No. 13-886

IN THE
Supreme Court of the United States

BAYSHORE FORD TRUCK SALES, INC., *et al.*,
Petitioners,
v.
FORD MOTOR COMPANY,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether, in this diversity case, the Court should grant certiorari to review the Third Circuit's conclusion that, under Michigan law, Ford Motor Company did not breach a contract concerning a product that was last sold more than 15 years ago.

RULE 29.6 DISCLOSURE STATEMENT

Ford Motor Company does not have a parent company. State Street Corporation, a publicly traded company whose subsidiary, State Street Bank and Trust Company, is the trustee for Ford common stock in the Ford defined-contribution-plans master trust, has disclosed in filings with the U.S. Securities and Exchange Commission that, as of December 31, 2013, it holds 10% or more of Ford's stock.

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JURISDICTION

The Third Circuit entered judgment on August 26, 2013, Pet App. 2a, and denied Petitioners' timely petition for rehearing on September 24, 2013. Pet. App. 73a. On December 19, 2013, Justice Alito granted an application to extend the time in which to petition for certiorari to and including January 22, 2014, and the petition was filed on that date. As explained below, the petition is jurisdictionally out of time for most of the Petitioners—arguably all but one of them—because under this Court's Rule 13.5, Justice Alito's order extended the time to petition for only those parties "clearly identif[ied]" in the application. *Infra* at 8-12.

INTRODUCTION

This is a state-law contract case asking whether Ford breached an agreement governing its manufacture and distribution of a vehicle that last rolled off its assembly line more than 15 years ago. To state this background is to give a complete and sufficient reason to deny the petition.

But the flaws with Petitioners' plea to this Court run deeper still. For one, the petition is jurisdictionally out of time for at least six and arguably ten of the eleven Petitioners. Although Justice Alito granted an application extending the time to petition, by rule that extension applies only to the parties "clearly identif[ied]" in the application. Sup. Ct. R. 13.5. Only one company was identified in the application's caption, and the application was unaccompanied by a separate Parties to the Proceedings section specifying any additional applicants. The closest the application came to naming another applicant was a corporate disclosure statement, but that form named just five of the eleven parties who have now petitioned for review. Thus, at least six of the eleven Petitioners are jurisdictionally barred from pursuing review. And as a practical matter, that should foreclose review for any parties who did timely seek it. Petitioners, after all, concede that this breach-of-contract case has no wider relevance to the public at large, which is why they boldly request summary reversal, not plenary review. Pet. 14-15. But it would be especially pointless for this Court to grant certiorari to summarily reverse a judgment that will still bind at least a majority, and arguably all but one, of the Petitioners.

But even without the jurisdictional flaws, the petition is still singularly unworthy of this Court's review. It is fact-bound, presents only state-law questions, and—even by Petitioners' own lights—requests only error correction. This Court's review is rare in any of these three scenarios. With all three combined, it should be unfathomable.

Finally, this Court's review is unwarranted because what the petition caricatures as an egregious factual error was anything of the sort. The Third Circuit drew ample support from the undisputed record that was before the court. What's more, even if this Court agreed with Petitioners on the facts, it would still need to address and resolve the alternative meritorious ground for reversal of the district court that Ford pressed below but that the Third Circuit did not reach. The Court should decline to do so and simply deny the petition.

COUNTERSTATEMENT

1. Ford sells its products in the United States through a nationwide network of independent franchised dealers. Pet. App. 4a. This case involves a subset of vehicles known as "heavy trucks." Heavy trucks are the largest trucks sold in America, and range from big-rigs to municipal garbage trucks. C.A. J.A. 587.

Ford's relationship with its heavy-truck dealers is governed by a standard contract known as the Heavy Truck Sales and Service Agreement. Pet. App. 4a; *see also* Pet. App. 92a-108a (reproducing portions of the Agreement). The Agreement contains a Michigan choice-of-law provision, and the parties agreed

below that Michigan law controlled the substantive contract questions in the case. Pet. App. 22a.

Under the "Sales" portion of the Agreement, Ford committed to "sell COMPANY PRODUCTS to the dealer" and the dealer committed to "purchase COMPANY PRODUCTS from" Ford. Pet. App. 93a. The Agreement defines COMPANY PRODUCTS as "new [heavy] trucks or chasses" and the "parts and accessories therefor" that "as from time to time are offered for sale by [Ford] to Authorized Ford Heavy Duty Truck dealers as such for resale." Pet. App. 95a.

Ford's commitment to sell COMPANY PRODUCTS is not absolute, but is instead "[s]ubject to and in accordance with the terms and conditions of th[e] agreement." Pet. App. 93. One of those conditions is the Agreement's Paragraph 13. Pet. App. 101a. That paragraph allows Ford to "discontinue any HEAVY DUTY TRUCK or other COMPANY PRODUCT at any time without liability to the dealer." Pet. App. 101a.

