IN THE SUPREME COURT OF FLORIDA

DWAYNE HAWKINS,
MILLARD RIPLEY,

Plaintiffs/Appellants, Case No. 92,503

v.

FORD MOTOR COMPANY,
Defendant/Appellee

---/

ON CERTIFICATION FROM THE UNITED STATES
COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF OF AMICI CURIAE ASSOCIATION OF INTERNATIONAL AUTOMOBILE MANUFACTURERS, INC. AND AMERICAN AUTOMOBILE MANUFACTURERS ASSOCIATION

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TABLE OF CONTENTS

Page

Table of Authorities..... i

TABLE OF AUTHORITIES

CASES

Page

Beard Motors, Inc. v. Toyota Motor Distributors, Inc.,
395 Mass. 428, 480 N.E.2d 303 (Mass. 1985) 12,27,28

City of Boca Raton v. Gidman,
440 So. 2d 1277 (Fla. 1983) 15

Colonial Ford, Inc. v. Ford Motor Co.,
592 F.2d 1126 (10th Cir.), cert. denied,
444 U.S. 837 (1979) 27

Fifth Ave. Motors, Ltd. v. Mercedes-Benz of
North America, Inc., 408 So. 2d 627
(Fla. 2d DCA 1981) 14

Florida Seed Co., Inc. v. Monsanto Co.,
105 F.3d 1372 (11th Cir.), cert. denied,
118 S. Ct. 296 (1997) 28

Forsythe v. Longboat Key Beach Erosion Control Dist.,
604 So. 2d 452 (Fla. 1992) 14

Hawkins v. Ford Motor Co.,
135 F.3d 1443 (11th Cir. 1998) 1

In re Claremont Acquisition Corp. Inc.,
186 B.R. 977 (C.D. Cal. Bankr. 1995) 13

In Re Pioneer Ford Sales, Inc.,
729 F.2d 27 (1st Cir. 1984) 6,21

In re Van Ness Auto Plaza, Inc.,
120 B.R. 545 (N.D. Cal. Bankr. 1990) 7

International Harvester Co. v. Calvin,
353 So. 2d 144 (Fla. 1st DCA 1977) 12

John Havlir Assocs., Inc. v. Tacoa, Inc.,
810 F. Supp. 752 (N.D. Tx. 1993) 25

Key v. Chrysler Motors Corp.,
121 N.M. 764, 918 P.2d 350 (N.M. 1996) 14,27

Knauz v. Toyota Motor Sales, USA, Inc.,
720 F. Supp. 1327 (N.D. Ill. 1989) 27

Magwood v. Smith, 791 F.2d 1438 (11th Cir. 1986) 22

Mehl v. State, 632 So. 2d 593 (Fla. 1993) 17

Mike Smith Pontiac, GMC, Inc. v. Mercedes-Benz of
North America, Inc., 32 F.3d 528 (11th Cir. 1994),
cert. denied, 516 U.S. 1044 (1996) 26,29,30

Pike v. Bruce Church, 397 U.S. 137 (1970) 25

Psychiatric Associates v. Siegel,
610 So. 2d 419 (Fla. 1992) 23

Roberts v. General Motors Corp.,
138 N.H. 532, 643 A.2d 956 (1994) 27

Rosenfeld v. Lu, 766 F. Supp. 1131 (S.D. Fla. 1991) 25

Ruckelshaus v. Monsanto, 467 U.S. 986 (1984) 24

Sherwood Ford, Inc. v. Ford Motor Co., 875
F. Supp. 590 (E.D. Mo. 1995) 12

Shevin v. International Inventors, Inc.,
353 So. 2d 89 (Fla. 1977) 23

Simmons v. General Motors Corp.,
435 A.2d 1167 (N.J. Super. App. Div. 1981),
cert. denied, 88 N.J. 498, 443 A.2d 712 (N.J. 1981) 8

Simonds Chevrolet, Inc. v. General Motors Corp.,
564 F. Supp. 151 (D. Mass. 1983) 7

Statewide Rent-a-Car, Inc. v. Subaru of Am.,
704 F. Supp. 183 (D. Mont. 1988) 27

Sundown Imports, Inc. v. Arizona Dep't of
Transp., Motor Vehicle Div., 115 Ariz. 428,
565 P.2d 1289 (Ariz. App. Div. 1977) 7

Tynan v. General Motors Corp.,
248 N.J. Super. 654, 591 A.2d 1024
(N.J. Sup. Ct.), cert. denied, 127 N.J. 548,
606 A.2d 362 (N.J. 1991), modified on other
grounds, 127 N.J. 269, 694 A.2d 99 (1992) 27

Walner v. Baskin-Robbins Ice Cream Co.,
514 F. Supp. 1028 (N.D. Tx. 1981) 7

STATUTES

Ala. Code §8-20-2 13

Ark. Stat. Ann. 23-112-102 13

Colo. Rev. Stat. §12-6-101 13

Del. Code Ann. tit. 6 §4901 13

Fla. Stat. Chapter 320.....passim

15 U.S.C. §1221 et seq 11

Fla. Const. art. I, §21 23

Ga. Code Ann. §10-1-621 13

Haw. Rev. Stat. §437-1 13

Ky. Rev. Stat. Ann. §190.015 13

La. Rev. Stat. Ann. §32:1251 13

Minn. Stat. Ann. §80E.01 13

Miss. Code Ann. §63-17-53 13

N.C. Gen. Stat. §20-285 13

N.J. Stat. Ann. §56:10-2 13

N.M. Stat. Ann. §57-16-1 13

N.Y. Veh. & Traf. Law §460 13

Neb. Rev. Stat. §60-1401.01 13

Nev. Rev. Stat. §482.3181 13

Okla. Stat. Ann. tit. 47, §561 13

Tenn. Code Ann. §55-17-101 13

Utah Code Ann. §13-14-2 13

Vt. Stat. Ann. tit. 9 §4084 13

W. Va. Code §17A-6-2 13

Wash. Rev. Code Ann. §46.70.005 13

STATEMENT OF THE CASE

Amici curiae Association of International Automobile Manufacturers ("AIAM") and American Automobile Manufacturers Association ("AAMA") hereby adopt and incorporate by reference

the Statement of the Case and Facts contained in the Brief of Appellee Ford Motor Company ("Ford").

