No. 13-___

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

This petition arises from a dispute between respondent Ford Motor Company (Ford) and the petitioners, eleven former dealers for Ford's heavy duty trucks. Ford sold its heavy duty truck manufacturing and parts business to a competitor and, accordingly, stopped supplying heavy trucks and parts to its dealers. In the dealers' subsequent breach of contract action, the district court awarded the dealers summary judgment. On Ford's appeal, the Third Circuit reversed. Ruling *sua sponte*, the court of appeals concluded that the contract was not breached because as a matter of fact Ford had continued to supply the dealers with truck parts. The panel, however, simply made that fact up: the record shows (and Ford has never disputed) that Ford ceased supplying the dealers with parts, because it was expressly required to do so by the contract under which it sold its truck manufacturing business. No doubt, that is why Ford has never defended its conduct on the basis invented by the court of appeals. Nonetheless, although petitioners demonstrated the panel's factual error in their petition for rehearing and rehearing en banc, the court of appeals denied rehearing without calling for a response.

The Question Presented is:

Whether in a case involving a significant harm to a substantial group of parties, a court of appeals' *sua sponte* invention of an indisputably false fact that is the sole premise of its ruling so far departs from the ordinary and usual course of proceedings that the judgment should be summarily reversed.

PARTIES TO THE PROCEEDINGS

In addition to the parties to the proceedings identified in the caption, the following were plaintiffs-appellees below and are petitioners here:

Badger Truck Center, Inc.

Boyer Ford Truck, Inc.

Boyer Ford Truck Sioux Falls, Inc.

Carmenita Ford Truck Sales, Inc.

Colonial Ford Truck Sales, Inc.

Colonial Trucks of Tidewater, Inc.

Colony Ford Truck Center, Inc.

Freeway Ford Truck Sales, Inc.

Motor City Ford Trucks, Inc.

West Gate Ford Truck Sales, Inc.

RULE 29.6 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.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Bayshore Ford Truck Sales, Inc., et al., respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Third Circuit (Pet. App. 1a) is unpublished. The opinions of the district court entering summary judgment in petitioners' favor (Pet. App. 11a-66a) are unpublished.

JURISDICTION

The judgment of the court of appeals was entered on August 26, 2013. Pet. App. 2a. The court of appeals denied a timely petition for rehearing on September 24, 2013. Pet. App. 72a-73a. On December 19, 2013, Justice Alito extended the time for filing this petition through January 22, 2014. *See* 13A613. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RELEVANT STATUTORY AND CONSTITUTIONAL PROVISIONS

There are no statutory or constitutional provisions relevant to this petition.

STATEMENT OF THE CASE

This case involves a dispute between respondent Ford Motor Company (Ford) and its heavy duty truck dealers arising from Ford's sale of its heavy duty truck and truck parts business.[1]

1. Ford's relationship with each of its heavy duty truck dealers is governed by a standard Sales and Service Agreement. *See* Pet. App. 92a-108a (reproducing relevant excerpts of the agreement). The Agreement recognizes the very significant financial investment dealers must make in reliance on Ford's promise to provide them a regular supply of heavy duty trucks to sell:

> [E]ach of the Company's franchised dealers in COMPANY PRODUCTS makes important investments or commitments in specialized heavy duty truck retail sales and service facilities and equipment, in working capital, in inventories of heavy duty trucks, parts and accessories, and trained sales and service personnel based on annual planning volumes for their markets. These investments must be substantially larger in relation to unit sales volume than for other automotive dealerships and the dealer's organization must be more highly trained technically in effective merchandising, financing and service.

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[1] References to "trucks" and "parts" throughout refer to such heavy duty trucks and parts for heavy duty trucks.

Pet. App. 93a. Each dealer thus was required to invest in substantial facilities, built and maintained in compliance with Ford guidelines. *Id*. 100a. The dealers were also required to "promote[] vigorously and aggressively the sale" of Ford's trucks, *id*. 96a, and to "maintain stocks of current models of" trucks in "an assortment and in quantities" dictated by Ford, *id*. 96a-97a. Moreover, dealers were obligated to provide warranty and other service on Ford heavy trucks, using genuine parts purchased from Ford and the types of "diagnostic and other tools, equipment and machinery" Ford designated. *Id.* 98a-99a. To perform these sales and service obligations, dealers were required to hire and train qualified personnel, including by sending workers to Ford training schools and courses at the dealers' expense. *Id.* 100a. In addition, the agreement required dealers to maintain working capital and lines of credit in amounts set by Ford. *Id.* 100a-101a.

Ford induced the dealers to make these large, long-term investments through its commitment to supply the dealers with trucks and parts. Under the agreement:

> Subject 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.

Pet. App. 93a. The contract defined the term "COMPANY PRODUCTS" to include:

> (1) new trucks and chassis of series 850 or higher designations and
>
> (2) parts and accessories therefor . . . .

Id. 95a.

The contract further provided that Ford would assume significant financial obligations in the event it terminated the contract or did not renew it. For example, if Ford terminated the agreement, it was obligated to buy back unsold inventory and special tools and equipment. Pet. App. 103a-106a. A dealer also had the option to require Ford to purchase or lease back certain physical facilities. *Id*. 106a-108a. In addition, state law frequently imposes additional obligations on car manufacturers who terminate dealer franchises. *See, e.g.,* Wis. Stat. § 218.0133(7) (providing that grantor of franchise "shall compensate the dealer in an amount not less than the fair market value of the franchise terminated").

2. In 1997, Ford sold its heavy duty truck and parts business to a competitor, Freightliner, for $300 million. In the agreement, Ford unequivocally promised for ten years to stop producing or selling not just heavy duty trucks, but also – particularly relevant to this petition – parts and accessories for those trucks. Pet. App. 118a-19a. The sale agreement provided:

> Ford agrees that, for a period of 10 years following [the sale], it will not, directly or indirectly, anywhere in the Territory, market, manufacture or sell any commercial vehicle with a gross vehicle weight exceeding 33,000 pounds [*i.e.,* heavy trucks] *or Spare Parts for any such vehicle* . . . .

Pet. App. 118a (emphasis added). Pursuant to the sale agreement, Ford stopped accepting orders from its dealers for both heavy duty trucks and parts. *See*

id. 15a; *see also id.* 120a-22a (letter from Ford to truck dealers).

As a consequence of the sale, petitioners lost tens of millions of dollars in sales during one of the strongest markets for heavy duty trucks in recent memory. *See* C.A. J.A. 592; C.A. S.A. 34-44. Among other things, Ford drastically reduced, then stopped, delivering trucks well before Freightliner could begin delivery of a regular supply of replacement vehicles. *See* C.A. S.A. 3, 5, 21, 24-26, 29-30. Although Freightliner offered petitioners the chance to become dealers for a new Freightliner subsidiary, the value of that franchise – for a brand with no established reputation in the market for heavy trucks – was substantially lower.

Ford itself estimated that complying with the termination provision of the dealer contracts would cost it between $100 and $700 million in termination obligations to the dealers under both the contracts and state law. C.A. J.A. 567. No less important, Ford's deal with Freightliner required Ford to cooperate in delivering a largely intact dealer network to the new buyer. The value of that established network was a "significant part" of the value of the business Freightliner was buying. C.A. J.A. 673, 777. In addition, terminating the contracts would have crippled Ford's ability to meet its warranty obligations to existing customers, since the Sales and Service Agreement required the dealers to provide warranty services on behalf of Ford. *See* Pet. App. 98a-99a; *see also* C.A. J.A. 714, 747.

3. Petitioners brought this breach of contract suit against Ford in the United States District Court for the District of New Jersey on behalf of a class of

Ford's heavy truck dealers.[2] In response, Ford did not dispute that it had ceased providing the dealers not only heavy trucks but also parts for those trucks. *See, e.g.*, C.A. J.A. 327, ¶ 50 (Second Amended Complaint, alleging that Ford announced its signing of a "letter of intent to sell its Heavy Duty Truck assets, *including its parts business*, to Freightliner") (emphasis added); *id*. at 355, ¶ 50 (Answer, admitting allegation).

Thus, while after the sale some dealers continued to sell their pre-existing inventory of Ford-produced parts, or parts sold to the dealers by Freightliner, Ford ceased providing new parts and accessories. Instead, Ford argued that it was entitled to cease supplying all trucks and parts under the contract under a provision entitled "CHANGES IN COMPANY PRODUCTS," which provided:

> [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

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[2] Jurisdiction in federal district court was based on asserted violations of the Federal Automobile Dealers Day in Court Act, 15 U.S.C. §§ 1221, *et seq*. Although the district court granted Ford summary judgment on that claim, *see* Pet. App. 17a-21a, it retained jurisdiction over the state law claims, *id*. 21a-22a. Ford did not challenge the decision to retain jurisdiction on appeal.

> 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.*

Pet. App. 101a (emphasis added).

