IN THE SUPREME COURT OF FLORIDA
TALLAHASSEE, FLORIDA

DWAYNE HAWKINS,
MILLARD G. RIPLEY,

Plaintiffs-
Appellants,

vs. **CASE NO: 92, 503**

FORD MOTOR COMPANY,

Defendant-
Appellee
_____/

CERTIFIED QUESTION FROM THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF OF AMICI SOUTH FLORIDA AUTOMOBILE AND TRUCK DEALERS ASSOCIATION AND GREATER TAMPA BAY AUTOMOBILE DEALERS ASSOCIATION

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Statutes

Session Laws

Miscellaneous

STATEMENT OF ISSUE

DOES SECTION 320.643(2)(a), FLORIDA STATUTES, PROVIDE THE EXCLUSIVE BASIS FOR OBJECTION BY A MOTOR VEHICLE MANUFACTURER TO THE PROPOSED TRANSFER OF ALL THE EQUITY IN INTEREST IN A MOTOR VEHICLE DEALERSHIP?

STATEMENT OF THE CASE

The matter before the Court is here on a Certified Question from the United States Court of Appeals for the Eleventh Circuit. This case was argued before the Eleventh Circuit on appeal from a order issued by the United States District Court, Middle District of Florida, granting Ford's motion for summary judgment and denying Messrs. Hawkins and Ripley's motion for summary judgment. The amici adopt and incorporate by reference the Statement of the Case contained in the Initial Brief of Plaintiffs/Appellants.

SUMMARY OF THE ARGUMENT

Florida's Dealer Protection Act ensures fair dealing among all participants in the automobile franchise distribution system and reduces economic imbalances between powerful manufacturers and their dealers. In interpreting and applying its provisions, appellate courts have observed the Act's plain language should prevail. The legislative purpose and plain meaning rule compel a straightforward reading of section 320.643(2), Florida Statutes: this provision governs all transfers of stock ("in whole or in part") in a motor vehicle dealership and provides that lack of moral character is the sole objection on which a withholding of consent to the transfer may be made by a motor vehicle manufacturer or distributor. Accordingly, Ford has in the instant case violated section 320.643(2) because it failed to raise a challenge to the moral character of Hawkins and Ripley as a basis for withholding consent to the proposed transfer of 100% of a motor vehicle dealership's stock.

Any effort by Ford to convince this Court to abandon the plain meaning of section 320.643(2) is little more than an invitation to legislate. Ford's "policy" arguments are merely attacks on the wisdom of the Florida Legislature in adopting this economic regulation. However, since the Florida Legislature accorded more protection from manufacturers' interference to stock transfers in section 320.643(2) than it did to franchise (asset) transfers, court's interpreting and applying this section must recognize this

distinction as purposeful. Further, the legal treatment of the transfer of a franchise (i.e., an intangible asset of a business) is distinctly different from the complete transfer of a franchised dealership's stock.

Ford improperly relies on section 320.644, Florida Statutes, which deals only with a ***change*** in executive management control, to bolster its arguments. Section 320.644 does not address or regulate ***transfers*** either stock or assets, which are expressly addressed under section 320.643. Thus, Ford's reliance on section 320.644 in support of its position that lack of business experience may serve as a basis for objecting to a transfer of stock is misplaced. Section 320.644 can only be utilized to challenge the proposed management itself, not a proposed transfer.

ARGUMENT

I. INTRODUCTION

Sections 320.60-.70, Florida Statutes (the "Dealer Protection Act"), were enacted to ensure fair dealing between motor vehicle manufacturers and dealers, and to prevent manufacturers from abusing their superior economic bargaining power over their dealer-franchisees. The Dealer Protection Act prohibits a manufacturer from committing certain acts, including unfairly canceling or terminating a franchise agreement, and significantly limits a manufacturer's ability to interfere with either the sale of a dealership franchise or the sale of stock in a dealership. §§ 320.641, .643, Fla.Stat.

The Act further provides for the licensing of manufacturers by the Florida Department of Highway Safety and Motor Vehicles (the "DHSMV") and for that agency's oversight of motor vehicle manufacturer's franchise business activities in the State. §§ 320.61-.70, Fla.Stat. Statutory remedies under the Act include civil treble damages, § 320.697; injunctive relief, § 320.695; the imposition of civil fines by the DHSMV, § 320.698; and the suspension or revocation of a manufacturer's license for a willful violation of the Act, § 320.64.