II. SUMMARY OF ARGUMENT[1]/

A. The question certified by the Eleventh Circuit is the following: "Does Fla. Stat. §320.643(2)(a) 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?" This Court should hold that Florida Statutes §320.643(1), §320.643(2)(a) and §320.644 apply to the proposed transfer of any controlling equity interest in a motor vehicle dealership. Only that result will harmonize the different sections of Fla. Stat. Chapter 320 and achieve its underlying legislative intent. The clear intent of Chapter 320 (Fla. Stat. §§320.01-320.865)like other states' motor vehicle franchise statutesis to balance the interests of motor vehicle manufacturers, dealers, consumers, while promoting competition and fair trade. Such laws were not created, nor should they be interpreted, solely to protect the economic interests of motor vehicle dealers at the expense of the other interests that such statutes were intended to protect.

In contrast, Hawkins' and Ripley's (hereinafter

collectively, "Hawkins") interpretation of the statutethat only §320.643(2)(a), and no other section, applies to even the transfer of 100% of the equity of a dealershipis not supported by the relevant statutory language, logic or public policy. The control of a dealership necessarily changes when a controlling interest in its equity is transferred. Nonetheless, Hawkins asserts that, although manufacturers have the right to assess the business qualifications of proposed dealers in every other setting, a manufacturer is deprived of any ability to assess the business qualifications of a transferee of a controlling share of dealer's equity. Under Hawkins' interpretation, the manufacturer, in short, would be forced to accept as its dealer a person or entity with no relevant experience, whom it never would have approved as an applicant for one of its franchises, merely because that party was becoming its dealer through a stock acquisition, rather than by asset acquisition or by applying for a new franchise agreement.

To the extent that Chapter 320 would have this effect, it would be held to be unconstitutional under both the United States and Florida Constitutions. Such an interpretation of the statute would deprive the manufacturer of substantive and procedural due process and equal protection. Well-established principles of

statutory construction prohibit such an interpretation when a constitutionally acceptable interpretation is not only possible, but well-supported by other provisions of Chapter 320.

B. To the extent that §320.697 authorizes any cause of action for damages for a manufacturer's good faith withholding of consent under §320.643 or §320.644, the statute nevertheless should not be interpreted to extend standing to the proposed transferee to bring such a suit. Well-established precedent reflects that the statutory grant of standing in §320.697 to "any person" must be applied in the context of the statute's overall purposes and the group(s) targeted for protection. For very good reasons, numerous other jurisdictionsand all the state courts of last resort which have considered the issuehave held that a proposed transferee has no standing to bring suit for violation of comparable statutes expressly designed to govern the manufacturer-dealer contractual relationship. To grant the proposed transferee such standing would actually interfere with the manufacturer-dealer relationship which the statute is designed to balance. This Court should take the opportunity to decide this threshold question of Florida law, which Ford raised in the District Court and preserved in the appellate proceedings before the Eleventh Circuit.

C. Another issue raised by this appeal is whether, under Fla. Stat. §320.697, treble damages are mandated against a manufacturer which objects in good faith to a proposed transfer and has complied with the procedural requirements of §320.643 and/or §320.644. Amici submit that §320.697 should not be interpreted to mandate a treble damages action against a manufacturer for a good faith objection to a proposed transferee. A contrary interpretation places the manufacturer in an untenable position and chills its good faith business decisions. It is irrational and unconstitutional to impose such a severe penalty for a good faith decision to pursue statutorily recognized procedures for rejecting a proposed transferee. Given the in terrorem effect of treble damages, this Court should also address this issue.

III. ARGUMENT

THE MEMBERS OF AIAM AND AAMA HAVE A SUBSTANTIAL INTEREST IN THIS APPEAL.

The Association of International Automobile Manufacturers, Inc. ("AIAM") and American Automobile Manufacturers Association ("AAMA") submit this brief, as amici curiae, in order to provide the Court with the automotive industry's views concerning the

proper interpretation of Florida Statutes, §320.643(2)(a), §320.643(1), §320.644(1), and other provisions of Chapter 320, as they relate to this case. AIAM is the trade association representing the United States subsidiaries of international motor vehicle manufacturers.[2]/ AAMA is a trade association of Ford, Chrysler and General Motors. Because the members of AIAM and AAMA sell their products and services through independent dealerships in Florida and throughout the United States, they have a significant interest in the proper interpretation and application of the laws that govern the relationship between dealers and manufacturers. The issues raised by this appeal are vitally important to the members of both organizations.

B. A MANUFACTURER'S ABILITY TO ASSESS THE BUSINESS EXPERIENCE AND QUALIFICATIONS OF A PROPOSED TRANSFEREE OF A CONTROLLING INTEREST IN A DEALERSHIP FOSTERS THE INTERESTS OF DEALERS, CONSUMERS, AND THE STATE.

What is at issue in this case is the ability of a motor vehicle manufacturer to assess the business qualifications of a proposed transferee before entering into a conceivably longstanding and statutorily protected franchise relationshipone

on which the manufacturer is entirely dependent for its business in Florida. In the State of Florida, as in numerous other states, manufacturer-owned dealerships, i.e., "company stores," are generally prohibited. See Fla. Stat. §320.645. Hence, manufacturers are entirely dependent on qualified dealers to sell to and service consumers, to protect the value of their trademarks, and to compete against other dealers for the business and loyalty of consumers.