Ford's argument faced the very significant obstacle that the en banc Third Circuit had rejected almost the identical defense in a very similar case involving Chrysler, also governed, as in this case, by Michigan law. *Buono Sales, Inc. v. Chrysler Motors Corp.*, 363 F.2d 43, 47-49 (3d Cir. 1966) (en banc). Consistent with that decision, petitioners argued that Ford's interpretation would negate the contract's express termination provisions by permitting Ford to evade its termination obligations. Further, the definitions provision of the contract distinguished between the singular and plural version of "HEAVY DUTY TRUCK," making clear that if the contract permitted Ford to stop providing all of its heavy duty trucks, it would have used the plural form. *See* Pet. App. 95a-96a ("'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).

The district court granted petitioners summary judgment on their breach of contract claim. Pet. App. 22a-32a. The court explained that Ford's interpretation of the dealer agreement could not be reconciled with "other terms and conditions of the Agreements, including the stated purpose and all 12

plus pages of termination provisions." *Id*. 30a. The court 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. *Id.* 3a.

4. Ford appealed the judgment in favor of the eleven dealers to the Third Circuit. On appeal, Ford did not dispute that, as expressly required by the sale agreement, it had ceased providing the dealers with heavy duty trucks and parts. Instead, it did the exact opposite: it renewed its argument that it had the contractual right to completely stop supplying petitioners with heavy-duty trucks and their parts and accessories, without liability. *See, e.g.*, Resp. C.A. Br. 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.") (emphasis added).

The Third Circuit reversed on grounds no party had asserted and on the basis of a factual mistake. The panel declined to decide Ford's actual argument that it was entitled to stop providing dealers with any company products at all. Pet. App. 9a n.4. Instead, the court based its decision on a legal theory developed by the panel entirely *sua sponte*. The court held that the term "COMPANY PRODUCT" was defined to include truck parts and accessories. *Id.* 8a. Without any citation to the record, the panel then incorrectly stated that "although Ford discontinued the production of all heavy trucks, Ford continued to manufacture and distribute parts and accessories to the Dealers." *Id*. 9a. 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*. The court accordingly reversed and remanded for entry of judgment in Ford's favor. *Id*. 10a.

5. Petitioners petitioned for panel rehearing and rehearing en banc, documenting that the panel's decision was based on the mistaken belief that Ford had continued to provide the dealers parts and complaining that the panel *sua sponte* resolved the case on a ground Ford neither preserved below nor argued on appeal. *See* Pet. App. 75a-91a. But the Third Circuit denied the petition without calling for a response from Ford or providing any explanation. *See id.* 72a-73a.

6. The district court subsequently held that it was required as a matter of law to apply the Third Circuit's ruling with respect to the eleven petitioners in this petition to all the other dealers, a further sixty-three. The court concluded that it was "not empowered to remedy any error the Third Circuit may have committed in reaching its decision." Pet. App. 71a.

REASONS FOR GRANTING THE WRIT

This Court should summarily reverse the court of appeals' judgment. The ruling below depends entirely on a single factual premise that the court of appeals made up without giving petitioners the opportunity to correct it. That premise is indisputably false. The error moreover destroys substantial rights of a significant number of parties. This Court has warned that basing decisions on grounds never raised by the parties or subjected to adversarial briefing risks precisely such errors. *See, e.g., Wood v. Milyard*, 132 S. Ct. 1826, 1833 (2012). The Third Circuit's refusal to grant rehearing or rehearing en banc to correct the obvious error constitutes a substantial departure from ordinary judicial process that requires this Court to exercise its supervisory authority.

1. There is no genuine dispute that the Third Circuit's judgment is premised on a manifest factual error that the court of appeals introduced into the case despite the parties' own clear understanding of the actual facts. When it sold its heavy duty truck business to Freightliner, Ford stopped providing petitioners both trucks *and* parts and accessories.

That fact is plain on the face of the sales contract between Ford and Freightliner. Article VI of the contract is entitled "TRANSFER OF SPARE PARTS BUSINESS ASSETS." Pet. App. 115a. Section 6.1 of that Article is entitled "Spare Parts Business Assumption" and requires that

> Freightliner will assume the Spare Parts Business . . . which will include the procurement, warehousing, sale and

> distribution of those quantities of Spare Parts and Common Spare Parts required to fulfill the reasonable expectations of vehicle owners . . . .

Pet. App. 115a[3]; *see also* C.A. J.A. 589 (Ford executive testifying that sale included "the related service parts business"); C.A. S.A. 6 (memorandum to Ford Board of Directors, explaining that under the deal "Ford would sell its Heavy Truck intellectual property, tooling, equipment and *parts business*") (emphasis added). The contract thus provides for "the transfer of Spare Parts in Ford's inventory from Ford warehouses to Freightliner warehouses." Pet. App. 115a.

Ford further entered into a covenant not to compete with Freightliner that encompassed both heavy trucks *and* spare parts:

> Ford agrees that, for a period of 10 years following [the sale], it will not, directly or indirectly, anywhere in the Territory, market, manufacture or sell any commercial vehicle with a gross vehicle weight exceeding 33,000 pounds [*i.e.,* heavy trucks] *or Spare Parts for*

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[3] "Spare Parts Business" is defined to "mean all aspects, including without limitation procurement, warehousing, sales, marketing and distribution, related to the sale of Spare Parts and Common Spare Parts for Product Lines." Pet. App. 111a. And the contract defines "parts" to include accessories. *See id*. ("Spare Parts" defined to include "HN80 Spare Parts"); *id*. ("HN80 Spare Parts" defined to include "assemblies, components, *accessories* and any other part used in the HN80") (emphasis added); *id*. 110a ("Common Spare Parts" defined to include "accessories").

> *any such vehicle*, except parts required to service Ford's pre-existing F-Series trucks and buses. . . .

Pet. App. 118a (emphasis added).

Consistent with this promise, the contract provided that Ford would stop taking parts orders from petitioners:

> Ford will remove access by Ford's dealers and other customers to DOES II or other order system with respect to all Ford part numbers for all Spare Parts, and *Ford will cease taking orders for those Spare Parts*.

Pet. App. 117a (emphasis added). True to its word, shortly after closing the deal with Freightliner, Ford sent a memorandum to petitioners stating:

> Parts Ordering
>
> 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*. . . .
>
> All existing backorders of unique heavy truck parts as of 4:00 pm EST on March 12 *will be cancelled* within the Ford system and transferred to Freightliner for handling.

Pet. App 121a (emphasis added).

After the Third Circuit's ruling, Ford has never claimed that the Third Circuit is correct that it is continuing to produce or provide dealers with parts or accessories, although it made a limited, and entirely disingenuous, effort to lend some minimal

credence to the panel decision in subsequent proceedings in the district court. Dealers who were not parties to the appeal requested that the district court not apply the ruling below to them, on the ground that the ruling was based on a plainly false factual premise. In response, Ford cited to snippets of testimony from a handful of dealers who stated that they had continued "to *sell* Ford heavy truck parts" after Ford ceased production of heavy trucks. *See* Doc. 592-1, at 20 (emphasis altered); *see also id*. ("Individual Plaintiffs testified that they *sold* and made money from *selling* Ford spare parts") (emphasis added). But the court of appeals' decision is not premised on the belief that the *dealers* continued to *sell* parts; it understood that the contract obligated *Ford* to "manufacture and distribute parts and accessories to the Dealers." Pet. App. 9a. And Ford omitted that the parts being sold were either leftover inventory from before the sale, or were part of the $57 million in parts inventory Ford sold to Freightliner, which *Freightliner* (not Ford) was providing to the dealers. *See* Pet. App. 115a-18a.[4] Moreover, Ford made no attempt to explain

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[4] As one dealer testified:

> What inventory we had at Ford heavy duty truck and parts that we purchased from Ford prior to 1997 that weren't returned to Ford were available for us to sell, but the remaining parts were transferred over to [Freightliner's subsidiary] Sterling and their organization, and those parts would have been through the Sterling parts, and that took some time to get up and running and coordinated.

how its contrary implication that Ford was continuing to provide dealers parts would fail to put it in breach of its contract with Freightliner or could be reconciled with its prior notification to dealers that it would not be accepting orders for spare parts after March 12, 1998.

3. The Third Circuit's unfounded judgment should not stand. The panel's factual error was indisputably consequential. The mistake was essential to the judgment, being the only ground upon which the panel reversed and ordered summary judgment be issued in Ford's favor. *See* Pet. App. 8a-10a. And that erroneous judgment has resulted in the dismissal of claims by dozens of dealers who, it is undisputed, suffered substantial damages as a result of Ford's conduct.

Correcting that error would not require any significant investment of this Court's resources. The Court need only acknowledge what is indisputably correct: that Ford has not, in fact, continued to supply petitioners with parts. When Ford responds to this petition, the answer to that question should be undisputed. And even if Ford does attempt to obfuscate the truth, it is apparent on the face of

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Doc. 592-2, at 79. Petitioners' ability to continue for a time to sell their existing parts inventory or obtain new parts from Freightliner would be no defense to Ford even under the Third Circuit's interpretation of the contract, which requires *Ford* itself to provide dealers with Company Products; the Third Circuit did not suggest (nor, given the language of the contract, could it) that Ford could satisfy its obligations by arranging for some third party to provide petitioners with substitute products. *See* Pet. App. 93a, 95a.