2. For years, Ford was a major player in the heavy-truck market. C.A. J.A. 663. But as the sector grew increasingly specialized, Ford began to lose market share. "In the 1980s and 1990s, Ford's heavy truck business became unprofitable, sustaining losses of $131 million in 1996." Pet. App. 4a. In order to stanch the flow of losses, Ford in 1997 decided to sell its heavy-truck assets to Freightliner, a leader in the industry. *Id.*

In negotiating the sale to Freightliner, Ford looked out for its dealers' well-being. Ford arranged for all its dealers to be offered a new franchise that would

allow the dealer to sell the exact same trucks it was currently selling, just as part of the Freightliner corporate family. *Id.* Ford also opted not to exercise its contractual right to terminate its dealers' Agreements. *See* Pet. App. 102a-108a. Had Ford done so, the dealers would have become ineligible to perform Ford-authorized warranty service under the "Service" portion of their Sales and Service Agreements or to sell Ford-authorized replacement heavy-truck parts. Pet. App. 6a. And that would have been a heavy blow to the dealers; their revenue from warranty work and associated parts sales generally "exceeded revenues from their sales of heavy trucks." Pet. App. 5a. In fact, Petitioners' expert testified that these parts-and-service-related sales accounted for two-thirds of Petitioners' profits. C.A. J.A. 1149.

If any dealer thought the Freightliner deal a bad one, however, it had ample remedies. Under the Agreement, the dealer had the option to terminate the Agreement at any time and force Ford to repurchase at cost unsold heavy trucks, unopened parts, and special tools and equipment used in repairing heavy trucks. C.A. J.A. 197-198, 205-208. A few dealers opted to resign their Sales and Service Agreements and accept these contractual termination benefits. C.A. J.A. 580. But most—including Petitioners—elected to remain heavy-truck dealers and accept Ford's offer, enabling them to continue to receive the lucrative benefits that came with remaining a Ford heavy-truck dealer for parts-and-service purposes. *Id.*

3. Two dealers not before this Court eventually sued Ford, alleging that Ford's decision to stop manufacturing heavy trucks violated Ford's obliga-

tion to sell them COMPANY PRODUCTS. The district court assigned to that case dismissed the claim, finding that nothing in the Sales and Service Agreement obligated Ford to perpetually manufacture a money-losing product. The Third Circuit affirmed, finding "no error" with that ruling. *Fette Ford, Inc.* v. *Ford Motor Co.*, No. 00-2951, at slip op. 3 (3d Cir. Sept. 26, 2011) (unpublished).

Undaunted, Petitioners in this case took another run at Ford before a different district court. That gambit initially paid off. The District Court declined to follow the Third Circuit's decision in *Fette*. Pet. App. 26a-27a. Instead, it agreed with Petitioners that Ford breached the Sales and Service Agreement by "fail[ing] to supply heavy trucks to Plaintiffs * * * in accordance with the terms of the contract." Pet. App. 31a. The District Court therefore granted the named plaintiffs partial summary judgment on breach, Pet. App. 38a, and later extended that liability holding to a certified class of all similarly situated Ford heavy-truck dealers. Pet. App. 40a-51a.

Following a bellwether trial on damages, Ford appealed the District Court's finding of breach. Pet. App. 6a-7a. In its appellate briefs, Ford emphasized that Petitioners' continuing parts-and-service businesses after Ford ceased heavy-truck production was a critical reason why Ford had not breached the Sales and Service Agreement. Ford C.A. Opening Br. 10-11, 14, 31-34; Ford C.A. Reply Br. 10-11. Ford also argued that Paragraph 13's proviso permitting Ford to "discontinue any HEAVY DUTY TRUCK or other COMPANY PRODUCT at any time without liability to the dealer" meant just what it said: that Ford could discontinue *any* COMPANY PRODUCT—

including all company products—without liability to Petitioners. Pet. App. 9a n.4.

4. The Third Circuit reversed in an unpublished opinion. Pet. App. 1a-10a. It held that the District Court had "misconstrued the meaning of 'COMPANY PRODUCTS' " when it concluded that "Ford breached the Sales and Service Agreement by completely withdrawing from the heavy truck market." Pet. App. 8a. Because COMPANY PRODUCTS encompassed both trucks *and* parts, and because Paragraph 13 "allowed Ford to discontinue (at the very least) *some* 'COMPANY PRODUCTS' without liability," Ford could not breach the Sales and Service Agreement by ceasing new heavy-truck production so long as it continued to sell parts. Pet. App. 8a-9a. In other words, Ford's obligation to provide heavy trucks was "severable from" its obligation to provide parts and accessories. Pet. App. 10a. And because Petitioners' lucrative parts-and-service businesses demonstrated that Ford had lived up to its obligation to provide Petitioners with new parts, the court held that Ford had not breached the Agreement. *Id.*

The Third Circuit accordingly reversed the District Court's grant of summary judgment and directed the District Court to enter judgment in Ford's favor. *Id.* The court did not reach Ford's separate argument that it was allowed under Paragraph 13 to discontinue production of all trucks and parts. Pet. App. 9a n.4.

5. Petitioners petitioned for panel rehearing and rehearing en banc, arguing that the panel's finding that Ford had continued distributing COMPANY

PRODUCTS after it stopped heavy-truck production was unsupported by the record. Pet. App. 85a-87a. The panel unanimously denied rehearing, and the full court denied rehearing en banc, without calling for a response. Pet. App. 72a-74a.