Accordingly, a manufacturer's legitimate interest in the business experience and financial qualifications of a proposed new franchisee and its executive management control has been upheld by courts in many different jurisdictions. For example, in the case of In Re Pioneer Ford Sales, Inc., 729 F.2d 27, 30 (1st Cir. 1984), the First Circuit concluded that a manufacturer's withholding of consent to a proposed transfer of a dealership was reasonable as a matter of law, in light of the proposed dealer's history of losses and failure to meet capital requirements. Another federal court noted with approval "[a]nalogous case law [which] indicates that the existence of genuine doubts as to a prospective dealer's business acumen and financial capabilities, when combined with a "dualing" proposal that is justifiably disfavored by the manufacturer, furnishes

ample justification for the withholding of consent." Simonds Chevrolet, Inc. v. General Motors Corp., 564 F. Supp. 151, 153 (D. Mass. 1983)

Indeed, federal and state courts have recognized various aspects of a franchisor's need to be represented by competent and successful franchisees. See, e.g., Walner v. Baskin-Robbins Ice Cream Co., 514 F. Supp. 1028, 1030 (N.D. Tx. 1981) (recognizing franchisors' "strong interest in the financial vitality of a new franchisee" and "solid, concerned management which it must have to be successful for [the proposed franchisee] and to enhance [franchisor's] image and relative position in the market"); In re Van Ness Auto Plaza, Inc., 120 B.R. 545, 547 (N.D. Cal. Bankr. 1990) (listing factors related to proposed assignee's likelihood of successful performance as including: adequacy of working capital, extent of prior experience, past profitability, proposed location, prior sales and customer service performance, proposed dealer's business acumen, suitability of combining franchise in question with other franchises at same location, and whether proposed dealer has provided sufficient information regarding its qualifications); Sundown Imports, Inc. v. Arizona Dep't of Transp., Motor Vehicle Div., 115 Ariz. 428, 432, 565 P.2d 1289, 1293 (Ariz. App. Div. 1977) (recognizing legitimate interest in

personal services requirement and policy discouraging long distance control of dealerships); Simmons v. General Motors Corp., 435 A.2d 1167, 1177 (N.J. Super. App. Div. 1981) ("An unacceptable franchisee can damage the public image as well as the pocketbook of the manufacturer."), cert. denied, 88 N.J. 498, 443 A.2d 712 (N.J. 1981).

Here the District Court properly recognized, based on the terms of the Ford Dealer Agreement, that the practical effect of a transfer of 100% of the dealership's equity interest is the same as a change in the franchisee, as well as inherently being a change in executive management control:

> In view of the personal nature of these Agreements and their objectives and purposes, the Company expressly reserves to itself the right to execute said Agreements with individuals or other entities specifically selected and approved by the Company. . . . These Agreements have been entered into by the Company with the Dealer in reliance upon (i) the representation and agreement that the following person(s), and only the following person(s), shall be the principal owners of the Dealer; [Wilson P. Davis, 80%; Wade A. Bodiford, Jr., 20%] . . .
>
> (ii) upon the representation and agreement that the following person(s), and only the following person(s), shall have full managerial authority for the operating management of the Dealer in the performance of these Agreements: [Wilson P. Davis; Wade A. Bodiford, Jr.]
>
> . . .
>
> The Dealer shall give the Company prior notice of any proposed change in said ownership or managerial authority of

> said Dealer . . . . No such change or notice, and no amendment or assignment of these Agreements or of any right or interest herein, shall be effective against the Company unless and until embodied in an appropriate amendment or assignment of these Agreements as the case may be, duly executed and delivered by the Company and by the Dealer. The Company shall not unreasonably withhold its consent to any such change . . .

See Hawkins v. Ford Motor Co., slip op. at 5. Virtually every other manufacturer's franchise agreement contains similar terms. The same terms clearly apply to the transfer of any controlling equity interest in the dealership (however such "control" may be defined under applicable law or relevant corporate documents). Hence, this Court should not narrow its holding here only to the transfer of 100% of the equity interest in a dealership, as opposed to the transfer of any controlling equity interest. In light of the inherent effects of a change of control in a dealership, a manufacturer's need to assess the business qualifications of a proposed controlling shareholder is as strong and legitimate as its need to assess the qualifications of any proposed franchisee.

Important consumer interests are promoted by the manufacturer's ability to assess the relevant business qualifications of those in control of a motor vehicle dealership.[3]/ Florida consumers have a substantial interest in dealing withand indeed they rely uponexperienced, honest, and

financially stable dealers. Moreover, consumers directly benefit from lower prices and higher quality facilitated by active interbrand and intrabrand competition. Competition, one of the explicit goals of Chapter 320, is facilitated by the presence of qualified dealers competing with each other in a given geographical area.

Existing dealers, too, directly benefit from the appointment of qualified, experienced dealers with a record of success. Public acceptance of the franchise brand name is enhanced by a dealer body that is well-managed and financially secure. Conversely, the shortcomings of unqualified or financially struggling dealers in customer service and other areas reflects poorly on other dealers marketing the same franchised products. Unqualified dealers may also reduce the value of an "auto mile" or "auto mall" by reflecting adversely on neighboring franchises of other manufacturers.

In short, the interests of competition, consumers, manufacturers and dealers are furthered by allowing manufacturers to assess the business qualifications of dealerswhether through direct appointment, the purchase of a dealership's assets or the purchase of a controlling interest in the stock of a dealership. By requiring that the assessment of business experience and

qualifications be pursuant to "written, reasonable and uniformly applied standards or qualifications," Chapter 320 protects against arbitrary, capricious or ad hoc business decisions.

C. MOTOR VEHICLE DEALER FRANCHISE LAWS LIKE CHAPTER 320 ARE DESIGNED TO BALANCE THE INTERESTS OF MANUFACTURERS, DEALERS, CONSUMERS AND THE STATE.

Chapter 320 is one of numerous state motor vehicle franchise laws which, like their federal analogue, 15 U.S.C. §1221 et seq.,[4]/ are designed to address the perceived imbalance in the relationship between manufacturers and their dealers.[5]/ However, neither Chapter 320, the federal statute, nor any other state motor vehicle franchise law is intended to protect the economic interests of motor vehicle dealers at all costs. Rather, such statutes are intended to balance the interests of dealers, manufacturers, consumers and the state. See, e.g., International Harvester Co. v. Calvin, 353 So.2d 144, 147 (Fla. 1st DCA 1977) ("Sections 320.60-70 were enacted as part of a legislative scheme to insure fair dealing at all levels between motor vehicle manufacturers, the dealers and the consuming public") (emphasis added); Sherwood Ford, Inc. v. Ford Motor Co., 875 F. Supp. 590, 593 (E.D. Mo. 1995), citing Carroll Kenworth Truck Sales v. Kenworth Truck Co., 781 F.2d 1520, 1525 (11th Cir.