Under the Dealer Protection Act, manufacturers must give effect to transfers, in whole or part, of motor vehicle dealer stock, unless it challenges the moral character of a stock

transferee within 60 days. § 320.643(2). To invoke its rights, manufacturers must file an administrative complaint with the DHSMV to challenge a stock transfer.

The Dealer Protection Act also draws an express distinction between transfers of motor vehicle dealership stock and transfers of a franchise agreement (which are intangible assets of a dealership business), and provides manufacturers with an expanded basis for objecting to the latter variety of transaction. When this intangible asset is transferred through a sale of all a dealership's assets, a manufacturer has two bases for challenging the transfer: (1) business experience, and (2) moral character. § 320.643(1). This portion of section 320.643 applicable to franchise or asset transfers provides its own authority for a DHSMV administrative challenge proceeding. § 320.643(1).

A *separate* and distinct provision in the Dealer Protection Act also deals with changes in "executive management control." § 320.644, Fla.Stat. Section 320.644, however, does not concern itself with regulating the transfer of stock or franchise agreements. Rather, this statute governs *only* changes in executive management control. Such a proposed change in executive management control can occur with or without a transfer of the franchise, or with or without the transfer of the stock in a dealership. Section 320.644 is simply inapplicable to issues concerning the transfer of motor vehicle dealership stock or assets.

Importantly, section 320.644 provides not only its own bases for rejecting proposed management, it authorizes the DHSMV to conduct an administrative hearing upon the receipt of a verified complaint from a manufacturer seeking to invoke its rights under the statute to reject proposed management. At such a hearing, manufacturers may challenge proposed dealership management on grounds of lack of (1) business experience, or (2) moral character.

In sum, section 320.643 and 320.644 serve separate and independent functions; they are not interdependent upon each other. Each of these statutes are applied to distinct circumstances. Consequently, if a change in management is proposed along with a proposal for 100% transfer of a dealership stock, manufacturers must look separately to sections 320.643 and 320.644 for guidance in rejecting or approving the proposals. That is, the stock transferee(s) may ***only*** be challenged on the basis of lack of moral character, the sole basis by which manufacturers may reject the transfer of dealership stock "in whole or in part;" manufacturers may object to proposed executive management on the basis of lack of moral character or business experience. The statutes operate independently and do not contemplate a melding of bases upon which manufacturers may reject stock transfers and changes in executive management when such proposals are part of the same package.

The matter before the Court is here on a Certified Question from the Eleventh Circuit Federal Court of Appeals. This case

originated in the Federal District Court, Middle District of Florida. In *Hawkins v. Ford Motor Company*,(M.D. Fla, Case No. 95-55-Civ-T-21E), the district court ruled motor vehicle manufacturers may consider the business experience of investors when such investors are purchasing in its entirety the stock of a motor vehicle dealership.

In a case before the same court with the same issue, the court ruled to the contrary in a fashion the amici urge this Court to follow. *Morse v. Ford Motor Company*, (M.D. Fla, Case No. 94-1013-Civ-T-17c) (Appendix Pages 1-9). In fact, the Morse case was consolidated with Hawkins in the Eleventh Circuit for appeal, but the Morse case was settled and thus dismissed. In *Morse*, the district court ruled Ford violated Section 320.643(2)(a) by rejecting the proposed stock transfer on grounds other than the one permitted in the statute. The district court specifically found: "It is ***undisputed*** that this transfer involved an equity transfer of stock, and ***not an agreement to sell or transfer a franchise agreement***." (Appendix Page 3) (emphasis added). Thus, Ford's arguments in the instant case that a 100% stock transfer involves a transfer of the franchise were flatly rejected by the *Morse* court.

The *Morse* court noted two types of transfers, franchise (asset) transfer and stock transfers, "are treated differently under the statute." (Appendix Page 3). Rejecting Ford's efforts to

amalgamate all of the provisions in sections 320.643 and 320.644 in order to expand its bases for challenging ownership transfers of motor vehicle dealerships, the district court noted section 320.643(2)(a) directly deals with equity transfers, whether "in whole or in part" of a dealership's stock.