REASONS FOR DENYING THE WRIT

I. THE PETITION IS JURISDICTIONALLY OUT OF TIME FOR THE MAJORITY OF PETITIONERS.

The petition suffers from a fundamental, threshold flaw: For the majority of Petitioners—if not all but one of them—it is jurisdictionally out of time. For that reason alone, the petition should be denied.

1. It is well-established that a party has 90 days to petition for certiorari following a lower court's denial of a timely petition for rehearing. Sup. Ct. R. 13.1, 13.5. That time may be extended for up to 60 days by a Justice of this Court. Sup. Ct. R. 13.5. But critically, an application for an extension of time "must clearly identify each party for whom an extension is being sought, as any extension that might be granted would apply *solely to the party or parties named in the application*." *Id.* (emphasis added).

In other words, "[i]n multiparty situations, an extension of time * * * obtained is effective only as to those parties named as applicants * * * in the application." Stephen M. Shapiro, *et al.*, *Supreme Court Practice* § 6.5, at 400 (10th ed. 2013). Parties not so named are "bound by the original time limitation in filing their petitions for certiorari." *Id.* And where a petition is filed beyond the time permitted, it "must * * * be denied for want of jurisdiction." *Dep't of Banking* v. *Pink*, 317 U.S. 264, 268 (1942); *see also Fed. Elec. Comm'n* v. *NRA Political Victory*

Fund, 513 U.S. 88, 90 (1994) (time limit on petitioning for certiorari in civil cases is " 'mandatory and jurisdictional' ") (citation omitted).

2. Here, the petition is jurisdictionally out of time for most of the Petitioners—if not all but one of them—because they were not named in Bayshore Ford Truck Sales' application for an extension of time. Petitioners' petition was originally due on December 23, 2013. On December 13, 2013, Petitioners' counsel sought an extension of time on behalf of "Petitioners Bayshore Ford Truck Sales, Inc., et al." Supp. App. 1a. The "et al." were not identified in the body of the application or in a separate listing of the parties to the proceeding. In fact, other than referring to "Petitioners" in the plural, the only suggestion that more than just Bayshore Ford Truck Sales was applying was a Rule 29.6 corporate disclosure statement identifying the parent companies of Petitioners Boyer Ford Truck, Boyer Ford Truck Sioux Falls, Colonial Ford Truck Sales, and Colonial Trucks of Tidewater. Supp. App. 10a. The remaining six Petitioners were not mentioned in the application, and indeed were not identified as petitioners until the filing of the petition itself.

Under this Court's precedent, a vague "et al." is not "sufficient to indicate [a party's] intention" to apply for an extension of time. *See Torres* v. *Oakland Scavenger Co.*, 487 U.S. 312, 317-318 (1988) (so holding with regard to notices of appeal).[1] Moreover,

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[1] Following *Torres*, the Federal Rules of Appellate Procedure were relaxed to provide that an appeal will not be dismissed if the notice of appeal fails " 'to name a party whose intent to

even if listing a company on a corporate disclosure statement sufficed to "clearly identify" the party as an applicant for Rule 13.5 purposes, under the Rule, Justice Alito's order still would not apply to the majority of Petitioners who were not named anywhere in the petition. For them, the time to petition ran on December 23.

Petitioners' failure to identify themselves cannot be forgiven as a mere procedural misstep. In the analogous context of a notice to appeal, this Court has held that "[t]he failure to name a party * * * is more than excusable 'informality'; it constitutes a failure of that party to appeal." *Torres*, 487 U.S. at 314. And under this Court's cases, "[t]he jurisdictional requirement of timeliness is strictly applied in civil cases. No exceptions or waivers are recognized; no matter how extenuating the circumstances, an untimely petition will not be entertained." *Supreme Court Practice* § 6.1(d), at 387 (citing cases).

Nor is Rule 13.5's clear-identification requirement an obscure bit of procedural arcana; this Court amended its rules only months ago to explicitly warn parties about this previously implicit jurisdictional prerequisite. *See* Revisions to the Rules of the Supreme Court of the United States 2-3 (Apr. 29,

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appeal is otherwise objectively clear from the notice.' " *Cole* v. *Ruidoso Mun. Schs.*, 43 F.3d 1373, 1385 (10th Cir. 1994) (quoting Fed. R. App. P. 3(c)(4)). But this Court has notably taken the opposite approach with its own rules: Just last year, the Court amended its Rule 13.5 to emphasize that—categorically—an application for an extension of time will "apply *solely* to the party or parties named in the application." Sup. Ct. R. 13.5 (emphasis added).

2013).[2] That bright-line rule makes sense. It is easy to apply and promotes certainty about who is in and who is out. After all, not every losing party will inevitably seek further review. This case is a good example. In a related appeal challenging the District Court's decision to dismiss 36 other class members, only 25 appealed to the Third Circuit. *See Bayshore Ford Truck Sales, Inc.* v. *Ford Motor Co.*, __ Fed. Appx. __, 2013 WL 4504780 (Aug. 26, 2013) (affirming the District Court's dismissal).