1986) ("The federal act was designed to create a level playing field for negotiations between local businessmen and multinational automotive companies. However, it was not designed to tilt the balance of power so heavily in favor of dealers as to tie a manufacturer to an undesirable and unproductive dealer.") (emphasis added); Beard Motors, Inc. v. Toyota Motor Distributors, Inc., 395 Mass. 428, 433, 480 N.E.2d 303, 306 (Mass. 1985) ("several provisions of [Mass.] G.L. c.93B . . . recognize and protect 'the dealer's equity in his business as his independent asset, alienable at market value, while simultaneously preserving reasonable prerogatives for the manufacturers'") (emphasis added).

In the case of Chapter 320, the legislative intent to further the interests of persons beyond dealers (let alone prospective dealers) is reflected in the statement of the statute's purpose set forth in §320.605[6]/:

> It is the intent of the Legislature to protect the public health, safety, and welfare of the citizens of the state by regulating the licensing of motor vehicle dealers and manufacturers, maintaining competition, providing consumer protection and fair trade and providing minorities with opportunities for full participation as motor vehicle dealers. [Emphasis added.]

The achievement and maintenance of this balance of interests often depend on the proper interpretation of a given franchise

statute by the courts. See, e.g., In re Claremont Acquisition Corp. Inc., 186 B.R. 977, 985-986 (C.D. Cal. Bankr. 1995) (noting with approval that another court's interpretation of California statute requiring reasonable refusal to consent to a franchise assignment "strikes an appropriate balance between the interests of the manufacturer and the interests of the franchisee", aff'd, 113 F.3d 1029 (9th Cir. 1997); Department of Motor Vehicles for use and benefit of Fifth Ave. Motors, Ltd. v. Mercedes-Benz of North America, Inc., 408 So.2d 627, 630 (Fla. 2d DCA 1981) (recognizing that "the [New Jersey statute] endeavored to equalize the bargaining power between the parties and to promote fair dealing"); Key v. Chrysler Motors Corp., 121 N.M. 764, 776, 918 P.2d 350, 362 (N.M. 1996) ("In requiring reasonableness of the manufacturer but precluding transfer without consent, we conclude that the [New Mexico statute] balances the interests of manufacturers and dealers."). In short, courts have rejected statutory interpretations which unilaterally favor dealers at the expense of manufacturers, consumers and the state.

D. THE ONLY PROPER CONSTRUCTION OF THE FLORIDA DEALER ACT MANDATES THE APPLICATION OF §§320.643(1) AND 320.644 TO ANY PROPOSED TRANSFER OF A CONTROLLING EQUITY INTEREST IN A MOTOR VEHICLE DEALERSHIP.

"[I]f from a view of the whole law, or from other laws in

pari materia, the evident intent is different from the literal import of the terms employed to express it in a particular part of the law, that intent should prevail, for that, in fact is the will of the Legislature." Forsythe v. Longboat Key Beach Erosion Control Dist., 604 So.2d 452, 454-455 (Fla. 1992). Here the language of the statute, the legislative intent underlying Chapter 320 as a whole, and the purposes which can be inferred from the statute's transfer provisions, support the District Court's conclusion in this case. There is nothing in the statute which prohibits the application of §320.643(1) and §320.644(1) to a transfer of an equity interest which will result in a transfer of the franchise and a change in executive management control. In the first instance, the fact that §320.643(2)(a) applies to a transfer of equity interest "in whole or in part" does not require that it apply to the exclusion of other applicable provisions, i.e., §§320.643(1) and §320.644(1).[7]/

1. Other Sections of Chapter 320 Support the Conclusion That a Manufacturer May Consider the Business Qualifications of a Proposed Transferee of a Controlling Equity Interest.

"It is axiomatic that all parts of a statute must be read together in order to achieve a consistent whole . . . [and] where possible, courts must give full effect to all statutory

provisions and construe related statutory provisions in harmony with one another." City of Boca Raton v. Gidman, 440 So.2d. 1277, 1281 (Fla. 1983). Properly harmonizing §320.643(2)(a) with the rest of Chapter 320 leads inexorably to the conclusion that all three transfer provisions must apply to a transfer of a controlling stock interest.

Sections §320.643(1) and §320.644(1) clearly manifest the concern of the Florida Legislature that the owner of the dealership or other persons or entities in "control" of a motor vehicle dealership be qualified. Under §320.643(1), the proposed transferee of a franchise agreement must be of good moral character and must meet the manufacturer's written, reasonable and uniformly applied standards and qualifications relating to the business experience of dealership executive management. Such a provision recognizes the fact that with a change of ownership of a franchise agreement comes a change in the control of the dealership. Section 320.644(1) permits the manufacturer to reject a proposed change of executive management control to a person or persons not of good moral character or who do not meet the manufacturer's written, reasonable and uniformly applied business experience-related standards and qualifications. Significantly, §320.644(1) refers to "executive management

control"not to the executive managers per se. The use of this phrase demonstrates concern about the qualifications of the persons or entity in actual control, such as a majority shareholder with voting control of the dealership.

It would render §320.643(1) and §320.644(1) nonsensical to permit the business experience of a controlling person to be considered where a change of control is effectuated by the sale of dealership assets or any other change of executive management control, except when the change of control is effectuated by transfer of a controlling stock interest. Where three provisions at issue are "part of a unified package of law," the proper approach is to read them in pari materia as expressing a unified legislative purpose. Mehl v. State, 632 So.2d. 593, 594 (Fla. 1993).