Applying the rule of construction regarding statutory plain meaning, the *Morse* court found "only Section 320.643(2)(a) applies because it is ***undisputed*** that this proposed transfer agreement involved the transfer of the equity interest in the car dealership." (Appendix Page 6). The court concluded "this section applies even if there is 100% sale of the stock, as was proposed in this case. Sections 320.643(1) and 320.644 are not triggered simply because this proposed transfer involved the sale of 100% of the car dealership's stock." (Appendix Page 6). Finding Ford failed to challenge the stock transfer on the sole permissible ground--moral character--the *Morse* court ruled Ford violated section 320.643(2)(a). It is this reading and application by the *Morse* court of the relevant statutory provisions that the Plaintiffs/Appellants in this case urge this Court, as the ultimate arbiter of disputes over Florida law, to adopt.

II. UNDER THE CLEAR LANGUAGE OF THE CONTROLLING PROVISION OF SECTION 320.643(2), MOTOR VEHICLE MANUFACTURERS, SUCH AS FORD, MAY NOT RAISE ISSUES OTHER THAN LACK OF MORAL CHARACTER AS A BASIS TO CHALLENGE A PROPOSED TRANSFER OF MOTOR VEHICLE DEALERSHIP STOCK.

The Eleventh Circuit has in the past had before it issues regarding the interpretation and application of Florida's Dealer Protection Act:

> The Florida Legislature enacted the Dealer Protection Act (the Act) to ensure fair dealing at all levels among all participants in the distribution and sale of motor vehicles, and to redress the economic imbalance which naturally exists between national manufacturers and local dealers. *International Harvester Co. v. Calvin*, 353 So.2d 144, 147 (Fla. 1st DCA 1977). The express purpose of the statute is to "protect the public health, safety, and welfare...by regulating the licensing of...dealers and manufacturers, maintaining competition, providing consumer protection and fair trade and providing minorities with opportunities for full participation as...dealers." Fla. Stat. § 320.605. This legislation is directed toward eliminating the "harsh practices large manufacturers had inflicted upon franchisees." *Mercedes-Benz of North America, Inc. v. Department of Motor Vehicles*, 455 So.2d 404, 410 (Fla. 2d DCA 1984); *see International Harvester*, 353 So.2d at 147.

Mike Smith Pontiac, GMC, Inc. v. Mercedes-Benz of North America, Inc., 32 F.3d 528, 533 (11th Cir. 1994). This Act is intended to redress the gross economic imbalances that have led automobile manufacturers to engage in coercive and unfair tactics toward their dealers. Section 320.643, in particular, is specifically designed to promote the free alienability of equity interests in car

dealerships and to protect the public interest in free competition and small business development. Any interpretation of section 320.643 must be made with these purposes in mind, and must further these judicially recognized important legislative goals.

The Dealer Protection Act is a remedial act, the provisions of which should be broadly interpreted to further its remedial purpose:

> Because the Dealer Protection Act is remedial in nature and designed to promote the public good, its provisions should be interpreted broadly to effectuate its purpose.

Mike Smith Pontiac, 32 F.3d at 534. Section 320.643(2) ensures the uninhibited transfer of interests in dealerships, allowing small business franchisees to recoup their substantial investments in their respective dealerships. *See Mercedes-Benz of North America v. Department of Motor Vehicles*, 455 So.2d 404, 410-11 (Fla. 2d DCA 1984). By requiring manufacturers to recognize the transfer of an interest in a franchise, this provision implements a social and economic policy that mandates the transferability of franchise interests in the free market place, unimpeded by the coercive economic power of motor vehicle manufacturers. Small business dealerships benefit because they can realize the full value of their dealerships in a competitive market place, free from the whims of motor vehicle manufacturers. Transferees benefit because their reasonable business expectations are protected. Because the Florida law directly favors transfer of interests in franchises,

the public also benefits because economic efficiencies are furthered and small business investment is encouraged.

In subsequent re-enactments and amendments to the Act, the Florida Legislature has made clear it serves several important public purposes:

> [T]o protect the public health, safety, and welfare...by regulating the licensing of ...dealers and manufacturers, maintaining competition, providing consumer protection and fair trade and providing minorities with opportunities for full participation as...dealers.