3. The jurisdictional untimeliness of the petition for most Petitioners also creates an insurmountable prudential problem for the remainder. Petitioners' primary claim is that this Court may remedy the Third Circuit's asserted error for all of them without any effort. Pet. 14-15. But, as to the four petitioners mentioned in the corporate disclosure statement but nowhere else, Petitioners' ambiguous application would require this Court to determine which Petitioners were properly identified, and consequently how far this Court's jurisdiction extends. Moreover, given that Petitioners admit that this case has no importance beyond the parties to it, Pet. 15-16, they are left to request a judgment from this Court that can aid—at most—five parties bound by the judgment below. This Court can and should avoid these procedural idiosyncrasies by simply denying the petition outright.

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[2] *Available at* http://www.supremecourt.gov/ctrules/2013revisedrules.pdf.

II. PETITIONERS' FACT-BOUND STATE-LAW QUESTION PRESENTED DOES NOT WARRANT THIS COURT'S REVIEW.

Even without its jurisdictional defects, the petition still would not come close to warranting this Court's review. The question Petitioners ask this Court to consider hits the uncertworthiness trifecta: It is fact-bound, involves only state-law issues, and asks for nothing more than error-correction. It does not warrant further review.

1. Petitioners' question presented essentially asks this Court to sift through the summary-judgment record and decide whether the Third Circuit correctly determined that Ford continued to distribute COMPANY PRODUCTS after it discontinued heavy-truck production. Pet. 10-14. That request is contrary to one of the fundamental principles of this Court's discretionary jurisdiction: that the Court will "rarely" grant review "when the asserted error consists of erroneous factual findings." Sup. Ct. R. 10. This Court, after all, "does not grant certiorari to review evidence and discuss specific facts." *United States* v. *Johnston*, 268 U.S. 220, 227 (1925). This case should not be the exception.

2. Review of Petitioners' fact-bound question presented is particularly unwarranted because this case does not even involve a federal-law question. Construction of the Sales and Service Agreement is a question of Michigan state law, Pet. App. 5a n.2, and Petitioners do not suggest that there is an embedded

question of federal procedure that would warrant this Court's consideration.[3]

That dooms Petitioners' request for review, for this Court has emphasized that "standing alone, a challenge to state-law determinations by the Court of Appeals will rarely constitute an appropriate subject of this Court's review." *Haring* v. *Prosise*, 462 U.S. 306, 314 n.8 (1983). In fact, Petitioners have not cited—and we are not aware of—any case in the modern era where this Court has granted the writ solely to determine whether a federal court of appeals has correctly decided a question of state law. There is no reason to make this case the first.

3. At bottom, Petitioners' petition is based on nothing more than their belief that the Third Circuit's decision is incorrect. But even if Petitioners had some valid ground for complaint, the petition should still be denied. "This Court's review," after all, "is discretionary and depends on numerous factors other than the perceived correctness of the judgment [it] is

[3] Below, Petitioners argued that the Third Circuit's allegedly "*sua sponte*" disposition conflicted with this Court's decision in *Wood* v. *Milyard*, 132 S. Ct. 1826 (2012). Pet. App. 76a. Petitioners do not renew that claim in this Court, because it is meritless. For one, there was nothing *sua sponte* about the Third Circuit's decision. *Supra* at 6. For another, " '[w]hen an issue or claim is properly before the court, the court is not limited to the particular legal theories advanced by the parties, but rather retains the independent power to identify and apply the proper construction of governing law.' " *United States Nat'l Bank* v. *Independent Ins. Agents of Am.*, 508 U.S. 439, 446 (1993) (citation omitted; alteration in original).

asked to review." *Ross* v. *Moffitt*, 417 U.S. 600, 616-617 (1974).

Petitioners attempt to head this concern off at the pass, suggesting their petition is the one-in-a-million exception because of an "unusual combination" of factors. Pet. 15. But Petitioners' supposedly unique circumstances are not that rare at all. For instance, Petitioners claim that their case is extraordinary because the "ruling below rests exclusively on a false factual premise," *id.*, but no doubt many a disappointed litigant believes that the court of appeals failed to properly appreciate the record facts. Similarly, Petitioners suggest that their case is unique because the supposedly "false premise was never asserted by any party below." *Id.* But even a casual review of the petitions this Court receives reveals that similar complaints of *sua sponte* dispositions are legion.[4] And Petitioners' protest that they have "exhausted every avenue available to make the court aware of the error and to seek its correction in the

[4] For instances from just last month, see, for example, Petition for a Writ of Certiorari, *Tsolainos* v. *Cain*, No. 13-922, 2014 WL 411562, at *26-*27 (Jan. 30, 2014) ("The court's decision to identify and resolve these issues *sua sponte* is the most questionable aspect of its decision * * *."); Petition for a Writ of Certiorari, *Los Angeles County Flood Dist.* v. *Natural Res. Defense Council, Inc.*, No. 13-901, 2014 WL 316665, at *23 (Jan. 24, 2014) ("The Ninth Circuit has done something unprecedented—it has essentially *sua sponte* granted rehearing on an issue that this Court expressly declined to decide * * *."); Petition for a Writ of Certiorari, *Amgen, Inc.* v. *Harris*, No. 13-888, 2014 WL 280529, at *11 (Jan. 21, 2014) ("The Ninth Circuit's *sua sponte* extension of *Basic* to the ERISA context was a grave error with far-reaching implications.").

court of appeals," Pet. 15, is nothing more than a statement that they filed an unsuccessful petition for rehearing and rehearing en banc—just like the over 9,700 such petitions filed in 2012. *See* U.S. Administrative Office of the Courts, *Annual Report of the Director: Judicial Business of the United States Courts* tbl.2.7 (2012).[5]

Petitioners' supposed limiting principles are therefore paper tigers at best. Nothing in the petition justifies deviating from this Court's usual rule that it does not engage in fact-specific error correction, particularly when error correction is sought in a case governed by state law. The petition should be denied.