The only way to harmonize §320.643(2)(a) with §320.643(1) and §320.644(1) is to hold that all three apply to the transfer of a controlling equity interest in a dealership, and that §320.643(2)(a) applies exclusively only in cases of transfers of a non-controlling equity interest. In such situations, which might, for example, involve the transfer of a small equity interest to the dealer's family member, the law properly reflects a decreased concern that such a personwho might even be an

inexperienced minor child of the dealer principalmeet the manufacturer's standards regarding automotive experience and other relevant business credentials. In contrast, a transfer of a controlling equity interest triggers the other transfer provisions in addition to §320.643(2)(a). In short, while §320.643(2)(a) does apply to the transfer of a controlling equity interest, it is not, as Appellants argue, the only section that applies.

Other provisions of Chapter 320 support the conclusion that the Legislature was concerned that the person or entity in control of a motor vehicle dealership demonstrate more than just "good moral character." For example, §320.27(4) provides that a change in the majority ownership interest of a licensed dealer requires submission of a new license application to the Department:

> A license certificate duly issued by the department may be modified by endorsement to show a change in the name of the licensee, provided, as shown by affidavit of the licensee, the majority ownership interest of the licensee has not changed or the name of the person appearing as franchisee on the sales and service agreement has not changed.

This section itself reflects Chapter 320's concern over changes in majority ownership, which are deemed so significant that a new license is required. Hawkins, in contrast, would have the Court

treat 1% equity transfers and 100% equity transfers in exactly the same way, despite their significantly different import.

Another provision, §320.64(18), provides that a manufacturer may not refuse to accept a legal heir or devisee as successor to "any interest" in a franchise agreement, unless that heir fails to meet the manufacturer's "written, reasonable, uniformly applied minimal standard qualifications for dealer applicants." Thus, even a 1% interest transfer affords the manufacturer the right to apply its qualification standards in cases of a proposed succession upon the death of a dealer. It would be totally illogical to conclude that a transfer to a third party of a controlling block of stock does not allow application of such standards. Similarly, it would be illogical to limit the transfer of control to the good moral character of the transferee, in light of the fact that §320.64(18) also provides that the manufacturer is not required to accept a successor which has been demonstrated to be detrimental to the public interest or the representation of the manufacturer.[8]/

2. Hawkins' Interpretation of §320.643(2)(a) Is Not Supported By Statutory Language, Logic or Public Policy.

There is nothing in Chapter 320 which mandates the exclusive

application of §320.643(2)(a) in all cases of a proposed transfer of an equity interest. Furthermore, there is nothing in the language of any of the transfer provisions which supports the argument that §320.643(2)(a) operates independently of §320.643(1) and §320.644(1) In fact, Hawkins' interpretation of Chapter 320 directly contradicts the statute's underlying public policy of balancing various interests.

Hawkins has identified no legitimate public interest in requiring a manufacturer's approval of an unqualified dealer. Under Hawkins' interpretation, even where 100% of the equity is being transferred, the only notice required to be given to the manufacturer is the proposed transferee's "identity and address."[9]/ Were such notice all that were required, manufacturers might be required to approve neophytes, children, those with absolutely no experience, and even those with a proven track record of running dealerships into bankruptcy and not satisfying consumers in accordance with their franchisors' standards. Under Hawkins' interpretation, there would be nothing to prevent the transfer of dealership control to the incompetent, the totally inexperienced, or those with business plans totally contrary to the established plans of the manufacturer. In short, the interpretation urged by Hawkins disregards the interests of

the public, of competition, of manufacturers, and of other dealers, all in favor of the narrow economic interest of selling dealers.

The argument suggested by amici curiae South Florida Automobile and Truck Dealers Association and Greater Tampa Bay Automobile Dealers Association, that such an interest equates with that of the "small businessperson" or "small investor" is simply no longer true. The record in this case shows substantial sums at issue. Published reports of recent transactions in Florida and elsewhere in the country, including sales of multiple dealerships to publicly held companies (which in turn own hundreds of dealerships across the country), have routinely been in the order of tens, if not hundreds, of millions of dollars.

Finally, the prospect of forcing the manufacturer to enter a contractual relationship with an unqualified dealer (i.e., the new majority owner of the dealership), only to terminate later for breach of the franchise agreement in failing to maintain the manufacturer's uniformly applied standards (a common franchise agreement obligation), is far more disruptive to the interests of the public, the promotion of competition, and the interests of other dealers and manufacturers (as well as more costly to the transferee) than a pre-transaction turn-down.[10]/ It makes

little sense for a manufacturer's standards to be applied before the appointment of a new franchisee, before the transfer of a franchise agreement and before a change of executive management control, but only after the closing of the transfer of a control block of stock.[11]/

3. Hawkins' Interpretation of §320.643(2)(a) Would Be Unconstitutional.

It is a basic principle of statutory construction that "if a statute can be made constitutionally-definite by a reasonable construction the court is under a duty to give it such a construction." See Magwood v. Smith, 791 F.2d 1438, 1446 (11th Cir. 1986). Applying this principle, Hawkins' interpretation of §320.643(2)(a) must be rejected. Under Hawkins' interpretation of Florida law, the State may force a manufacturer to do business with an entity with a desultory or unproven track record in the automotive business, or even with a competitor operating its dealerships, as long as that entity was of "good moral character." Such an interpretation must be rejected by this Court because it would, in contrast to the interpretation urged by Ford, render Chapter 320 violative of both the state and federal constitutions. Although such a constitutional challenge is not before this Court, and would require a fuller factual

record, even a brief examination of some of the applicable constitutional principles demonstrates the unconstitutional underpinnings of Hawkins' interpretation.

As applied, §320.643(2)(a) would, under Hawkins' interpretation, unconstitutionally interfere with the manufacturer's right of access to Florida courts.[12]/ In order to guarantee broad accessibility to the courts for resolving disputes, courts should liberally construe the right of access. Psychiatric Associates v. Siegel, 610 So.2d 419, 424 (Fla. 1992). If read so as to mandate treble damages where the manufacturer unsuccessfully challenged qualifications of a proposed transferee (even in good faith), the statute would have an impermissible chilling effect on manufacturers' access to prescribed forums for the enforcement of legitimate business objectives. Thus, the manufacturer would be deprived of the right to regulate its dealer network for valid and legitimate business reasons, without providing an alternative remedy. Cf. Shevin v. International Inventors, Inc., 353 So.2d 89, 93 (Fla. 1977) (invalidating statute as unconstitutionally vague and, in the alternative, as impairing "the right to do business and to contract free from unreasonable government regulation" in violation of Florida and U.S. Constitutions).