§ 320.605, Fla.Stat. Like most legislation designed to protect the public's welfare, the Act serves several purposes. First and foremost, the Act provides individuals with a remedy for damages they have sustained as a result of a manufacturer's violation of the Act. § 320.697, Fla.Stat. In addition, the Act serves to deter socially undesirable business practices that diminish competition, and threaten the freedom of opportunity and business independence of small businesses. *See New Motor Vehicle Bd. v. Orrin W. Fox Co.*, 439 U.S. 96, 103 n.7 (1978) (the purpose of dealer protection laws is "the promotion of fair dealing and the protection of small business"). The Act provides every person with a right to recover directly for the harms perpetrated upon them by manufacturers in violation of the Dealer Protection Act.

It is axiomatic "[w]hen the language of a statute is clear and unambiguous and conveys a clear and definite meaning, the statute must be given its plain and ordinary meaning." *In re McCollam*, 612

So.2d 572, 573 (Fla. 1993). Further, absent an ambiguity, the statute's plain meaning prevails. *Streeter v. Sullivan*, 509 So.2d 268, 271 (Fla. 1987); *see also Holly v. Auld*, 450 So.2d 217, 219 (Fla. 1984).

Applying these guiding principles, it is not difficult to conclude the Florida Legislature enacted a comprehensive statutory scheme that treats separately the two different types of transfers (i.e., asset transfers vs. stock transfers, in whole or part) as well as changes in dealership management. This comprehensive scheme provides a separate administrative challenge process for ***each one*** of these events. Indeed, the Legislature specifically added the separate DHSMV administrative challenge procedure to section 320.643(1) in 1988, making perfectly clear each one of these procedures was intended to operate independently. *See* Ch. 88-395, §13 Laws of Fla. The failure of a manufacturer to successfully challenge a franchise transfer, a stock transfer, or a change in management, results in the transfer or change in management being deemed statutorily to have occurred by each provision *separately*. §§ 320.643(1), (2); .644.

In sum, sections 320.643 and 320.644 operate together, albeit independently, in a logical and rational manner consistent with Florida law. Under section 320.643(1), motor vehicle manufacturers may raise both lack of business experience and moral character to challenge a transfer of a franchise as part of an asset transfer,

the franchise being an intangible asset. In contrast, under Section 320.643(2), manufacturers may challenge proposed stock transferees (whether obtaining equity ownership in whole or part) ***only*** on the basis of lack of moral character. If, however, a stock transfer is coupled with a change in dealership management, manufacturers may challenge the proposed management's lack of business experience or moral character under section 320.644, but is limited to challenging proposed transferees on the basis of lack of moral character only. In this regard, manufacturers are amply protected: they may challenge the business experience of dealership management and may challenge the moral character of investors.

III. FORD'S READING OF SECTION 320.643 DISREGARDS THE STATUTE'S PLAIN MEANING AND THE LEGISLATURE'S STATEMENT OF POLICY AS REGARDS ITS OPERATION.

Instead of focusing on the purposes of the Dealer Protection Act and the clear language of section 320.643, Ford has chosen to focus on the terms of its own franchise agreement, a classic contract of adhesion. This is precisely the obfuscation that caused the Federal District Court below to become confused in its statutory interpretation, even reciting that Ford's franchise agreement does not distinguish between transfers of the franchise as an asset and stock purchases of a dealership.

Of course, the viewpoints of motor vehicle manufacturers/distributors do not control the disposition of issues

before the Court, and what manufacturers provide in their self-serving franchise agreements is completely irrelevant to the application of the Dealer Protection Act. The Act itself expressly declares any franchise agreement inconsistent with its provisions void:

> Any franchise agreement offered to a motor vehicle dealer in this state shall provide that all terms and conditions in such agreement inconsistent with the law and rules of this state are of no force and effect.