Ford's contract with Freightliner, which is appended in relevant part to this petition. The Court accordingly can resolve this petition through a short per curiam opinion simply remanding the case for reconsideration in light of that obvious mistake.[5]

The Court could also make clear that its decision is not a broad invitation to petitions seeking simple error correction but rather is justified by the unusual combination of four facts: (1) the ruling below rests exclusively on a false factual premise; (2) the false premise was never asserted by any party below, but instead was an invention of the appellate panel; (3) petitioners exhausted every avenue available to make the court aware of the error and to seek its correction in the court of appeals; and (4) the erroneous decision

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[5] On remand, the Third Circuit will be free to consider any argument that Ford has properly preserved. In those further proceedings, there is every reason to believe that the court of appeals will affirm the judgment in petitioners' favor. The panel cast no doubt on the district court's conclusion that if Ford had, in fact, ceased supplying petitioners with any products (*i.e.*, trucks, parts, and accessories) it would be in material breach of its contract with its dealers. Indeed, the panel recognized that the Third Circuit sitting en banc had previously held, in a similar case, that "a manufacturer's reservation of the right to discontinue distributing some products to a dealer did not allow the manufacturer to completely withdraw from the market." Pet. App. 8a (citing *Buono Sales, Inc. v. Chrysler Motors Corp.*, 449 F.2d 715, 721-22 (3d Cir. 1971) (en banc)). But in any event, the possibility that the Third Circuit might reach the same result on a proper ground is no basis to permit it dispose of an important case on the basis of a theory and factual record invented by the panel *sua sponte*.

has significant consequences for a substantial number of parties.

Those circumstances describe the kind of substantial "depart[ure] from the accepted and usual course of judicial proceedings" described by this Court's rules as an appropriate occasion for the exercise of this Court's certiorari jurisdiction. *See* S. Ct. R. 10(a); *cf., e.g.*, *Dye v. Hofbauer*, 546 U.S. 1, 3-4 (2005) (per curiam) (summarily reversing where federal court manifestly erred in asserting that a habeas claim had not been raised in the state trial court); *Smith v. Digmon*, 434 U.S. 332, 333 (1978) (per curiam) (same).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted and the judgment of the court of appeals summarily reversed.

Respectfully submitted,

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January 22, 2013

APPENDIX A

NOT PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 12-4342

BAYSHORE FORD TRUCK SALES, INC., a Delaware corporation; MOTOR CITY FORD TRUCKS, INC., a Delaware corporation; COLONY FORD TRUCK CENTER, INC., a Rhode Island corporation, individually and on behalf of all others similarly situated

v.

FORD MOTOR COMPANY,

Appellant

On Appeal from the United States District Court
for the District of New Jersey
(D. C. No. 2-99-cv-00741)
District Judge: Honorable Jose L. Linares

Argued on July 18, 2013

Before: RENDELL, SMITH and ROTH, Circuit Judges

(Opinion filed: August 26, 2013)

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ROTH, Circuit Judge:

This appeal arises from Ford's alleged breach of its Sales and Service Agreement with its heavy truck dealer network (the Dealers). The District Court granted summary judgment to the Dealers, holding that Ford was liable for breaching the Sales and Service Agreement. A jury subsequently awarded the Dealers approximately $29 million in damages. For the reasons that follow, we will reverse the District

Court's grant of summary judgment to the Dealers, vacate the jury's verdict, and remand the case to the District Court with instructions to enter judgment in Ford's favor.

I. Background[1]

A. Ford's Heavy Truck Business

Until 1997, Ford was a manufacturer of heavy trucks. Ford's business model was straightforward and common in the automotive industry: Ford would manufacture heavy trucks and sell them through the Dealers—an independent network of franchisees. Ford's relationship with the Dealers was governed by a standard contract, the Sales and Service Agreement.

In the 1980s and 1990s, Ford's heavy truck business became unprofitable, sustaining losses of $131 million in 1996. In early 1997, Ford decided to sell its heavy truck business to Freightliner, another truck manufacturing company. Under the sales agreement with Freightliner, Ford agreed to exit the heavy truck industry for ten years. In addition, one of the terms of the sale to Freightliner required Freightliner to offer all Ford heavy truck franchisees a franchise selling Freightliner trucks.

In mid-1997, Ford stopped accepting orders from its dealers for heavy trucks. Ford ceased manufacturing heavy trucks altogether by the end of the year. However, even though Ford no longer

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[1] We write primarily for the parties, who are familiar with the facts of this case. Therefore, we will set forth only those facts necessary to our analysis.

produced heavy trucks, Ford continued to manufacture parts and accessories for heavy trucks. Those parts and accessories were then distributed to the Dealers for retail sale. The Dealers also continued to provide warranty work on Ford heavy trucks and did business using Ford's trademarks. The Dealers' post-1997 revenue was substantial. In fact, the Dealers' revenue from warranty work exceeded revenues from their sales of heavy trucks.

B. The Sales and Service Agreement[2]

Under the Sales and Service Agreement, Ford agreed to distribute "COMPANY PRODUCTS" to the Dealers. In exchange, the Dealers would sell and perform warranty work on those products using only parts, accessories, and equipment sold by Ford. The dispute in this appeal revolves around the definition of "COMPANY PRODUCTS" and how that definition affects the provisions of Paragraph 13, which governs changes in sales of those products.

Paragraph 1(a) of the Sales and Service Agreement defines Company Products as follows:

> "COMPANY PRODUCTS" shall mean such (1) new trucks and chassis of series 850 or higher designations and (2) parts and accessories therefor, as from time to time are offered for sale by the Company . . . .

The relevant portion of Paragraph 13 of the Sales and Service Agreement reads as follows:

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[2] The Sales and Service Agreement provided that it was to be construed in accordance with Michigan law.

> The Company 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 . . . . The Company may discontinue any HEAVY DUTY TRUCK or other COMPANY PRODUCT at any time without liability to the Dealer.

The Sales and Service Agreement further provided that, if either party terminated the agreement, the Dealers would no longer be eligible to use Ford's trademarks, perform warranty work, or sell Ford heavy trucks, parts, or accessories.

C. Procedural Posture

In 1999, the Dealers filed a class action complaint against Ford. They alleged a single federal cause of action—a violation of the Automobile Dealer's Day in Court Act, 15 U.S.C. § 1221, *et seq.*—and several Michigan common law causes of action, including breach of contract, fraud, breach of the covenant of good faith and fair dealing, and unjust enrichment. The Dealers and Ford filed cross-motions for summary judgment. The District Court ruled in Ford's favor on all of the Dealers' claims, except the breach of contract claim. As to the breach of contract claim, the District Court held that Ford's decision to discontinue manufacturing heavy trucks constituted a breach of the Sales and Service Agreement.

The District Court held that damages could not be calculated on a class-wide basis. As a result, Ford, the Dealers, and the District Court agreed to hold a bellwether trial to assess the damages of eleven

plaintiffs. The jury ultimately awarded those plaintiffs approximately $29 million in damages. Ford now appeals both the denial of its motion for summary judgment on the Dealers' breach of contract claim and the jury award.

II. Standard of Review

We exercise plenary review over a grant of summary judgment. *See Liberty Lincoln-Mercury, Inc. v. Ford Motor Co.*, 676 F.3d 318, 323 (3d Cir. 2012). Summary judgment is appropriate only when there is no issue in dispute regarding any material fact, such that the moving party is entitled to judgment as a matter of law. *Id*. A grant of summary judgment is reviewed in the light most favorable to the non-moving party. *Id*. This means that all reasonable inferences must be drawn in the non-movant's favor. *Id*.

"[C]ontract construction, that is, the legal operation of the contract, is a question of law mandating plenary review." *In re Cendant Corp. Prides Litig.*, 533 F.3d 188, 193 (3d Cir. 2000).

III. Discussion[3]

Under Michigan law, the elements of a claim for breach of contract are (1) the existence of a contract, (2) a breach of the agreement, and (3) damages. *Miller-Davis Co. v. Ahrens Constr., Inc*., 817 N.W.2d 609, 619 (Mich. App. 2012). A breach occurs "when the promisor fails to perform under the contract."

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[3] The District Court had subject matter jurisdiction under 28 U.S.C. § 1331 and § 1367. We have appellate jurisdiction under 28 U.S.C. § 1291.

Vandendries v. General Motors Corp., 343 N.W.2d 4, 7 (Mich. App. 1983). Here, the question whether Ford breached the Sales and Service Agreement hinges on the interpretation of Paragraph 13 of the agreement and the definition of "COMPANY PRODUCT."