As interpreted by Hawkins, the Florida statute might also effect an unconstitutional taking of property in violation of the manufacturer's due process rights. Manufacturers have developed significant property interests in their trademarks, their general reputations, and the costly development of a dealer network to promote their trademarks and further their investment-backed expectations. If they were required by state law to vest those property interests in the hands of those with no experience or interest in protecting them, the state would thereby effect a taking. The key factors of takings inquiry include "the character of the governmental action, its economic impact, and its interference with reasonable investment-backed expectations." Ruckelshaus v. Monsanto, 467 U.S. 986 (1984). AIAM and AAMA submit that the exclusive application of the "good moral character" standard to the proposed transfer of a controlling equity interest might, as perhaps would be reflected on a more developed factual record which detailed the manufacturer's investment-backed expectations of a qualified dealer network, result in the deprivation of the manufacturer's property without due process.

Finally, to the extent that a more developed record might show that exclusive application of §320.643(2)(a) burdens

interstate commerce excessively in relation to any putative local benefit, Hawkins' interpretation would be deemed in violation of the Dormant Commerce Clause of the United States Constitution. See Pike v. Bruce Church, 397 U.S. 137, 142 (1970); Rosenfeld v. Lu, 766 F. Supp. 1131, 1134 (S.D. Fla. 1991); John Havlir Assocs., Inc. v. Tacoa, Inc., 810 F. Supp. 752, 756 (N.D. Tx. 1993). Florida, with a population of 14,166,000, is the fourth largest retail automotive market in the United States. The State recorded over 1,100,000 new car registrations in 1997. As of 1997, there were between 1200 and 1300 new motor vehicle dealers licensed to do business in the State of Florida. Each of those dealers is a party to a franchise agreement with one or more automobile manufacturers, none of whom resides in Florida. The law at issue in this case thus affects a significant portion of interstate commerce in automobiles.

Were Chapter 320 to apply so as to force the transfer of control of a motor vehicle dealership with no regard whatsoever for the manufacturers' interest in assessing the proposed transferee's relevant automotive business experience, it is likely that empirical evidence would establish that the statute would burden interstate commerce excessively in relation to any legitimate local benefit. Hawkins' interpretation of Chapter 320

would thus disproportionately benefit in-state, resident dealers at the expense of the free flow of interstate commerce, with no benefit whatsoever to the public interest.

E. A PROPOSED TRANSFEREE HAS NO STANDING TO BRING SUIT UNDER §320.697.

In Mike Smith Pontiac, GMC, Inc. v. Mercedes-Benz of North America, Inc., 32 F.3d 528, 531 (11th Cir. 1994), cert. denied, 516 U.S. 1044 (1996), two-judge majority concluded that §320.697 literally authorized "any person" damaged by a violation of Chapter 320 to sue for treble damages. In his dissenting opinion, Judge Hill asked rhetorically, "Do we include prospective managers and employees of transferees, building contractors engaged to construct the new dealership facilities and others?"[13]/ If prospective transferees are afforded standing, however, then so must everyone else who is economically affected by an alleged violation of the statute. In contrast to clearly expressed causes of action for motor vehicle dealers and consumers within Chapter 320, there are no substantive rights granted to prospective motor vehicle franchisees, much less proposed buyers of all or a part of a dealership's stock.

Courts in numerous cases have held that the federal and

state motor vehicle franchise laws, even those purporting to grant a right to sue to "any person" or "any motor vehicle dealer," nevertheless do not grant standing to a proposed franchisee.[14]/ Although the language of each state statute is unique, when construed in light of its intended purpose, no state court of last resort has held that a proposed transferee has standing to bring a cause of action under the state motor vehicle franchise act in the absence of an express provision so stating.

It has long been recognized that standing under a particular statute cannot simply be predicated upon its literal terms. For example, §4 of the Clayton Act, 15 U.S.C. 15(a), authorizes suits for damages by "any person . . . injured in his business or property by reason of anything forbidden in the antitrust laws . . ." Notwithstanding this broad reference to "any person," there is a vast body of federal case law narrowly defining the limits of standing under that section to those who are within the "target area" of an alleged statutory violation and those who have suffered "antitrust injury." See, e.g., Florida Seed Co., Inc. v. Monsanto Co., 105 F.3d 1372, 1374 (11th Cir.), cert. denied, 118 S.Ct. 296 (1997). The scope of standing under §320.697 involves the same prudential concerns as those underlying the doctrine of antitrust standing, namely, to avoid

burdening the courts with speculative or remote claims by parties whose rights do not fall within the area of concern the Legislature intended the statute to address. See Beard Motors, Inc. v. Toyota Motor Distributors, Inc., 395 Mass. 428, 432, 480 N.E.2d 303, 306 (1985). In short, statutory standing under §320.697 does not begin and end with the language "any person," but must involve an analysis of whether the legislation was designed to protect proposed transferees and whether granting them standing furthers or interferes with the goals of the Chapter 320.[15]/

Indeed, a grant of standing to proposed transferees actually interferes with the manufacturer-dealer relationship which the statute is designed to protect. For example, a dealer might propose to sell its stock to Buyer A, whom the manufacturer subsequently rejects. The dealer may well accept the manufacturer's decision and, in reliance thereupon, negotiate with Buyer B and submit that person to the manufacturer for approval.[16]/ The dealer and the manufacturer may be quite content with the subsequent approval of Buyer Bwho may even have agreed to a higher price than Buyer A. In short, there is no dispute between the manufacturer and its dealerthe very parties whose relationship is the one which is statutorily regulated.

Nonetheless, if the proposed transferee has standing to pursue a claim (let alone a treble damages claim), Buyer A would be able to assert a cause of action against the manufacturer for a "violation" of §320.643 and/or §320.644. Such a cause of action would seriously interfere with the manufacturer-dealer relationship.

