purpose. Yet that is the

[6] Indeed, Plaintiffs should be completely familiar with this provision given that it was once Count II of their Complaint.

only result of the approach advocated by Plaintiffs.

D. Plaintiffs' Efforts To Insert Voluntary Past Renovations Into The Statute Ignore The Principle Of *Expressio Unius Est Exclusio Alterius.*

Much of Plaintiffs' briefing focuses on broad pronouncements of what they wish the statute said. Although the statute, by its plain language, is limited to only prior improvements "required and approved" by a manufacturer, Plaintiffs attempt to rewrite the statute to also include a new category of qualifying prior facility work along the lines of "voluntary projects agreed to by the dealers that contain specific image elements." For example, Plaintiffs falsely claim that "the statute states that a change in franchiser image elements required and approved by the manufacturer ***as part of the offered program*** triggers protection under the grandfather clause." (Ps' Br. p. 9 (emphasis added).) Again, the ***statute does not say that***. The statute says nothing about franchise image elements required and approved ***as part of a program***—it stops at "required and approved." The reference to "program" is a fiction.

Plaintiffs' attempts to add language into the statute that simply is not there fails under another basic canon of statutory interpretation. That the "grandfather clause" to applies ***only*** to prior facility work that was both "required by and approved by" the manufacturer is clear because the Legislature expressly included only those categories, and as such intentionally excluded any other category of prior renovations or improvements. *Progressive Max Ins. Co. v. Brehm*, 246 W. Va. at 334 ("Just as courts are not to eliminate through judicial interpretation words that were purposely included, we are obliged not to add to statutes something the Legislature purposely omitted[.]") Put simply, if the Legislature wanted prior facility improvements, including image elements, that were voluntarily agreed to by a dealer or undertaken as part of some prior program to fall under the "grandfather clause," then it would have included the same in the statute. The

Legislature did not do so. The Court should not amend the statute to include that new category now.

E. Plaintiffs Engage In Rhetorical Sleight Of Hand By Pretending The Reference To "By Agreement, Program, Incentive Provision Or Otherwise" Applies To The Prior Renovations And Brings Voluntary Renovations Under The "Grandfather Clause."

Presumably recognizing that their three prior attempts to render the word "required" meaningless are not permitted under West Virginia law, Plaintiffs now engage in rhetorical slight of hand by taking language from one part of the statute and inaccurately applying it to another. Specifically, this concerns the language "by agreement, program, incentive provision or otherwise." Plaintiffs are correct that this language appears in the statute, but their attempt to apply this language to the prior facility work is disingenuous at best. The statute, broken apart into clauses, states as follows:

> 1. It is a violation for a manufacturer to "coerce or require[7] 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 …
>
> 2. that replace or substantially alter those improvements, signs or franchisor image elements completed within the proceeding [sic] ten years that were required and approved by the manufacturer.
>
> 3. [F]acility improvements or installation of franchiser image elements ***required by and approved*** by the manufacturer . . . 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

[7] Although not before this Court as a Certified Question, Ford notes for the sake of the record and as argued before the District Court for the Southern District of West Virginia that the statute at issue ***also*** does not apply here because the LCP is neither required nor coercive, and because the LCP was in place prior to the effective date of the statute. (*See* JAR082-85, Ford's Memorandum in Support of Summary Judgment pp. 11-14; *see also* JAR256-260.)

> or substantially alter those previously constructed or installed with that ten year period.

W. Va. Code 17A-6A-10(1)(i). As illustrated above, the reference to "agreement, program, incentive provision, or otherwise" refers to the ***current program*** that is being challenged—in this instance the LCP. The references to ***prior*** improvements, however (as shown in paragraphs 2 and 3) do not saying anything about the prior improvements having been made by "agreement, program, incentive provision, or otherwise"—instead the prior facility renovations are limited to only those "required and approved" by the manufacturer. Further, contrary to Plaintiffs' assertions, all references to "program" in the statute unambiguously refer to the current "program" and not the prior renovations. Indeed, the statute specifically states "required by and approved by the manufacturer . . . and completed within ten years ***preceding*** the program," i.e., renovations put into place ***before the challenged "program"*** (here the LCP) was put into place. Once again, Plaintiffs simply pretend the statute says something it does not, and appear to be trying to replace the word "preceding" with something else.