The relevant portion of Paragraph 13 of the Sales and Service Agreement states that Ford "may discontinue any HEAVY DUTY TRUCK or other COMPANY PRODUCT at any time without liability[.]" The District Court held that Ford's decision to cease manufacturing heavy trucks was a breach of the Sales and Service Agreement because "Ford did not have the right to discontinue or cease producing all products, i.e. all heavy trucks . . . . [A]bsent proper termination of the Agreements, Ford did not have a right to stop supplying heavy trucks altogether." In other words, the District Court ruled that Ford breached the Sales and Service Agreement by completely withdrawing from the heavy truck market. *Cf. Buono Sales, Inc. v. Chrysler Motors Corp.*, 449 F.2d 715, 721-22 (3d Cir. 1971) (en banc) (noting that that a manufacturer's reservation of the right to discontinue distributing some products to a dealer did not allow the manufacturer to completely withdraw from the market).

The District Court's interpretation of the Sales and Service Agreement was wrong because it misconstrued the meaning of "COMPANY PRODUCTS." The definition of "COMPANY PRODUCTS" includes not only heavy trucks, but also Ford parts and accessories. Applying the proper definition of "COMPANY PRODUCTS" to the undisputed facts of the case, it is clear that Ford did not breach the Sales and Service Agreement. Here,

although Ford discontinued the production of all heavy trucks, Ford continued to manufacture and distribute parts and accessories to the Dealers. As a result, the District Court's conclusion that Ford ceased production of all "COMPANY PRODUCTS" was incorrect.

Instead, in light of the definition of "COMPANY PRODUCTS" and the undisputed factual record, the District Court should have held that Ford satisfied its obligation to perform under the terms of the Sales and Service Agreement. Ford satisfied its end of the bargain by continuing to provide "COMPANY PRODUCTS"—i.e. parts and accessories—to the Dealers. Therefore, Ford's decision to discontinue production of all heavy trucks was permissible under the Sales and Service Agreement because Paragraph 13 allowed Ford to discontinue (at the very least) *some* "COMPANY PRODUCTS" without liability.[4]

The Dealers insist that the definition of "COMPANY PRODUCTS" must be read as applying to both heavy trucks *and* parts and accessories—i.e. that Ford's promise to provide "COMPANY PRODUCTS" required delivery of both heavy trucks as well as parts and accessories. As a result, the Dealers argue that Ford's failure to deliver heavy trucks breached the contract. This argument is unpersuasive. Looking to the text of the Sales and

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[4] Ford argues that the language in Paragraph 13 of the Sales and Service Agreement stating that Ford could "discontinue *any* . . . COMPANY PRODUCT" means that Ford had the right to discontinue *all* "COMPANY PRODUCTS." We need not reach this distinction because Ford did not discontinue all "COMPANY PRODUCTS."

Service Agreement, it repeatedly refers to both "COMPANY PRODUCTS" and "COMPANY PRODUCT." For example, Paragraph 10 states: "The Company has the right . . . to change . . . terms of sale affecting COMPANY PRODUCTS . . . . In the event the Company shall increase the [price] for any COMPANY PRODUCT, the Dealer shall have the right to cancel . . . any orders for such product." This language demonstrates that a variety of products are contained within the designation "Company Products." Thus, Ford's obligation to provide one product, *e.g.*, heavy trucks, is severable from its obligation to provide other products, *e.g.*, parts and accessories. In fact then, Ford continued to provide the Dealers with COMPANY PRODUCTS because Ford continued to supply the Dealers with parts and accessories. As a result, Ford did not breach the Sales and Service Agreement.

IV. Conclusion

For the foregoing reasons, we will reverse the District Court's grant of summary judgment to the Dealers, vacate the District Court's entry of judgment for the Dealers on the jury's verdict, and remand the matter to the District Court with instructions to enter judgment in Ford's favor on the Dealers' breach of contract claim.

APPENDIX B

NOT FOR PUBLICATION

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

BAYSHORE FORD TRUCK SALES, INC., MOTOR CITY TRUCKS, INC., AND COLONY FORD TRUCK CENTER, INC., et al.,	)	Civil Action No.: 99-CV-0741 (JLL)
Plaintiffs,	)	
v.	)	**OPINION AND ORDER**
FORD MOTOR COMPANY,	)	
Defendant.	)	

LINARES, District Judge

This matter comes before this Court on the motion for partial summary judgment by Defendant, the Ford Motor Company ("Ford"), and the cross-motion for partial summary judgment by Plaintiffs, Bayshore Ford Truck Sales, Inc. ("Bayshore"), Motor City Ford Trucks, Inc. ("Motor City"), and Colony Ford Truck Center, Inc. ("Colony") (collectively "Plaintiffs") pursuant to Fed. R. Civ. P. 56(c). Plaintiffs commenced this action against Ford alleging, inter alia, violations of the Federal Automobile Dealers Day in Court Act ("ADDCA"),

breach of contract, breach of the implied covenant of good faith and fair dealing, fraud, unjust enrichment, accounting, and violation of the Plaintiffs' respective home state franchise statutes. Ford has moved for partial summary judgment on six of the seven claims; Plaintiffs have moved on only the breach of contract claim. This Court has jurisdiction over this case pursuant to 28 U.S.C. § 1331 based on the claim asserted under the Automobile Dealer's Day in Court Act, 15 U.S.C. § 1221-1225, and supplemental jurisdiction over the other claims pursuant to 28 U.S.C. § 1367. The Court has considered the submissions in support of and in opposition to the motions as well as arguments by counsel at the oral argument heard by this Court on November 3, 2005. For the reasons set forth below, the Defendant's motion is GRANTED in part and DENIED in part, and Plaintiffs' cross-motion is GRANTED.

FACTUAL AND PROCEDURAL BACKGROUND

For purposes of the instant motions, the relevant facts are as follows. This action stems from Ford's decision to exit the heavy truck business in 1997. Plaintiffs were all Ford heavy truck franchisees who each, prior to Ford's decision to exit the business, sold and serviced Ford heavy trucks. The relationship between Ford and each Plaintiff was governed by the Ford Heavy Duty Truck Sales and Service Agreement ("Agreements"). The Agreements were drafted by Ford and outlined the rights and obligations of the parties. The Agreements were executed as "Michigan Agreement[s]" and state that they are "to be construed in accordance with laws of the State of

Michigan." (Danzig Aff., Tab 38 p. HVT2 13355 (June 11, 2003).) The stated purpose of the Agreements was to "(i) establish [each] Dealer as an authorized dealer in COMPANY PRODUCTS including HEAVY TRUCKS . . . ." (LaRobardier Certif., Tab 1 p. 0001 (Nov. 30, 2004).)[1] In addition to requiring each dealer to sell heavy trucks, the Agreements also required Plaintiffs to perform warranty, maintenance and repair service on existing Ford Heavy Trucks. Each Plaintiffs' Agreement was to "continue in force and effect from the date of its execution until terminated by either party under the provisions of paragraph 17 hereof." (LaRobardier Certif. at Tab 1 p. 0004.)

In the 1980's and continuing into the 1990's, Ford's heavy truck business was unprofitable. The business was very competitive, and, by the mid 1980's, Chrysler and General Motors were no longer in the heavy truck business. In the 1980's due to unprofitability, Ford executives discussed various business options including restructuring, reducing, merging, or selling the business. Nevertheless, in the early 1990's, Ford decided to launch a new Ford heavy truck, the HN-80. Notably, the HN-80 was "Ford's first new heavy truck in 20 years." (Def.'s Br. in Supp. of Summ. J. Mot. at 3 (Jun. 11, 2003).) In 1995, as part of the launch, Ford required its dealers to become certified to service the three different HN

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[1] The specific cite is to Bayshore's Franchise Agreement. All of the Plaintiffs' Agreements contained identical provisions. The Court will continue to cite only to Bayshore's Agreement as representative of all Plaintiffs' Agreements unless there is a difference, in which case the Court will note it.

80 engines. Dealers could not order the new truck if they did not meet the new service requirements. Subsequently, in 1996, Ford modified these "order requirements" to require dealer certification for only two of the three HN-80 engines and, in exchange for compliance, Ford provided monetary incentives to offset some of the certification costs.

Also in 1995, at the request of Ford management, a report called "Heavy Truck Business Review: Should Ford Stay in the Heavy Truck Business?" was put together. (Danzig Aff. at Tab 15.) The report highlighted strategies for turning Ford's heavy truck business around including: "capitalizing on the HN-80 new-product launch; making aggressive cost reductions; and making improvements in sales and service." (Def.'s Br. In Supp. of Summ. J. Mot. at 5.) In August of 1995 after reviewing this report, Ford executives considered four options: "(1) stay in the business; (2) sell the business; (3) find a joint venture partner for the business; or (4) liquidate the business." (Id.)

The HN-80 sales were disappointing, and Ford continued to suffer losses due to its heavy truck business. In 1996, these losses were $131 million. So, in 1996, Ford conducted a complete review of its heavy truck business. The project went by the code name "Project Utah." In order to avoid rumors that may have affected the business, information about the project was kept strictly confidential. As part of the project, Ford considered selling its heavy truck business to various companies, including Navistar, PACCAR, and an investment group. However, discussions with these companies did not turn into serious sale negotiations.