In sum, to allow standing to any disappointed prospective buyer to sue a manufacturer for "wrongful rejection" (regardless of the dealer's position on the matter) does not logically follow from the stated intent of Chapter 320 to regulate motor vehicle manufacturers and dealers for the protection of Florida consumers. See §320.605. Such an interpretation of §320.697 would also completely destroy a cooperative manufacturer-dealer relationship.

F. A MANUFACTURER SHOULD NOT BE EXPOSED TO THE POSSIBILITY OF TREBLE DAMAGES WHEN IT HAS OBJECTED IN GOOD FAITH AND FULLY COMPLIED WITH APPLICABLE PROCEDURAL REQUIREMENTS.

Independent of the constitutional infirmities of the statutory interpretation urged by Hawkins, §320.697[17]/ should not be read to mandate an award of treble damages based on an alleged "violation" of §§320.643 or 320.644, where the

manufacturer has asserted its objection in good faith and has complied with all applicable procedural requirements, i.e., has timely filed a properly verified complaint with the Department which sets forth permitted grounds for objection to a proposed transfer of a franchise or equity interests and/or change of executive management control. To the extent that any prior court decision asserts a contrary interpretation of Florida law, AIAM and AAMA respectfully suggest that this Court hold such cases to have been wrongly decided.[18]/

If this Court believes that §320.697 authorizes cause of action where a manufacturer objects to a proposed transfer on statutorily permitted grounds, the remedial purposes of Chapter 320 would be fully satisfied by permitting compensation for actual damages, if any (after all, the dealer retains the full market value of its unsold equity and/or assets). To permit a punitive damages action against a manufacturer for being "wrong" on the ultimate merits of its objection, notwithstanding the fact that manufacturer acted in good faith and complied with the procedural requirements of the law, defies logic legislative intent and fundamental notions of fairness.

FOOTNOTES

[1]: /The Eleventh Circuit explicitly recognized that its "statement of the question to be certified is intended as a guide and is not meant to restrict the scope of inquiry by the Supreme Court of Florida." Hawkins v. Ford Motor Co., 135 F.3d 1443 (11th Cir. 1998). AIAM and AAMA therefore respectfully request that, in addition to the certified question, the Court address two additional issues raised by the instant appeal.

[2]: /AIAM members include American Honda Motor Co., Inc.; American Suzuki Motor Corporation; BMW North America, Inc.; Fiat Auto USA, Inc.; Hyundai Motor America; Isuzu Motors of America, Inc.; Kia Motors America, Inc.; Land Rover North America; Mazda Motor of America, Inc.; Mercedes-Benz North America, Inc.; Mitsubishi Motor Sales of America, Inc.; Nissan North America, Inc.; Porsche Cars North America, Inc.; Rolls Royce Motor Cars, Inc.; Subaru of America, Inc.; Toyota Motor Sales USA Inc.; Volkswagen of America, Inc.; and Volvo North America Corporation.

[3]: /The State of Florida and its citizens also have a strong practical interest in preserving limited governmental resources by avoiding the burden and expense of administrative and judicial enforcement activities generated by unqualified dealers, e.g., termination protests, lemon law and other consumer protection actions, and license denial proceedings, etc. The State's economic and prudential interests are directly served by allowing manufacturers an early opportunity to take legitimate business qualifications into account before approving the proposed transfer of a controlling equity interest in a motor vehicle dealership.

[4]: /The federal law is known as the Automobile Dealers Day in Court Act ("ADDCA").

[5]: /The rapidly changing dynamics of the industrywith dealer entities growing well beyond single-franchise family businesses, to even companies publicly traded on the New York Stock Exchangehas rendered many of the statutory protections anachronistic at best.

[6]: /The declarations of legislative intent and purpose contained in other state motor vehicle franchise laws similarly reflect a desire to protect the rights and interests of multiple constituencies, not just dealers. See Ala. Code §8-20-2; Ark. Stat. Ann. 23-112-102; Colo. Rev. Stat. §12-6-101; Del. Code Ann. tit. 6 §4901; Ga. Code Ann. §10-1-621; Haw. Rev. Stat. §437-1; Ky. Rev. Stat. Ann. §190.015; La. Rev. Stat. Ann. §32:1251; Minn. Stat. Ann. §80E.01; Miss. Code Ann. §63-17-53; Neb. Rev. Stat. §60-1401.01; Nev. Rev. Stat. §482.3181; N.J. Stat. Ann. §56:10-2; N.M. Stat. Ann. §57-16-1; N.Y. Veh. & Traf. Law §460; N.C. Gen. Stat. §20-285; Okla. Stat. Ann. tit. 47, §561; Pa. Code §19.1; Tenn. Code Ann. §55-17-101; Tx. Code Ann. art. 4413(36), §1.02; Utah Code Ann. §13-14-2; Vt. Stat. Ann. tit. 9 §4084; Wash. Rev. Code Ann. §46.70.005; W. Va. Code §17A-6-2.

[7]: /Neither Ford nor amici suggest that the phrase "in whole or in part" in §320.643(2)(a) is meaningless when a dealer seeks to transfer a controlling equity interest. Certainly, by its terms, §320.643(2)(a) applies to such a transfer; because of the resulting change of dealer company ownership and change of executive management control, however, so must §320.643(1) and §320.644(1).

[8]: /Cf. §320.6403 (providing that a manufacturer is not required to accept a successor distributor which has been demonstrated to be significantly detrimental to the public interest or the interest of the manufacturer).

[9]: /Once again, where only a minority interest is being transferred, arguably the manufacturer needs no more information than this. In contrast, where control of the dealership is changing hands, much more information is (and should be) required. See §320.643(1) and §320.644(1).

[10]:/As to such a suggestion, one Court observed that:

> This suggestion...overlooks the legal difficulties that [the manufacturer] would have in proving cause for termination under the Rhode Island [Motor Vehicle Franchise Act]. The very purpose of the statute, protecting dealer reliance -- suggests that it ought to be more difficult for a

> manufacturer to terminate a dealer who has invested in a franchise than to oppose the grant of a franchise to one who has not. In any event, the law does not suggest a manufacturer is "unreasonable" in objecting to a transfer unless he would have "good cause" to terminate the transferee. And, to equate the two standards would tend to make the "unreasonable" provision superfluous."