§ 320.63(3), Fla.Stat. Likewise, Florida courts have held that manufacturers are not permitted to "evade or circumvent" the Dealer Protection Act by using contracts at odds with this statutory scheme. *See Bayview Buick-GMC Truck, Inc. v. GMC*, 597 So.2d 887, 889 (Fla. 1st DCA 1992)(quoting *Department of Motor Vehicles v. Mercedes-Benz of North America*, 408 So.2d 627, 630 (Fla. 2d DCA 1981)). Thus, Ford's success at misdirecting the Federal District Court below to focus on the terms of the franchise agreement as a part of the interpretation of the Florida Dealer Protection Act flatly contradicts the statutory requirement a motor vehicle manufacturer's agreement *cannot* alter or affect Florida law.[1]

Although the Florida Legislature's enactment of section 320.643 establishes the Legislature intent to treat transfers of

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[1] Of course, Hawkins and Ripley have not sued Ford for breach of the existing franchise agreement, but for violating Section 320.643(2). The terms of the franchise agreement, therefore, have no bearing on their cause of action.

motor vehicle franchises as assets differently from transfers of dealership stock, Ford's basic premise is this Court should ignore this distinction because Ford does not believe there is really any difference when the stock transfer involves all of the dealership's stock. The central problem with this thesis is that it steadfastly ignores that Section 320.643(2) governs stock sales of dealerships' equity stock "***in whole or in part.***" (emphasis added) Further, in this regard, Ford's position is diametrically opposite to a decision out of this Court. *See Robbinson v. Central Properties, Inc.*, 468 So.2d 986 (Fla. 1985) (holding the transfer of 100% of stock of corporation does not effect a transfer of title to underlying contract rights or assets); *see also, Cruising World, Inc. v. Westermeyer*, 351 So.2d 371, 373 (Fla. 2d DCA 1977) ("A transfer of stock of a corporation or a transfer of certificates of stock which only evidenced the stock, is held not to be a transfer of the property and assets of the corporation itself." (internal quotation marks omitted) (quoting *McClory v. Schneider*, 51 S.W.2d 738, 741 (Tex. App. 1932)). The Legislature is presumed to have had knowledge of these decisions at the time it enacted and amended section 320.643. Ford's argument section 320.643(2) applies only to the sale of less than 100% of a dealership's stock simply must fail.

Rules of statutory construction require all parts of a statute be given full effect, and a statute may not be construed to render

part of it meaningless. *See Unruh v. State*, 669 So.2d 242, 245 (Fla. 1996); *Johnson v. Feder*, 485 So.2d 409, 411 (Fla. 1986). Statutory provisions must be given some useful purpose and no part of a statute should be construed as superfluous. *See In re City of Mobile*, 75 F.3d 605, 611 (11th Cir. 1996).

If a 100% transfer of stock is covered by Section 320.643(1), as Ford contends, then the "in whole" language in Subsection (2) is rendered inoperative. Such a reading must be avoided under fundamental rules of statutory construction, and subsection (2) ***must*** be read as controlling 100% transfers of stock. *Cf. United States v. Brame*, 997 F.2d 1426, 1428 (11th Cir. 1993) (stating courts must avoid rendering words in statutes inoperative).

Furthermore, legislative history demonstrates the Legislature meant to address the transfer of any measure of equity interest in a franchise by means of Subsection (2). The House Final Staff Summary of CS/SB 1077 (June 6, 1984) (Senate companion bill to CS/HB 890) states: "[Section 320.643(2) precludes manufacturers] from prohibiting the transfer of ***any interest*** in a franchise agreement to any person unless [the manufacturer] proves . . . that such transfer is to a person who is not . . . of good moral character."

Ford's effort to convince this Court to abandon the plain and unambiguous words in the Florida Dealer Protection Act is little more than an invitation for this Court to legislate. When the

words of a statute are clear, courts must avoid "speculating as to what the legislature intended," *Zuckerman v. Alter*, 615 So.2d 661, 663 (Fla. 1993), and "must read the statute as written, for to do otherwise would constitute an abrogation of legislative power," *Nicoll v. Baker*, 668 So.2d 989, 990-91 (Fla. 1996). Further, rules of statutory construction should never be used to create doubt (as Ford attempts), only to remove it. *See Coon v. Continental Ins. Co.*, 511 So. 2d 971, 973 (Fla. 1987).