At the end of 1996, Jim Donaldson, who headed Ford's heavy truck business in the 1990's, returned to this business line. Mr. Donaldson's understanding at that time was that "the base plan was to continue the business." (Danzig Aff. at Tab 8 p. 22.) By the end of 1996, Ford estimated the costs of shutting down the business to be between $300 and $500 million, making shutdown a prohibitively costly option.

In January of 1997, Mr. Donaldson contacted another company, Freightliner, to see if it was interested in purchasing Ford's heavy truck business. Freightliner was interested and sale negotiations "moved extremely quickly." (Id. at Tab 8 p. 56.) The letter of intent for the sale was signed on February 11, 1997. On February 19, 1997, Ford informed its dealers of the sale and that, as part of the agreement, they would be given the opportunity to obtain a new heavy truck franchise with Freightliner. There was no indication by Ford at that time, or at any time thereafter, that it was terminating the Ford Heavy Duty Truck Sales and Service Agreement with its dealers pursuant to Paragraph 17 of the agreement.

The sales agreement with Freightliner required Ford to stop producing Ford Heavy Trucks for ten years. Therefore, on July 28, 1997, "Ford stopped accepting heavy truck orders from its heavy truck dealers," (Pls.' Stmt. Pursuant to Local Civ. R. 56.1, p.5 (Nov. 30, 2004)), and stopped producing heavy duty trucks in December 1997. Ford received $300 million dollars for the sale. Ford never terminated or sought to terminate the contracts with any of the Plaintiffs even though under the terms of the Agreements, it could terminate them at will, subject to meeting the termination provisions.

Plaintiffs commenced the instant action on February 18, 1999. In December of 2000, the action was stayed pending resolution of a similar action. The instant motions were filed on January 24, 2005.[2] Defendants presently move before this Court for summary judgment on six of the seven claims asserted by Plaintiffs. Plaintiffs move only on its breach of contract claim.

LEGAL DISCUSSION

A. Summary Judgment Standard

To prevail on a motion for summary judgment, the moving party must establish that "there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c)); Gleason v. Norwest Mortgage, Inc., 243 F.3d 130, 138 (3d Cir. 2001). "A 'genuine' issue is one where a reasonable jury, based on the evidence presented, could hold in the movant's favor with regard to that issue." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-48 (1986). When considering a motion for summary judgment, all evidence must be reviewed and all inferences drawn therefrom must be in the light most favorable to the nonmoving party. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986).

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[2] Defendant originally filed its motion for partial summary judgment on February 27, 2004, but by agreement of both parties and the Court, the motion was withdrawn to be reactivated when Plaintiffs' motion was filed. Oral argument on the motions was heard on November 3, 2005.

Once the moving party files a properly supported motion, the burden shifts to the nonmoving party to demonstrate the existence of a genuine dispute of material fact. Fed. R. Civ. P. 56(e); Anderson, 477 U.S. at 256. "The mere existence of a scintilla of evidence in support of the [nonmovant]'s position will be insufficient; there must be evidence on which the jury could reasonably find for the [nonmovant]." Id. at 252. Furthermore, conclusory statements and arguments do not raise triable issues which preclude summary judgment. Ridgewood Bd. of Educ. v. N.E., 172 F.3d 238, 252 (3d Cir. 1999). If the opponent fails to make a sufficient showing regarding an essential element of his or her case upon which he or she will bear the burden of proof at trial, all other facts are necessarily immaterial and summary judgment must be granted. Celotex Corp. v. Catrett, 477 U.S. 317, 321 (1986).

The Court's present task is to determine whether genuine issues of material fact exist and whether pursuant to the standards set forth above either Plaintiffs or Defendant are entitled to judgment as a matter of law.

B. Automobile Dealer's Day in Court Act

Plaintiffs allege that Ford violated its obligation to Plaintiffs under the federal Automobile Dealer's Day in Court Act ("ADDCA"), 15 U.S.C. §§ 1221-1225. To state a claim under the ADDCA, the Plaintiffs must prove the following four elements: "(1) the plaintiff must be an automobile dealer; (2) the defendant must be an 'automobile manufacturer' engaged in commerce; (3) there must be a manufacturer-dealer relationship embodied in a

written franchise agreement; and (4) the plaintiff must have been injured by the defendant's failure to act in good faith." Northview Motors, Inc. v. Chrysler Motors Corp., 227 F.3d 78, 93 (3d Cir. 2000). In this case, the only element in dispute is the fourth element, i.e. whether the injury was caused by Ford's failure to act in good faith.

Under the ADDCA "good faith" is defined as "the duty of each party to any franchise . . . to act in a fair and equitable manner toward each other so as to guarantee the one party freedom from coercion, intimidation, or threats of coercion or intimidation from the other party . . . ." 15 U.S.C. § 1221(e). The good faith duty, however, should be interpreted narrowly and is not to be given an expansive construction. Northview Motors, 227 F.3d at 93. Thus, "the ADDCA does not protect dealers against *all* unfair practices, but only against those evidenced by acts of coercion or intimidation." Id. at 95 (internal quotations omitted and emphasis added). A plaintiff must demonstrate a "wrongful demand which will result in sanctions if not complied with." Buono Sales, Inc. v. Chrysler Motors Corp., 449 F.2d 715, 724 (3d Cir. 1971) (quoting Berry Bros. Buick, Inc. v. General Motors Corp., 257 F. Supp. 542 (E.D. Pa. 1966), aff'd, 377 F.2d 552 (3d Cir. 1967)). Therefore, a breach of contract alone will not violate the statute. Buono Sales, 449 F.2d at 717, 722, 724. Likewise, insistence by a company that its dealer fulfill its reasonable obligations under a franchise agreement will not be deemed a wrongful demand in violation of the ADDCA. GMC v. New A.C. Chevrolet, Inc., 263 F.3d 296, 304 (3d Cir. 2001).

But, the following types of manufacturer behavior may, depending on all of the circumstances, violate the ADDCA: a manufacture threatens to stop supplying a car line unless the line is given an exclusive showroom, a manufacturer tries to drive a dealer out of business, or a manufacturer forces a dealer to accept cars that it does not want. Northview Motors, 227 F.3d at 93. In Buono Sales, the court held that an automobile manufacturer breached its contract with a dealer when it unilaterally discontinued a car line, effectively terminating the contract. 449 F.2d at 722. The court also held that this breach did not violate the ADDCA because no evidence showed that the discontinuation of the line had been used as a threat or coercion to make the dealer do certain things. Id. at 724.

In the case at bar, Plaintiffs assert that Ford violated the ADDCA by carrying out "an 'ulterior motive' for years, and [seeking] to maximize its position in the sale to Freightliner by refusing the dealers their contract rights to termination benefits if they refused to transfer their franchise to Freightliner." (Pls.' Opp'n Br. at 5 (Aug. 12, 2003).) Put another way, Plaintiffs assert that Ford "gave Plaintiffs a sudden Hobson's choice: either become a [Freightliner] dealer . . . *or else* . . . [forego Ford contract termination] compensation." Id. at 21.

Plaintiffs, in their opposition brief, do not point the Court to the specific evidentiary facts on which they rely to establish Ford's alleged "ulterior motive" carried out for years. Therefore, the Court will assume that Plaintiffs refer to the following facts and assertions: (1) as part of the launch of the HN-80 in 1995, Ford dealers were required to increase its

service certifications as a condition to ordering the HN-80; (2) during the time period of the launch of the HN-80, Ford was considering business options that included selling its heavy truck business; (3) Ford did not inform its dealers that it was considering selling its heavy truck business; (4) Ford subsequently sold its heavy truck business in 1997 to Freightliner for $300 million; (5) as part of the sale agreement, Ford stopped manufacturing heavy trucks and hence supplying heavy trucks to its dealers; (6) as part of the sale agreement Freightliner was required to offer Ford heavy truck dealers a Freightliner franchise; and (7) if the dealers wanted to continue to sell the HN-80 heavy truck (albeit under a new name), they would need to become a Freightliner franchisee.

Plaintiffs, citing to Northview Motors, assert that its claim of "ulterior motive" is "sufficient by itself to defeat Ford's motion on the ADDCA." (Id.) However, in Northview Motors when the court referred to the requirement of an "ulterior motive," the statement stood not for the proposition that motive alone was enough, but rather that it was one necessary element. 227 F.3d at 94. In the present case, there was never any "choice" put to Plaintiffs by Ford, coercive or otherwise. Viewing the evidence in the light most favorable to Plaintiffs, the evidence shows that Ford unilaterally made a decision to exit the heavy truck business. Plaintiffs were not given a choice about this, they were not presented with any option that if complied with would have prevented Ford's exit, nor was Ford's decision designed to force Plaintiffs to do something. As Plaintiffs argue, the evidence shows that Ford's motivation for the exit was its own economic considerations. Additionally, with respect to whether the implementation of new

order requirements in 1995 could be used as the coercive act in violation of the ADDCA, Plaintiffs have failed to point to any evidence indicating that the implementation of the new order requirements, requirements that were permitted by the Agreements, was merely a pretext to coerce Plaintiffs into some action.