In re Pioneer Ford Sales, Inc., 729 F.2d 27, 30 (1st Cir. 1984) (emphasis added).

[11]:/Indeed, the transfer provisions themselves state that disputes over the withholding of the manufacturer's consent must be determined by the Department on an expedited basis. §320.643(2)(b), §320.644(2). In so doing, there is evidence of a clear intent to streamline the proposal/objection procedures so as to prevent a waste of capital investment by an unqualified transferee.

[12]:/Fla. Const. art. I, §21, provides: "The courts shall be open to every person for redress of any injury, and justice shall be administered without sale, denial or delay."

[13]:/It was Judge Hill's opinion, furthermore, that such a question was a matter of Florida law and, therefore, appropriate for this Court to decide on certification.

[14]:/See Colonial Ford, Inc. v. Ford Motor Co., 592 F.2d 1126, 1128 (10th Cir.) (prospective franchisee did not have standing under the ADDCA), cert. denied, 444 U.S. 837 (1979); Statewide Rent-a-Car, Inc. v. Subaru of Am., 704 F. Supp. 183 (D. Mont. 1988) (same under Montana statute); Knauz v. Toyota Motor Sales, USA, Inc., 720 F. Supp. 1327 (N.D. Ill. 1989) (same under Illinois statute); Beard Motors, Inc. v. Toyota Motor Distribs., Inc., 395 Mass. 428, 480 N.E.2d 303 (1985) (same under Massachusetts statute); Roberts v. General Motors Corp., 138 N.H. 532, 643 A.2d 956 (1994) (same under New Hampshire statute); Tynan v. General Motors Corp., 248 N.J. Super. 654, 591 A.2d 1024 (N.J. Sup. Ct.) (same under New Jersey statute), cert. denied, 127 N.J. 548, 606 A.2d 362 (N.J. 1991), modified on other grounds, 127 N.J. 269, 694 A.2d 99 (1992) (per curiam); Key v.

Chrysler Motors Corp., 121 N.M. 764, 918 P.2d 350 (1996) (same under New Mexico statute).

[15]:/To interpret §320.697 to afford standing to a disappointed prospective franchisee does nothing to further the purposes of the Florida motor vehicle franchise statute. The interests of the manufacturer-dealer relationship are fully protected by the requirements that the manufacturer file a verified complaint (styled against the dealer) to reject a transferee, by the statutorily required expedited treatment of such a complaint, by the requirement that the manufacturer provide the dealer with the material reasons for rejection, and that the manufacturer not unreasonably withhold its consent to the transfer "proposed" by the dealer. In short, the transfer statutes and all other provisions of Chapter 320 impose express duties on the manufacturer toward its existing dealer, not a proposed transferee.

Furthermore, §320.643(1) makes clear that the decision by the dealer to sell his franchise agreement is the sine qua non to the operation of this provision: "A motor vehicle dealer shall not transfer, assign, or sell his franchise agreement to another person unless the dealer first notifies the licensee of his decision to make such a transfer..." A prospective transferee's legal rights derive from its buy-sell agreement with the dealer; when that agreement is terminated, the transferee's derivative rights as a prospective transferee also terminate.

[16]:/Such a scenario is not at all farfetched, as borne out by the facts recited in Mike Smith, 32 F.3d at 530. In that case, there were two previous proposed buyers. In response to the majority opinion, the dissenting judge in that case rightly asked, "Must the manufacturer award a franchise to each of several transferees as to whom it has no objection to qualifications or moral character? Does good faith questioning of the bona fides of a proposed transfer subject the offender to damages?" 32 F.3d at 535 (Hill, J. dissenting). Cases such as Mike Smith raise the issue of whether a manufacturer may fairly be exposed to a treble damages suit by an unlimited number of proposed transferees in seriatim and whether, if so, such circumstances are ripe for collusive suits brought by a dealer and one or more sham "proposed transferees."

[17]:/§320.697 provides:

> Any person who has suffered pecuniary loss or who has been otherwise adversely affected because of a violation by a licensee of Sec. 320.60-320.70, notwithstanding the existence of any other remedies under Secs. 320.60-320.70, has a cause of action against the licensee for damages and may recover damages therefor...in an amount equal to 3 times the pecuniary loss, together with costs and a reasonable attorney's fee to be assessed by the court. [Emphasis added.]

In Mike Smith Pontiac, GMC, Inc. v. Mercedes-Benz of North America, Inc., 32 F.3d 528, 531 (11th Cir. 1994), cert. denied, 516 U.S. 1044 (1996), the Eleventh Circuit held that the phrase "Any person...may recover" mandated treble damages in all cases. The authorization of treble damages is permissive ("may"), not mandatory ("shall"). Where a statute mandates treble damages it states so directly. For example, §4 of the federal Clayton Act, discussed infra, provides that "Any person...shall recover" treble damages.

[18]:/Not surprisingly, sophisticated selling dealers and proposed buyers are well aware of the manufacturer's dilemma when confronted with a notice of transfer that arguably triggers §320.643 and §320.644. That awareness has resulted in an historical pattern of dealership sellers and buyers routinely abusing the Florida statute by promptly calling off a deal upon the manufacturer's filing of a verified complaint, in order to create huge liability exposure for the rejecting manufacturer. This places the manufacturer in the untenable position that a good faith decision to reject a proposed transfer can be implemented only at the risk of legal exposure to treble damages actions by the dealer, the proposed transferee, or both.

IV. CONCLUSION

For the reasons set forth above, AIAM and AAMA request that

the Court respond in the negative to the Certified Question and likewise as to whether §320.643(2)(a) applies exclusively to a proposed transfer of any controlling equity interest in a motor vehicle dealership. Furthermore. the Court should hold that, under Florida law, a proposed transferee has no standing to bring any damages claim for having been rejected The Court should also decide that §320.697 does not mandate a treble damage award against a motor vehicle manufacturer which has objected in good faith and complied with the procedural requirements of §320.643 or §320.644.

Respectfully submitted,

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Certificate of service

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