III. THE THIRD CIRCUIT'S DECISION IS CORRECT.

Finally—although, quite frankly, it is the least important factor in this Court's consideration—the Third Circuit's decision was correct. The undisputed record demonstrates that Petitioners continued to sell Ford-authorized parts and accessories, and that Petitioners were able to make those sales as a result of their existing Sales and Service Agreements. Moreover, Petitioners' quibbles with the factual record make no difference to the result the Third Circuit reached. Under the Agreement's Paragraph 13, Ford has the right to discontinue all COMPANY PRODUCTS without liability to its dealers.

1. During depositions and at trial, dealer after dealer testified that his dealership continued to sell Ford-brand parts and accessories at a profit after

[5] *Available at* http://www.uscourts.gov/uscourts/Statistics/JudicialFactsAndFigures/2012/Table207.pdf.

Ford stopped making heavy trucks. *See*, *e.g.*, C.A. J.A. 617, 620, 630, 638 (trial testimony). Indeed, the ability to sell Ford-authorized parts as a Ford heavy-truck dealer was often *the* reason Petitioners opted not to terminate their Sales and Service Agreements after Ford stopped manufacturing heavy trucks in 1997.

For instance, Petitioner Carmenita Ford Truck Sales' owner testified that one of the chief reasons Carmenita remained a Ford heavy-truck dealer after 1997 is that he "wanted to generate revenues from selling Ford parts." ECF No. 289-3, Ex. 8, at 134:23-135:1. Similarly, Petitioner Colony Ford Truck Center's owner testified that Colony "continued to * * * sell parts for Ford heavy trucks" after 1997 and, in fact, "still do[es] so today." ECF No. 137, Ex. F, at 15:8-17.

In arguing the contrary, Petitioners point primarily to a memorandum from Ford stating that it would not take parts orders after March 1998. Pet. App. 120a-122a. But this memorandum was not in the District Court record at the time of the decision below; it first appeared in a post-decision submission from Petitioners. *See* ECF No. 585, Ex. A (filed Oct. 11, 2013); *see also id.* ¶¶ 2, 5 (calling the memorandum "newly discovered," but admitting it was produced by Ford in discovery a decade previously). Needless to say, the Third Circuit can hardly be faulted for not taking notice of a document that was not in the record on appeal. And, as the leading treatise on practice before this Court has warned, "it is misleading to suggest, by insertion of a nonrecord document in the [petition] appendix, that the docu-

ment was before the court below when in fact it was not." *Supreme Court Practice* § 12.5(b), at 698.

What's more, Petitioners concede that Ford arranged for them to receive their needed spare parts from Freightliner. Pet. 13. They argue, however, that Ford could not "satisfy its obligations by arranging for some third party to provide petitioners with substitute products." Pet. 14 n4. But that is simply not so. The rule in Michigan, like everywhere else, is that contractual obligations are generally delegable. *See Detroit T & I R.R.* v. *Western Union Tel. Co.*, 166 N.W. 494, 495 (Mich. 1918); *see also Restatement (Second) of Contracts* § 318 (1981) (Delegation of Performance of Duty).

2. The Third Circuit's decision was also correct because Ford had an absolute right under Paragraph 13 to discontinue production of all COMPANY PRODUCTS without breaching the Agreement.

Under that Paragraph, Ford had the power to "discontinue any HEAVY DUTY TRUCK or other COMPANY PRODUCT at any time without liability to the dealer." Pet. App. 101a. And as used in its ordinary way, "the word 'any' * * * generally [has] the sense of 'all' or 'every' and its meaning is most comprehensive." *Fleck* v. *KDI Sylvan Pools, Inc.*, 981 F.2d 107, 115 (3d Cir. 1992) (quotation omitted); *see also Do Sung Uhm* v. *Humana, Inc.*, 620 F.3d 1134, 1153 (9th Cir. 2010) (same); *Micron Tech., Inc.* v. *United States*, 243 F.3d 1301, 1308 (Fed. Cir. 2001) (same). Ford therefore had the power to discontinue "all" or "every" COMPANY PRODUCT without breaching its promises to Petitioners. Michigan's courts are unequivocal that "terms of [a] contract are

accorded their plain and ordinary meaning," *Hastings Mut. Ins. Co.* v. *Safety King, Inc.*, 778 N.W.2d 275, 292 (Mich. Ct. App. 2009), and "unambiguous contracts are not open to judicial construction and must be enforced as written." *Rory* v. *Continental Ins. Co.*, 703 N.W.2d 23, 30 (Mich. 2005) (emphasis omitted).