This Court finds that the facts asserted by Plaintiffs do not establish the type of coercive choice that the ADDCA is aimed at preventing. The situation here is more akin to that in Buono Sales where a manufacturer unilaterally decided to stop supplying automobiles to a dealer. Like Buono Sales, even if Ford's unilateral decision to cease making and supplying heavy trucks to its dealers was a breach of the Agreements (as discussed below), Plaintiffs have not shown that the breach was a sanction for not complying with a wrongful demand. Because Plaintiffs have failed to produce any evidence establishing a genuine issue of material fact that Ford violated the ADDCA, Defendant's motion for summary judgment on this claim is GRANTED.

C. Supplemental Jurisdiction over Plaintiffs Remaining State Law Claims

At oral argument, Plaintiffs requested that this Court retain supplemental jurisdiction over the state law claims in the event of the dismissal of the federal ADDCA claim; Defendant did not object to this request. Neither party briefed the issue.

In making the determination of whether to exercise supplemental jurisdiction over state law claims, a court "should take into account generally accepted principles of 'judicial economy, convenience,

and fairness to the litigants." Growth Horizons, Inc. v. Delaware County, Pa., 983 F.2d 1277, 1284 (3d Cir. 1993) (quoting United Mine Workers v. Gibbs, 383 US 715, 726 (1966)). In light of the length of this litigation to date, the familiarity of this Court with the issues at dispute, the request of the parties, and the aforementioned principles of economy, convenience, and fairness, the Court elects to exercise supplemental jurisdiction over Plaintiffs' remaining state law claims.

D. Breach of Contract

1. Choice of Law

A federal court, when exercising supplemental jurisdiction over state law claims, must apply the choice of law rules of its forum state. Ramsey v. AT&T Corp., 1997 WL 560183, *2 (E.D. Pa. Aug. 27, 1997). Therefore, this Court must apply New Jersey's choice of law rules to determine which state's law governs Plaintiffs' breach of contract claim. Generally, New Jersey courts will enforce a contract's forum selection clause "provided the public policies of New Jersey are not offended and the contract bears some relation to the chosen jurisdiction." Pepe v. Rival, 85 F.Supp. 2d 349, 381 (D.N.J. 1999). The Agreements in this case contain a provision stating that the intent is for Michigan law to apply. Additionally, both parties agree that Michigan law should apply to the breach of contract analysis. Therefore, since the parties are in agreement and no evidence indicates that application of Michigan law would offend New Jersey's public policies, this Court

holds that Michigan law applies to Plaintiffs' breach of contract claim.

2. Breach of the Agreements

Under Michigan law, in order to prevail on a breach of contract claim, a plaintiff must establish "(1) that a contract existed between the parties; (2) the terms of the contract; (3) that defendants breached the contract; and (4) that the breach caused plaintiff injury." Wilson v. Continental Dev. Co., 112 F. Supp. 2d 648, 663 (W.D. Mich. 1999). In the case before this Court, while it is undisputed that a contract existed between the parties, the parties dispute what the terms of the Agreements actually meant, whether Ford breached the Agreements, and if a breach did occur, whether Plaintiffs suffered injury.

Plaintiffs assert that the Agreements in question are predominantly for the sale of goods and, as such, interpretation of the terms is controlled by Article 2 of the U.C.C. Although a majority of jurisdictions hold that distributor or franchise agreements fall under Article 2 of the U.C.C., see Babst v. FMC Corp., 661 F. Supp. 82, 87-88 (S.D. Miss. 1986) (reviewing treatment of franchise/distributor agreements in various jurisdictions, including Michigan), Plaintiffs do not cite to any Michigan cases adopting this position. In fact, the case they do cite applying Michigan law did not apply the U.C.C. to its analysis of a similar franchise agreement. (Pls.' Br. in Supp. of Cross-Mot. at 17 (Nov. 11, 2003) (citing Karl Wendt Farm Equip. Co. v.International Harvester Corp., 931 F.2d 1112 (6th Cir. 1991).) Additionally, the Michigan Supreme Court in Lorenz

Supply Co. v. American Standard., Inc. held that all distributorship agreements are not contracts for the sale of goods as defined by the U.C.C., and instead looked to see if the particular agreement contained a definitively stated, written quantity term to determine whether the U.C.C. applied. 358 N.W.2d 845, 847 (Mich. 1984). Plaintiffs, however, assert that the Agreements in this case are distinguishable from Lorenz because Paragraph 2(a) of the Agreements set specific criteria for sales volume by dealers. In fact, what Paragraph 2(a) requires is that a dealer obtain a "reasonable share" of the sales of heavy trucks in the dealer's locality and further that the "[d]ealer's performance of his sales responsibility for HEAVY DUTY TRUCKS shall be measured by such reasonable criteria as the Company may develop from time to time. . . ." (Danzig Aff. at Tab 38 p. HVT2 13328.) Nothing in this language persuades this Court that the Agreements require different treatment than provided for by the Michigan Supreme Court in Lorenz. Therefore, since the Agreements in this case do not contain a definitely stated quantity term, this Court finds that the U.C.C. does not apply. The Court also notes that even if it were to find that the U.C.C. applied in this case, such a finding would not affect the outcome of its breach of contract analysis.

Under Michigan common law, the intent of parties to an agreement is determined by looking at the agreement as a whole, and all clauses and provisions must be harmonized so that the contract is not given an unreasonable meaning. South Macomb Disposal Auth. v. American Ins. Co., 572 N.W.2d 686, 695 (Mich. Ct. App. 1997); Auto-Owners Ins. Co. v. Churchman, 489 N.W.2d 431, 434 (Mich. 1992). Also,

"[a]bsent any offer of proof giving rise to issues of fact, questions of contracts interpretation, being legal in nature, [can] properly be disposed of by summary judgment." Burroughs Corp v. City of Detroit, 171 N.W.2d 678, 681 (Mich. Ct. App. 1969). Here, the Plaintiffs' allegation of breach hinges on what the terms as written in the Agreements mean; no reference to external evidence is necessary.

The parties' dispute centers around the interpretation of the following provisions of the Agreements:

> Subject 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. (La Robardier Certif., Tab 1 p. 00003.)
>
> * * *
>
> DEFINITIONS
>
> 1. (a) "COMPANY PRODUCTS" shall mean such (1) new trucks and chassis of series 850 or higher designations and (2) parts and accessories therefor, as from time to time are offered for sale by the Company . . . .
>
> * * *
>
> CHANGES IN COMPANY PRODUCTS
>
> 13. The Company 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 . . . . The Company may discontinue any HEAVY

> DUTY TRUCK or other COMPANY PRODUCT at any time without liability to the Dealer.

(Danzig Aff. at Tab 38 p. HVT2 13326, 13340.) Based on these provisions, as they are asserted to relate to the Agreements as a whole, Plaintiffs argue that, as long as the contract remained in effect, Ford was obligated to supply Company Products to Plaintiffs. Defendant disagrees and asserts that the "contract permitted Ford to cease production of heavy trucks altogether without consequence." (Def. Br. in Supp. Of Mot. for Summ. J. at 18.)

In support of its interpretation, Defendant relies almost exclusively on Fette Ford, Inc. v. Ford Motor Comp., Civil Action No. 97-4311 (D.N.J. Sept. 15, 2000). In Fette the Court analyzed the same contract at issue in this case and held that Ford's rights under the contract encompassed a "right to cease making all of its trucks," and as such, Ford's withdrawal from the heavy truck business did not amount to a breach of the contract nor triggered the contract's termination provisions. Id. at 38. While the unpublished opinion, including the Third Circuit's unpublished affirmation on this issue, is not binding on this Court, it is indeed persuasive authority. However, the Fette case analysis, while relating to the same contract, is distinguishable from the case before this Court because in Fette the Court interpreted the terms of the contract by applying New Jersey law. Id. at 38-39. Here, as discussed above, Michigan law, not New Jersey law, applies to the contract, and while it is true that many general principles of contract interpretation may be the same under both New Jersey and Michigan law, the

jurisdictions are split on how to interpret franchise agreement provisions similar to those present in this case. Wendt, 931 F.2d at 1120. Therefore, this Court finds that cases applying Michigan law, unlike Fette, are most persuasive.

In Wendt, a case applying Michigan law, the plaintiff, a farm equipment dealer, sued International Harvester for breach of contract after International Harvester sold its manufacturing capacity to another company. Id. at 1114, 1120-1121. International Harvester had not terminated its dealer contract with the plaintiff pursuant to the terminations provisions of the contract. Id. In that case, International Harvester, much like Ford herein, claimed that it did not breach the contract, reasoning that if it had a right to discontinue a line, it could discontinue all products and completely withdraw from the market without obligation to plaintiff. Id. at 1120-1121. In support of its position, International Harvester relied on the following provision, Section 2, of its dealer agreement:

> The agreement shall cover all those items of agricultural tractors, machines, equipment and attachments, . . . service parts for such goods. The company reserves the right to make additions to and eliminations from such list, including but not limited to reductions resulting from the discontinued production of a line or lines of such tractors, machines, equipment and attachments, without incurring any responsibility to the dealer.