Florida's lawmakers chose to treat stock transfers in motor vehicle dealerships differently from franchise transfers as an asset of a dealership. The Florida Legislature facially treated these two types of transfers differently, giving a proposed stock transfer greater protection from manufacturer interference since only moral character may be raised to challenge a stock transfer. Courts must assume the legislature acts intentionally and purposely when it includes particular language in one part of a statute, but omits it from another. *See Rodriguez v. United States*, 480 U.S. 522, 525 (1987). Since the Florida Legislature expressly included two bases for challenging transfers of franchises — business experience and moral character — but only included one basis for challenging stock transfers — moral character — Ford's reading, which merely infers the inclusion of the business experience basis of objecting to stock transfers governed by subsection (2), is directly contrary to rules of statutory construction. *See St.*

George Island, Ltd. v. Rudd, 547 So.2d 958, 961 (Fla. 1st DCA 1989)("[T]he presence of a term in one portion of a statute and its absence from another argues against reading it as implied by the section from which it is omitted"). Accordingly, Ford's contention that the business experience basis for challenging franchise transfers can be read into subsection (2), which governs stock transfers "in whole or part," must be rejected based on fundamental rules of statutory construction.

One possible policy sought to be advanced by the Legislature by limiting the bases on which a motor vehicle manufacturer may object to transfers of stock is to encourage equity investor acquisitions of motor vehicle dealerships as a means of access to these small businesses. Indeed, one of the Act's express statutory goals is providing "fair trade." §320.605, Fla.Stat. The Legislature's decision to enhance the alienability of motor vehicle dealership stock can be seen both as a means of promoting "fair trade" by protecting the transfer rights of small business interests, as well as providing investor access to motor vehicle dealerships' stock. While such investors might initially lack the business experience to meet a manufacturer's "written, reasonable, and uniformly applied standards or qualifications," § 320.643(1), investors may choose individuals to manage their dealership investments and, in that regard, a manufacturer's interests are protected by § 320.644. Where a statute serves to benefit the

public, the statute should be interpreted most favorably to the public. *See Board of Public Instruction v. Doran*, 224 So.2d 693, 699 (Fla. 1969).

The public is best served by a plain reading of section 320.643(2), which affords increased protection to transfers of equity stock interests in small business franchises, thereby ensuring the survival of small businesses and providing small business investors a viable means of access to these types of businesses. Notwithstanding, such speculation as to motives of the Legislature is not appropriate in the face of the statute's plain language. *See Public Health Trust v. Lopez*, 531 So.2d 946, 949 (Fla. 1988) (stating that courts are not permitted to speculate about "what should have been intended"). The judiciary must also avoid the temptation to construe ***un***ambiguous statutes, "however wise it may seem to alter the plain language." *State v. Jett*, 626 So.2d 691, 693 (Fla. 1993). This Court has observed "if the legislature did not intend the result mandated by the statute's plain language, the legislature itself will amend the statute at the next opportunity." [2] Since it is not the prerogative of the

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[2] Efforts to amend section 320.643 to weaken its dealer protection provisions have been attempted by motor vehicle manufacturers, including Ford. *See* Balzer, *The Fragility of Good Ideas: A Case For Abolishing Sunset Review of Florida's Motor Vehicle Manufacturer Licensing Statute*, 16 Fla.St.U.L.Rev. 697,

judiciary to modify clear legislative intent in order to promote another policy viewed more favorably by the courts, *Holly v. Auld*, 450 So.2d 217 (Fla. 1984), this Court should resist Ford's invitation to legislate and should apply section 320.643(2) as unambiguously written.

Amici concede even though the statute is a "Dealer Protection Act" the statutory scheme cannot be interpreted to impose ridiculous burdens on manufacturers. ***It does not.*** The issue thus arises concerning what Ford should have done when presented with the proposed stock transfer and proposed change of management in the instant case. Under the terms of the statute, Ford, since it did not contest the moral character of the proposed stock transferee, was obliged to consent to the stock transfer; however, Ford also had the option of pursuing an administrative remedy to contest the proposed change of management, pursuant to section 320.644. In a section 320.644 proceeding, which provides Ford a full administrative hearing, Ford could have fully litigated its

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741 n.247 (1988). Indeed, House Bill 1525 introduced during the 1995 Session would have limited the stock transfer protections of Section 320.643(2) to only transfers of non-controlling interests, the interpretation espoused by Ford below. *See* Fla. House Bill 1525 (Reg. Session 1995); House of Rep. Bill Analysis at 4 (March 11, 1995). All such efforts, to this point, have been unsuccessful.

challenge to the business qualifications of the proposed executive management. If Ford had prevailed in that action, the proposed executive management would have not been permitted to manage the dealership. The proposed stock transferees would have then been relegated to a position of mere investors, not managers of the dealership.