Petitioners object to this argument in advance, claiming that the Court need not reach it in order to reverse. Pet. 15 n.5. But this Court " 'reviews judgments, not statements in opinions.' " *California* v. *Rooney*, 483 U.S. 307, 311 (1987) (citation omitted). If this Court were to grant review, Ford would be entitled to defend its judgment on this ground, "whether or not [it] was relied upon, rejected, or even considered by * * * the Court of Appeals." *Washington* v. *Confederated Bands & Tribes of Yakima Indian Nation*, 439 U.S. 463, 476 n.20 (1979).

Petitioners also assert that the Court need not worry about this alternative argument because the Third Circuit supposedly rejected it back in 1966. Pet. 15 n.5 (citing *Buono Sales, Inc.* v. *Chrysler Motors Corp.*, 363 F.2d 43, 48 (3d Cir. 1966) (en banc)). But *Buono Sales* is not the on-point decision Petitioners make it out to be. The statement that Petitioners seize on—that a certain contractual provision allowing a manufacturer to discontinue "any" product did not allow it to discontinue "all" such products—was "recorded in passing" only. It was pure dicta. 363 F.2d at 48.

Moreover, even if *Buono Sales* could be read as Petitioners claim, it has been abrogated by later Michigan precedent. The *Buono Sales* majority's

analysis turned on the unequal bargaining power between the manufacturer and its dealers. The majority, for instance, disparaged the manufacturer as the "dominating party" and claimed that the manufacturer's interpretation of its contract with its dealers amounted to "subterfuge" that "hardly fits * * * into the basic picture of an outstanding American industry." *Id.* at 44.

In 1966, the majority's hostility toward what it saw as the manufacturer's sharp practices may have been justified by loose language in Michigan opinions. But no longer. In a seminal decision, the Michigan Supreme Court squarely rejected the "adhesion contract" doctrine that drove the *Buono Sales* majority's analysis. *See Rory*, 703 N.W.2d at 35-42. As the Michigan high court explained, "[a]n 'adhesion contract' is simply that: a contract. It must be enforced according to its plain terms unless one of the traditional contract defenses applies." *Id.* at 35. Just so here.

In any event, *Buono Sales* is not binding on this Court. And other courts have held that similar provisions permit a manufacturer to cease vehicle production without breach. *See*, *e.g.*, *Truck Ctr. Corp.* v. *General Motors Corp.*, 837 P.2d 631, 634-635 (Wash. Ct. App. 1992) (applying Michigan law and holding that a clause that allowed a manufacturer to "discontinue any Product at any time" meant that the manufacturer "had no contractual obligation to continue to offer its dealers any particular line of vehicles"); *Volvo GM Heavy Truck Corp.* v. *Key GMC Truck Sales, Inc.*, 773 F. Supp. 1033, 1041 (S.D. Ohio 1991) (same). In fact, one of those courts is the Third Circuit. As explained, *supra* at 5-6, in an un-

published opinion addressing the exact same facts and exact same Sales and Service Agreement as the decision below, the court held that a district court committed "no error" in rejecting the dealers' breach-of-contract claims. *Fette Ford*, *supra*, at slip op. 3.

And all of this simply underscores why this case is such a poor candidate for this Court's review. This was a factually and legally intricate case, one that has already consumed nearly 15 years of judicial resources, and one that was hard-fought by the parties and carefully considered by the panel below. The Third Circuit's decision was correct, and this Court has no reason to pass upon it, much less summarily reverse it. The petition should be denied.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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February 2014

APPENDIX

APPENDIX

IN THE
SUPREME COURT OF THE UNITED STATES

App. No. _____

BAYSHORE FORD TRUCK SALES, INC., *et al.*

Petitioners,

FORD MOTOR COMPANY,

Respondent.

PETITIONERS' APPLICATION TO EXTEND TIME TO FILE PETITION FOR A WRIT OF CERTIORARI

To the Honorable Justice Alito, as Circuit Justice for the United States Court of Appeals for the Third Circuit:

Petitioners Bayshore Ford Truck Sales, Inc., et al. ("petitioners") respectfully request that the time to file a petition for a writ of certiorari in this case be extended for thirty days to and including January 22, 2014. The court of appeals issued its opinion on August 26, 2013. *See* App. A, *infra*. The court denied a timely petition for rehearing and rehearing en banc on September 24, 2013. *See* App. B, *infra*. Absent an extension of time, the petition therefore would be due on December 23, 2013. Petitioners are filing this application at least ten days before that date. *See* S. Ct. R. 13.5.

Background

This case involves a dispute between respondent Ford Motor Company and a number of its heavy-duty truck dealers, over Ford's decision to sell its heavy duty truck business to a competitor and cease supplying trucks to petitioners.