Id. The court rejected International Harvester's interpretation and held that:

> Section 2, by its terms, seems to be intended to allow IH to make shifts in its product lines and to discontinue product lines without changing the binding force of the agreement. We find it quite a stretch to believe that the parties intended this provision to function as an alternative means for termination of the contract. This interpretation is reinforced by the fact that the agreement provides specific conditions and provisions for termination.

Id.

Similarly, in Buono Sales, the Third Circuit, applying Michigan law to a dealer agreement, held that a "right to amend did not include the right to insert a termination provision." 449 F.2d at 721 n.6, 722. The expressly stated purpose of the contractual relationship was "to provide for the sale and service of DeSoto and Plymouth cars, parts and accessories." Id. at 722. Additionally, the contract stated that the parties intended for the agreement not to have an expiration date. Id. The court stated that an elementary principle of contract interpretation is that wording of a contract is to be given its plain and ordinary meaning, and that where there is ambiguity, it should be resolved in a way that best represents the intention of the parties. Id. at 721. Applying this principle, the court concluded that to permit the defendant to use an amendment clause to unilaterally and effectively terminate the contract would be in "contravention of the parties' expressed intention." Id. at 722.

In this case, the parties do not dispute that Ford ceased producing heavy trucks in 1997 and as a

result stopped supplying Plaintiffs with heavy trucks at that time. What the parties do dispute is whether this action by Ford breached the terms of the Agreements. Like in Wendt and Buono Sales, Plaintiffs assert that Ford's interpretation of the Agreements to mean that Ford was permitted "to cease production of heavy trucks altogether without consequence" is contrary to the stated purpose of the Agreements and if accepted would render many other provisions of the Agreements meaningless. Plaintiffs assert that absent a proper termination of the Agreements by Ford pursuant to the contract provisions, Ford was required to supply Company Products.[3] Both parties also seem to agree that Ford did not terminate the Agreements in accordance with the contract termination provisions.[4]

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[3] In Plaintiffs Opposition Brief to Defendant's motion for partial summary judgment on the breach of contract claim, Plaintiffs state that "Ford owed a contractual duty to provide product and support to its dealers" during the transition from Ford to Freightliner. (Pls.' Opp'n Br. at 22.) This argument appears to contradict its broader argument in its moving brief that under the Agreements Ford had an obligation to Plaintiffs to supply heavy trucks until the contract was terminated. However, the issue before the Court on the present motions is simply whether Ford's failure to supply heavy trucks, during transition or otherwise, represented a breach of the Agreements. The duration of Ford's obligation to Plaintiffs may affect any award of damages, but that issue is not presently before the Court.

[4] In Defendant's Sur Reply dated November 10, 2005 and submitted to the Court without prior permission, Defendant, for the first time, re-characterizes Plaintiffs' argument as one of breach by constructive termination. Plaintiffs strongly object to

Ford does not argue that it had a right to terminate the contract without consequence, rather it argues that it had the right, without terminating, to cease the supply of all heavy trucks. Ford argues that the Agreements' requirement that the "Company shall sell COMPANY PRODUCTS" provision is limited by the clause's preceding language which makes any obligation "[s]ubject to and in accordance with the terms and conditions of this Agreement." Ford asserts that this language incorporates Paragraphs 1(a) and13 (reproduced above) and thereby limited Ford's obligation to sell heavy trucks to Plaintiffs by permitting it to discontinue all heavy trucks. Ford, however, ignores the fact that while the highlighted sentence incorporates paragraphs 1(a) and 13, it also incorporates all other terms and conditions of the Agreements, including the stated purpose and all 12 plus pages of termination provisions. Ford cannot pick and choose which provisions are to be read together; Michigan law requires that to the extent that a term is ambiguous, it should be read in light of the entire agreement.

Ford also argues that, in practical terms, any provision that allows them to discontinue any truck allows them to discontinue all trucks since they only offered one heavy duty truck. This argument may have some force if there was any evidence in this case that the Agreements were only intended to be franchise agreements pertaining to the sale of only

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this characterization. Since both parties, prior to the Sur Replies, asserted that Ford had not terminated the agreement, the Court disregards the new arguments related to this theory.

one Ford heavy duty truck. However, to the contrary, the agreement itself, in paragraph 13, allowed Ford to add new trucks for sale, and the definitions section differentiated between HEAVY TRUCK and HEAVY TRUCKS.

Plaintiffs, on the other hand, assert that while Ford had the right under the Agreements to change or discontinue a particular product, Ford did not have the right to discontinue or cease producing all products, i.e. all heavy trucks. The Court agrees with Plaintiffs; absent proper termination of the Agreements, Ford did not have a right to stop supplying heavy trucks altogether. The stated purpose of the Agreements was to "establish [each] dealer as an authorized dealer in COMPANY PRODUCTS including HEAVY TRUCKS." Similar to Wendt and Buono Sales, if the Court were to accept Ford's interpretation of the provision in question, it would effectively allow Ford to completely change the nature and purpose of the contract unilaterally and without consequence despite express provisions to the contrary. Applying Michigan law, this Court finds such an interpretation to be unsupported by the terms of the Agreement taken as a whole. Thus, the Court holds that, as a matter of law, Ford's failure to supply heavy trucks to Plaintiffs, in the absence of termination by Ford in accordance with the terms of the contract, was a breach of the Agreements.

3. Waiver

Ford argues that by continuing to perform under the Agreements after the alleged breach by Ford, Plaintiffs waived any breach of contract claim. However, as Plaintiffs point out, under Michigan law,

the waiver rule does not "depriv[e] [the non-breaching party] of a right of action for the breach which has already taken place, but[, rather] depriv[es] him of any excuse for ceasing performance on his own part." Schnepf v. Thomas L. McNamara, Inc., 93 N.W.2d 230, 232 (Mich. 1958) (emphasis removed). In this case, therefore, the waiver argument by Ford is not applicable to bar Plaintiffs' breach of contract claim. Accordingly, for the reasons stated above, Defendant's motion for summary judgment with respect to Plaintiffs' breach of contract claim is hereby DENIED, and Plaintiffs' motion for summary judgment with respect to its breach of contract claim is hereby GRANTED as to liability.

E. Breach of Implied Covenant of Good Faith and Fair Dealing

Although Michigan law will recognize an implied covenant of good faith in some limited circumstances, Hammond v. United of Oakland, Inc., 483 N.W.2d 652, 655 (Mich. Ct. App. 1992), it does not provide an independent cause of action for breach of an implied covenant of good faith separate from a breach of contract claim, Ulrich v. Federal Land Bank, 480 N.W.2d 910, 911 (Mich. Ct. App. 1991). Plaintiffs, in their opposition brief, focus solely on why an implied covenant of good faith should attach to specific terms of the Agreements. However, in making these arguments, Plaintiffs fail to establish how a breach of such a covenant, if any, would supply an independent basis for relief. Therefore, this Court finds that under Michigan law no such independent cause of action exists. Accordingly, Defendant's summary judgment

motion on Plaintiffs' breach of covenant of good faith claim is hereby GRANTED.

F. Fraud

Plaintiffs assert a claim for fraud based on Ford's alleged misrepresentations "of its commitment to the heavy truck business, on which Plaintiffs relied in making further investments in their businesses, representations Ford knew to be false at the time they were made." (Pls.' Opp'n Br. at 27) Beyond this broad statement, Plaintiffs, in their opposition brief, do not point the Court to any specific facts that form the basis for their assertion. The Court notes, however, that Ford does not dispute the following facts: (1) that Ford's heavy truck business was generally unprofitable; (2) that by launching the HN-80 in 1995, it was "affirming its commitment to the [heavy truck] business;" (3) that the development and launch of the HN-80 required significant investment by Ford; (4) that as part of the launch of the HN-80, Ford required dealers to increase their service certifications to include the HN-80 engines; (5) that during the 1980's and 1990's, Ford evaluated its business options with respect to its heavy truck business including possible sale or shutdown of the business; (5) that Ford did not tell its franchisees that it was considering these options; (6) that in 1997, Ford did, in fact, sell its heavy truck business to Freightliner; and (7) that Ford could, subject to incurring termination costs, terminate the Agreements at will. The issue for the Court, then, is whether these facts, when viewed in a light most favorable to Plaintiffs, raise a genuine issue of

material fact with respect to whether Ford's actions could amount to fraud.

To state a claim for fraud, a plaintiff is required to prove, aside from other elements, that the defendant made a material misrepresentation of a past or present fact which it knew to be false at the time.[5] Nicolet, Inc. v. Nutt, 525 A.2d 146, 149 (Del. 1987); Kamalnath v. Mercy Mem'l Hosp. Corp., 487 N.W.2d 499, 506 (Mich. Ct. App. 1992); St. Paul & Marine Ins. Co. v. Russo Bros., 641 A.2d 1297, 1300 n.2 (R.I. 1994). Representations, opinions, or promises about future events do not satisfy this standard. Id. Additionally, failure to provide information may also satisfy this requirement where there was a duty to disclose. M&D, Inc. v. McConkey, 585 N.W.2d 33, 36 (Mich. Ct. App. 1998). However, a "silent fraud" claim requires a plaintiff to set forth a "more complex set of proofs." Id.