If Ford had consented to the stock transfer and pursued a section 320.644 management challenge and prevailed, the new stockholders would have had to propose alternative executive management. In that case, Ford would be fully protected since it would have the same right to challenge this alternative management under section 320.644. By all accounts, motor vehicle manufacturers are fully protected under this statutory scheme and they have the right to fully litigate all claims regarding the business qualifications of any party proposed as executive management of one of their franchise dealerships. On the other hand, when the issue is stock ownership, as an investor, manufacturers are fully protected by the statutory criteria allowing them to contest on moral character grounds acquisitions by such investors.

In summary, in the absence of a moral character objection, Ford was obliged to accept the 100% transfer of stock, and pursue its objection to the dealership's ***management*** under section 320.644. Ford, however, in total disregard of the applicable portions of

section 320.643, wrongfully rejected the stock transfer on grounds other than moral character. In doing so, Ford violated Florida Law.

IV. SECTION 320.644 DOES NOT APPLY TO PROPOSED STOCK PURCHASES AND CANNOT PROVIDE THE BASIS FOR REJECTING STOCK TRANSFERS.

Ford, in an effort that clouds the statutory issues, also in support of its position relies on section 320.644, concerning a dealership's proposed changes to its executive management control. Under this provision, a manufacturer may raise two grounds to challenge the new ***management***: (1) business experience; and (2) moral character. Section 320.644 also provides for an administrative challenge should a motor vehicle manufacturer choose to contest proposed management.

The fundamental problem that Ford ignores is nothing in section 320.644 provides manufacturers with the opportunity to challenge the stock ***transfer*** itself. Section 320.644 neither addresses ***transfers*** of franchises as a corporate asset nor ***transfers*** of dealership stock (equity), as does section 320.643. Rather, section 320.644 addresses only changes in executive management control, which can occur without any transfer of corporate assets or corporate ownership.[3]

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[3] For example, if the owner of a dealership is unhappy with the productivity of his day-to-day management, the owner may decide to change his entire management.

The provisions of section 320.644 demonstrate the exaggerated nature of Ford's claim it will be forced to accept unsuitable dealers if it can only challenge a stock transfer on the ground of moral character. What Ford seems intent on ignoring is under section 320.644, manufacturers in fact have a say over who will manage their franchise dealerships, and they may object to proposed executive management on the basis of business experience. Thus, the public's perception of motor vehicle dealerships, which is through their day-to-day management and not the owner of dealership stock, is subject to manufacturer's scrutiny of the business experience of a dealership's management, precisely the type of scrutiny necessary to protect the public image of manufacturers' franchise dealerships. When, however, only stock is being transferred with no change of management, the stock purchaser is an investor and the ability to reject this investor on moral grounds amply protects the manufacturer.

V. DECISIONS FROM OTHER JURISDICTIONS HAVE HELD THE SALE OF 100% OF A FRANCHISEE'S STOCK DOES NOT CONSTITUTE A TRANSFER OF THE FRANCHISE AGREEMENT.

In a recent decision involving the sale of 100% of the stock in a franchise company, a federal district court faced a similar claim by the franchisor that the sale of all of the franchisee's stock constituted a transfer of the franchise without the franchisor's permission. *See Jameson Crosse, Inc. v. Kendall-Jackson Winery, Ltd.*, 917 F. Supp. 520 (N.D. Ohio 1996). The Ohio franchise statutory scheme for distribution of alcoholic beverages required, similar to Florida's Dealer Protection Act, manufacturers to permit their distributors/franchisees the right to sell or transfer their "business, ***in whole or in part***," except distributors/franchisees were not permitted to sell or transfer a franchise without consent. Id. at 524 (emphasis added). There the franchisor argued (as does Ford in the instant case) a 100% stock sale of the franchisee's business necessarily included a transfer of the franchise. In response, the franchisee argued the franchise was an asset of the corporation and the sale of the stock in his business was not the transfer of the franchise, which remained with the original franchise corporation.