In short, Plaintiffs improperly take the language describing the current program (the LCP) and attempt to move it elsewhere in the statute so they can apply it to prior facility work. This purported "interpretation" has no support in the language of the statute—it is instead directly contrary to it. The ***only*** prior facility work eligible for the grandfather clause is that which was "required and approved" by the manufacturer and nothing more. Had the Legislature intended to *also* include prior facility work undertaken by "agreement, program, incentive provision, or otherwise" with respect to the prior renovations, it would have done so; instead, the Legislature limited it to "required and approved." This Court should not add this language into statute when the Legislature chose to not put them there. *See Progressive Max Ins. Co.*, 246 W. Va. at 334 ("we

are obliged not to add to statutes something the Legislature purposely omitted[.]").

F. Plaintiffs' Repeated References To "Legislative Intent" Ignore The Plain Language Of The Statute.

Finally, given that the statute does not say what Plaintiffs want it to say, they resort to citing general language from the Dealer Act noting that the purpose of the Dealer Act is to "avoid undue control of the independent motor vehicle dealer by the manufacturer . . . and to protect the investments and properties of citizens and motor vehicle dealers[.]" (Ps' Br. p. 9.) Plaintiffs' argument appears to be that this Court can simply ignore the plain language of the statute in favor of Plaintiffs' self-generated view of Legislative intent. Tellingly, Plaintiffs cite no authority for this proposition, nor can they. "In ascertaining legislative intent, [this Court should] ***look to the language of the statute***. If the statutory language is plain and does not lend itself to multiple constructions, the statute's plain language must be applied as it is written. Plain statutory language does not need to be construed." *Tribeca Lending Corp. v. McCormick*, 231 W. Va, 455, 460, 745 S.E.2d 493 (2013) (emphasis added) (answering certified question and applying statute as written).

As set forth above, the Legislature's intent is clear in this instance: "required" means required, and the only prior facility work eligible for the "grandfather clause" must have been required by the manufacturer. Additionally, even if this Court could ignore the statutory language here, Plaintiffs do not articulate how their objective in this instance—to obtain funds from Ford they concede they have not earned (by choice, no less), and to then treble that amount and obtain an unearned windfall—would somehow further the interests of the West Virginia consumer or the dealer body at large.

VI. CONCLUSION

The Court's decision here should be fairly straightforward. The Dealer Act should be

enforced as written. The Dealer Act should not be rewritten in such a manner that ignores the word "required" or revises "required" to include "voluntary." There is no support Plaintiffs' proposed interpretation in the language of the statute, any authority provided by Plaintiffs, or in established maxims of statutory interpretation. No matter how many creative approaches they propose, Plaintiffs cannot change the law to say what they want it to say.

Dated: March 15, 2024

FORD MOTOR COMPANY

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DOCKET NO. 23-683

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

WEST VIRGINIA AUTOMOBILE AND TRUCK DEALERS' ASSOCIATION, THORNHILL AUTO GROUP, INC., MOSES FORD, INC., ASTORG FORD OF PARKERSBURG, INC.,

Plaintiffs/Petitioners,

v.

FORD MOTOR COMPANY,

Defendant/Respondent.

CERTIFICATE OF SERVICE

I, Jason A. Proctor, counsel for Ford Motor Company, do hereby certify that on this 15th day of March, 2024, I served the foregoing "***RESPONDENT'S BRIEF***" via the E-Filing System maintained by the Supreme Court of Appeals of West Virginia, and upon the following counsel of record via U.S. mail:

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