1. In consideration of the millions of dollars petitioners would invest in developing and maintaining Ford truck dealerships, Ford agreed in a standard Sales and Service Agreement to supply petitioners with heavy duty trucks, as well as parts and accessories therefor. *See* App. A, at 3. The essence of the agreement was that "[s]ubject to and in accordance with the terms and conditions of this agreement, the Company shall sell COMPANY PRODUCTS to the Dealer and the Dealer shall purchase COMPANY PRODUCTS from the Company." A145.[1]

2. In 1997, Ford abruptly stopped accepting orders from its dealers for heavy trucks, having agreed to sell its heavy truck business to a competitor, Freightliner, for $300 million. *See* App. C, at A4-A5 (district court summary judgment opinion). As part of the agreement, Ford promised to stop producing heavy trucks for ten years. *Id.*

Ford had the right, at that point, to terminate the Sales and Service Agreements with its dealers. *Id.* at A3. But doing so would have cost Ford, by its own estimates, between $100 and $700 million in termination obligations to the dealers. *See* A567. To

[1] Citations to "AXXX" refers to the joint appendix filed in the court of appeals.

avoid these and other adverse consequences of terminating the contracts, Ford invoked a provision of the Sales and Service Agreement that it claimed allowed it to stop providing products to the dealers without incurring any termination liability. Standard Provisions ¶ 13, entitled "CHANGES IN COMPANY PRODUCTS" provides:

> [Ford] may change the design of any COMPANY PRODUCT, or add any new or different COMPANY PRODUCT or line, series or body style of HEAVY DUTY TRUCKS, at any time and from time to time, without notice or obligation to the Dealer, including any obligation with respect to any COMPANY PRODUCT theretofore ordered or purchased by or delivered to the Dealer. Such changes shall not be considered model year changes as contemplated by the provisions of any HEAVY DUTY TRUCK TERMS OF SALE BULLETIN. **[Ford] may discontinue any HEAVY DUTY TRUCK or other COMPANY PRODUCT at any time without liability to the Dealer.**

A196 (emphasis added). Everyone agreed that this provision permitted Ford to discontinue producing a particular model of heavy duty truck. Ford, however, claimed that by allowing it to discontinue "*any* HEAVY DUTY TRUCK" (singular), the provision allowed Ford to discontinue providing *all* HEAVY DUTY TRUCKS (plural) and associated products. *But see Buono Sales, Inc. v. Chrysler Motors Corp.*, 363 F.2d 43 (3d Cir. 1966) (rejecting a similar

argument by Chrysler, under a similarly worded dealership agreement).[2]

Petitioners were offered the chance to become dealers for a new Freightliner subsidiary (indeed, Ford's ability to deliver Freightliner and existing dealer network was a significant part of the value of Ford's heavy duty truck business to any prospective buyer, *see* A673). *See* App. A, at 4; A588, A591, A716. But the value of that franchise — for an unknown brand with no established market reputation — was substantially lower. Moreover, during a transition period extending for more than a year, Ford drastically reduced, then stopped, delivery of trucks, well before Freightliner could begin delivery of a regular supply of replacement vehicles. As a consequence, petitioners lost tens of millions of dollars in sales during one of the strongest markets for heavy duty trucks in recent memory.

3. Petitioners commenced a class action in the United States District Court for the District of New Jersey, asserting violations of, among other things, the Federal Automobile Dealers Day in Court Act, 15 U.S.C. §§ 1221, *et seq.*, and breach of contract claims. Although the district court granted Ford summary judgment on the federal claim, *see* App. C., at A6-A10, it retained jurisdiction over the state law claims and entered summary judgment in

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[2] The definitions provision of the contract specifically distinguished between the singular and plural version of "HEAVY DUTY TRUCK," making clear that when the contract means to refer to *all* of Ford's heavy duty trucks, the contract uses the plural form. *See* Paragraph 1(b) (" 'HEAVY DUTY TRUCK' shall mean *any* truck or chassis, and 'HEAVY DUTY TRUCKS' shall mean *all* trucks and chassis included in this agreement....") (emphasis added).

petitioners' favor on the breach of contract claim, *id.* at 10-18. The court explained that Ford's reading of Paragraph 13 was inconsistent with "other terms and conditions of the Agreements, including the stated purpose and all 12 plus pages of termination provisions." *Id.* at 17.

The trial court determined that damages could not be resolved on a class-wide basis and, accordingly, set for trial eleven "bellwether" cases for a determination of lost profits arising from Ford's breach of contract. A jury returned individual verdicts for the eleven dealers, from which Ford appealed. App. A, at 6.

4. a. On appeal, Ford identified a single issue regarding the correctness of the trial court's breach-of-contract holding: "1. Whether a franchise contract that expressly allows Ford to 'discontinue any HEAVY DUTY TRUCK or other COMPANY PRODUCT at any time without liability to the Dealer,' entitles Ford to discontinue its heavy-duty truck line without incurring liability for breach of contract." Ford C.A. Br. 6 (Statement of the Issues).[3] Ford thus argued that Paragraph 13 gave it the right to completely stop supplying petitioners with heavy-duty trucks and their parts and accessories, without liability under the termination provision. *See, e.g., id.* 22 ("Thus, Ford had the power to discontinue any heavy-duty truck or chassis and any 'parts and accessories therefor' without liability to the dealer").