The federal district court rejected the franchisor's attempt "to read into controlling law what simply is not there, i.e. that

a transfer of a majority stock is equivalent of a transfer of the franchise." Id. The court held the sale of a majority interest in stock is not a sale or transfer of the franchise agreement. Id. at 525. It further noted the legislature could easily have limited the rights of distributors/franchisees to dispose of their businesses in less than a controlling interest, and, indeed, the Ohio automobile franchise law expressly provided such limitations:

> Had the Ohio legislature wished to require manufacturer consent for the sale of a controlling portion of a distributor's stock, it could have done so. Such a requirement was adopted by the legislature in the context of motor vehicle franchise relationships. O.R.C. 4517.56(A) requires franchisor notice and approval of "the sale or transfer of the business and assets ***or all or a controlling interest in the capital stock***..." (emphasis added).

Id. Comparing the two different franchise statutory schemes, the court noted the Ohio Legislature chose to address the two types of transfer (franchise transfer v. stock transfer) differently, and the difference in statutory treatment could not reasonably be seen as gratuitous. Id. Accordingly, the federal district court held: "The sale of a majority interest in stock is not a sale, assignment, or transfer of a franchise agreement." Id; *see Cruising World, Inc.*, 351 So.2d at 373.

Comparison of the Ohio statutory scheme governing alcoholic beverages franchises with Florida's Dealer Protection Act reveals both state legislatures perceived a valid distinction between the

sale of franchisees' stock and the actual transfer of a franchise agreement. Both state's franchise statutes accord greater protection from manufacturers interference with the sale of a franchisee's business through a transfer of the business's stock. Both statutes accord this added protection even when the sale involves a ***controlling*** interest in the franchisee's business, as

both statutes protect stock transfers whether "in whole [all] or in part."

This separate treatment between the sale of a franchisee's business by means of a stock transfer and the actual transfer of a franchise agreement in conjunction with an asset purchase is echoed in other parts of Florida's statutes. Under section 686.413, Florida Statutes, governing farm equipment franchises, a manufacturer cannot interfere with the transfer of a franchisee's business interest to another, but a franchise agreement itself can only be transferred with the manufacturer's consent. § 686.413(3)(h).

This distinction has also been recognized by the Florida Supreme Court in a case involving sale of stock in a company holding a franchise. In *State v. Dade County*, 142 So. 2d 79, 88 (Fla. 1962), the Florida Supreme Court reasoned, "the sale involved

is not a sale of assets in the sense used in the franchise agreement, but one of the common stock of the companies involved."

These cases and comparable statutes make manifest that the Florida Legislature has not simply provided gratuitous language in section 320.643(2). This law was intentionally designed to give greater protection to stock transfers of ***all*** or part of a motor vehicle dealership's stock. This provision, as with the distinct provision under subsection (1), contains its own separate administrative challenge procedures, and has its own "as a matter of law" provision, which results in the equity transfer being deemed effective if not successfully challenged by the manufacturer. Under the controlling principles of plain language interpretations of statutes, this Court should not second-guess the wisdom of Florida's Legislature in creating this greater protection from manufacturer interference of stock transfers, but rather should simply apply the provisions as written.

As the United States Supreme Court has instructed, manufacturers' problem with the plain meaning of Florida's Dealer Protection Act is not one which is properly addressed to the judiciary. Rather, manufacturers' disagreement with the purpose and policy of these laws is properly an issue for legislative consideration.

CONCLUSION

Amici submit when the plain meaning "rule of construction" is applied and the controlling provisions of Florida Statute 320.643(2) are considered in a logical straight forward fashion, it is clear that the Middle District Court erred in the instant case when it allowed business experience as a basis for rejecting a proposed transfer of dealership stock. In contrast, the Middle District in the ***Morse*** case properly interpreted the law in limiting stock transfer objections to moral character. The latter decision is consistent with the statute's plain meaning and underlying purposes, and protects Florida automobile dealers by allowing them to freely alienate stock interests in their dealerships. The former decision is merely an improper abrogation of legislative authority. Under the Act, manufacturers are provided adequate protection in contesting stock transfers on moral character grounds when the entire statutory scheme is considered. This scheme allows manufacturers to contest changes in executive management on business experience ***and*** moral character grounds, and thus manufacturers are fully protected. Amici request Ford's invitation to legislate be rejected and section 320.643(2), Florida Statutes, be interpreted under its clear terms, and that this Honorable Court respond to the Eleventh Circuit to the Certified Question in the affirmative.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been sent by U.S. Mail to the following parties this _____day of _____, 1998.

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