At oral argument, however, members of the panel *sua sponte* suggested for the first time an alternative grounds for reversal that Ford had never raised: the

[3] Ford also raised two issues regarding the measure of damages.

possibility that Ford could comply with the contract by ceasing production of trucks, but continuing production of truck *parts* for distribution to the dealers. There was, however, a problem: the factual premise of the suggestion was simply wrong. When Ford ceased production of heavy trucks, it also stopped producing and supplying petitioners with parts. Instead, Ford sold both its truck and truck parts business to Freightliner. While some dealers had testified that they continued to sell their pre-existing inventory of Ford-produced parts, or parts sold to the dealers by Freightliner, the evidence was undisputed that Ford had agreed, as part of its deal with Freightliner, to discontinue production of both heavy trucks and heavy truck parts. *See, e.g.*, Doc. 280-9[4] (contract between Ford and Freightliner, providing that Ford will not "market, manufacture or sell any commercial vehicle with a gross vehicle weight exceeding 33,000 pounds [*i.e.*, a heavy truck] *or Spare Parts* for any such vehicle" for ten years) (emphasis added); Doc. 592-2 at 53 (Ford memorandum to dealers dated Feb. 12, 1998, stating that "FORD WILL ACCEPT ORDERS FOR HEAVY TRUCK PARTS UNTIL 4:00PM EST ON THURSDAY, MARCH 12, 1998. All orders submitted after 4:00pm EST on March 12 will not be processed").

Petitioners filed a motion for supplemental briefing to address the suggested alternative ground, but the panel denied the motion.

b. Subsequently, the panel issued its opinion, reversing the district court and ordering summary

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[4] References to "Doc. XX" refer to the docket entries in the district court.

judgment be entered in Ford's favor on the new theory developed by the panel *sua sponte*. The court declined to decide whether Ford's actual argument on appeal — that under Paragraph 13 it was entitled "to discontinue *all* 'COMPANY PRODUCTS" without invoking the termination provision — was correct. App. A, at 8 n.4. Instead, the court held that even if Ford could not cease providing *all* "HEAVY DUTY TRUCK[s] or other COMPANY PRODUCT[s]," the term "COMPANY PRODUCT" was defined to include truck parts and accessories. App. A, at 7. Without any citation to the record, the panel then stated that "although Ford discontinued the production of all heavy trucks, Ford continued to manufacture and distribute parts and accessories to the Dealers." *Id.* As a result, the panel reasoned, "Ford satisfied its end of the bargain by continuing to provide 'COMPANY PRODUCTS' — i.e., parts and accessories to the Dealers." *Id.* at 8. The court accordingly reversed and remanded for entry of judgment in Ford's favor. *Id.* 9.

5. Petitioners petitioned for panel rehearing and rehearing en banc, documenting the panel's factual error and complaining that the panel *sua sponte* resolved the case on a ground Ford neither preserved below nor argued on appeal. *See* App. D. However, the Third Circuit denied the petition without calling for a response or providing any explanation. *See* App. B.

6. Subsequent to the Third Circuit's decision, the non-bellwhether dealers opposed extension of judgment in the bellwhether cases to the remaining plaintiffs, explaining that the Third Circuit's decision was premised on a factual error. *See* Doc. 592-1, at

23-25. Ford principally responded that the district court lacked authority to refuse to apply the Third Circuit's mandate to the remaining plaintiffs, *see* Doc. 599, at 4-10, but it also briefly attempted to defend the Third Circuit's decision on the merits, *id.* at 18-21. Instead of disputing that Ford had agreed with Freightliner to cease all production and sale of truck parts, Ford cited to a handful of statements in the record from certain dealers that they had continued "to sell Ford heavy truck parts" after Ford ceased production of heavy trucks. *See id.*, at 20 (emphasis omitted); *see also id.* ("Individual Plaintiffs testified that they *sold* and made money from *selling* Ford spare parts") (emphasis added). Ford neglected, however, to acknowledge that the parts being sold were either leftover inventory from before the sale, or were provided to the dealers by Freightliner. *See* Doc. 280-9, at 33-34 (sales contract). Accordingly, even now, Ford has never claimed — contrary to the clear evidence — that *Ford* is continuing to produce or provide dealers with parts or accessories, as the panel wrongly assumed.

Reasons For Granting An Extension Of Time

The time to file a Petition for a Writ of Certiorari should be extended for thirty days for several reasons:

1. Petitioners have only recently retained Supreme Court counsel for the filing of a petition for a writ of certiorari. Additional time is necessary and warranted for counsel to, among other things, review the record in the case, research case law, and prepare a clear and concise petition for certiorari for the Court's review.

2. The petition is likely to be granted. The panel's indefensible decision to order judgment for Ford on a ground that is indisputably counterfactual calls out for summary reversal.

3. No prejudice would arise from the extension. Whether the extension is granted or not, the petition will be considered in the present Term and, if plenary review were granted, the case would be heard next Term.

Conclusion

For the foregoing reasons, the time to file a Petition for a Writ of Certiorari in this matter should be extended for thirty days to and including January 22, 2014.

Respectfully submitted,

/s/ Thomas C. Goldstein

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RULE 26.1 CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of this Court's Rules, petitioners state that the following petitioners have the parent companies identified:

Boyer Ford Truck, Inc.: **Equipoise Corporation**

Boyer Ford Truck Sioux Falls, Inc.: **Equipoise Corporation**

Colonial Ford Truck Sales, Inc.: **Greater Richmond Businesses, Inc.**

Colonial Trucks of Tidewater, Inc.: **Greater Richmond Businesses, Inc.**

Petitioners further state that no publicly held company owns 10 percent or more of the stock of any of the petitioners.