The facts presented in this case, at most, show that Ford made representations about its future commitment to its heavy truck business while at the same time engaging in an ongoing business analysis, including considering possible sale or shutdown of its heavy truck business. The facts show that Ford invested millions of dollars in launching the HN-80. In addition, Ford has provided evidence that in 1996,

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[5] Defendant's analysis of Plaintiffs fraud claim appears to assume that the applicable law is that of each Plaintiffs' home state. Plaintiffs, in their opposition brief, do not challenge this approach. The element that is dispositive for purposes of the present motion are common to all.

when Mr. Donaldson was brought back to the heavy truck business, the "base plan was to continue the business." (Danzig Aff. Tab 8 p. 22) Plaintiffs have supplied no specific facts to counter Ford's position; no credible facts show that in 1995 when Plaintiffs made additional investments in their heavy truck dealerships (by increasing their service certifications) Ford made representations about presently existing facts that Ford knew to be false. In fact, there is ample evidence to the contrary. Additionally, Plaintiffs have not established that Ford had a duty to disclose to its dealers its ongoing business strategy considerations. Accordingly, Defendant's motion for summary judgment with respect to Plaintiffs' fraud claim is hereby GRANTED.

G. Unjust Enrichment and Accounting

1. Unjust Enrichment

Under Michigan law[6] to state a claim for unjust enrichment, a plaintiff must prove that: (1) the defendant received a benefit from the plaintiff, and (2) that an inequity resulted because the defendant retained the benefit. Barber v. SMH (US), Inc., 509

[6] Defendant, like with its fraud analysis, cites to cases from all of the home states of the Plaintiffs. Defendant does not present any analysis of why this is the appropriate approach. Plaintiff does not address the issue. While the Court finds that Michigan law should apply to the unjust enrichment claim because it is based on the interpretation of the Michigan Agreements and whether they do or do not cover the sale of Ford's heavy truck business, the Court notes that the outcome would be the same under the laws of the other states set forth by Defendant.

N.W.2d 791,796 (Mich. Ct. App. 1993). When these elements are established, the law will imply a contract. Id. But, where parties "have an enforceable contract and merely dispute its terms, scope, or effect, one party cannot recover for . . . unjust enrichment." Terry Bar Sales Agency v. All Lock Co., 96 F.3d 174, 181 (6th Cir. 1996).

Plaintiffs argue that the Agreements do not contain a "single provision that contemplates the sale of the heavy truck business or that more narrowly addresses transfer of Plaintiffs' franchise relationship to another manufacturer." (Pls.'Opp'n Br. at 28.) While the Agreements, in fact, do not contain a specific provision dealing with the sale or transfer of Ford's heavy truck business, it does contain numerous termination provisions including a provision allowing Ford to terminate the Agreements at will provided they meet their termination obligations as set forth in the Agreements. Therefore, under the provisions of the Agreements, Ford could have terminated the Agreements at will and subsequently sold its assets to Freightliner. As noted above, Ford chose not to do so. To the extent that Ford breached the Agreements by ceasing to supply Plaintiffs with heavy trucks due to sale of the assets to Freightliner and received benefits from this sale without meeting its termination obligations, damages stemming from Plaintiffs breach of contract claim provide an adequate remedy. To the extent that Plaintiffs argue that Ford received some benefit from Freightliner not only for Ford's heavy truck assets, but also for the value of its dealer network, Plaintiff overlooks the fact that Ford did not, nor could, force Plaintiffs to accept the new Freightliner franchise agreement; any value of the dealer network was

contingent on dealers' voluntary agreements with Freightliner.

Plaintiffs have failed to explain how Ford received a benefit from Plaintiffs that resulted in an inequity to them separate from any remedy due as a result of Ford's breach of the Agreements. Plaintiffs do not cite to any case law in support of their position except one Eighth Circuit case stating the rule that where "an express contract does not fully address a subject, a court of equity may impose a remedy to further the ends of justice." Klein v. Arkoma Prod. Co., 73 F.3d 779, 786 (8th Cir. 1996) (citing to an Arkansas case). The Court finds that the Agreements governed the relationship between the franchise relationship between the parties and holds that the remedy at law as a result of the breach of contract claim is an adequate remedy under the facts of this case. Accordingly, Defendant's motion for summary judgment with respect to Plaintiffs' unjust enrichment claim is hereby GRANTED.

2. Accounting

Under Michigan law[7] a claim for an accounting also requires a court to employ its equitable powers. Continental Dev. Co., 112 F. Supp. 2d at 663. The plaintiff has the burden of proving that any legal remedy is inadequate. Id. Under the facts of this case and applying these principles, Plaintiffs have no right to an equitable accounting. Plaintiff's ability to bring a damage claim for breach of contract is a fully

[7] See footnote 5.

adequate remedy at law. Accordingly, Defendant's motion for summary judgment with respect to Plaintiffs' accounting claim is hereby GRANTED.

CONCLUSION

For all of the reasons set forth in the preceding pages, it is on this 7 day of December, 2005 hereby:

ORDERED that Defendant's motion for summary judgment [# 107] with respect to Plaintiffs' ADDCA claim is hereby GRANTED**;** and

IT IS FURTHER ORDERED that this Court will exercise supplemental jurisdiction over Plaintiffs' state law claims as they relate to the named Defendant; and

IT IS FURTHER ORDERED that Defendant's motion for summary judgment [# 107] with respect to Plaintiffs' breach of contract claim is hereby DENIED; and

IT IS FURTHER ORDERED that Plaintiffs' motion for summary judgment [# 137] with respect to its breach of contract claim is hereby GRANTED as to liability; and

IT IS FURTHER ORDERED that Defendant's motion for summary judgment [# 107] with respect to Plaintiffs' breach of an implied covenant of good faith and fair dealing is hereby GRANTED; and

IT IS FURTHER ORDERED that Defendant's motion for summary judgment [# 107] with respect to Plaintiffs' fraud claim is hereby GRANTED; and

IT IS FURTHER ORDERED that Defendant's motion for summary judgment [# 107] with respect to

Plaintiffs' unjust enrichment claim is hereby GRANTED; and

IT IS FURTHER ORDERED that Defendant's motion for summary judgment [# 107] with respect to Plaintiffs' accounting claim is hereby GRANTED.

/s/ Jose L. Linares

UNITED STATES DISTRICT JUDGE

DATED: December 7, 2005

APPENDIX C

NOT FOR PUBLICATION

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

BAYSHORE FORD TRUCK SALES, INC., et al.,	)	
Plaintiffs,	)	Civil Action No.: 99-CV-
v.	)	0741 (JLL)
	)	**OPINION**
FORD MOTOR COMPANY,	)	
Defendant.	)	

LINARES, District Judge

This matter comes before the Court on Plaintiffs' motion for partial summary judgment on behalf of the certified class, Ford's motion for summary judgment as to the class, and Ford's motion for summary judgment as to the claims of thirty-six class members.[1] The Court has considered the submissions

[1] Also pending before this Court, but not addressed in this Opinion, are a motion by Ford for decertification of the damages class, and several motions filed by both parties to strike the reports of experts.

in support of and in opposition to the motions and decides the matter without oral argument pursuant to Federal Rule of Civil Procedure 78. For the reasons set forth below, Plaintiffs' motion is granted, Ford's motion for summary judgment as to the class is denied, and Ford's motion for summary judgment as to the claims of thirty-six class members is granted.

I. BACKGROUND

The facts in this case have been more fully set forth in this Court's prior summary judgment and class certification opinions. Plaintiffs in this action were all dealers of Ford heavy trucks pursuant to Ford Heavy Duty Truck Sales and Service Agreements ("Agreements"). "The material terms of the Agreements as they relate to Ford's obligation to supply Company Products, including Ford heavy trucks, are substantially identical." (Stmt. Pursuant to L. Civ. R. 56.1 in Supp. of Pls.' Mot. for Partial Summ. J. on Behalf of Cert. Class [hereinafter "Pls.' Fact Stmt."] ¶ 1.) Company products was defined in the Agreements as "(1) new trucks and chassis of series 850 or higher designations and (2) parts and accessories therefor, as from time to time are offered for sale by the Company . . . ." (Def.'s Counter-Stmt. to Pls.' Stmt. of Undisputed Facts in Supp. of Their Mot. for Partial Summ. J. on Behalf of Cert. Class [hereinafter "Ford's Fact Counter-Stmt."] ¶ 4.) As this Court has previously held and as both parties agree, Michigan law applies to the interpretation of the Agreements. See Bayshore Ford Truck v. Ford Motor Co., No. 99-741, CM/ECF No. 146, at 11 (Dec. 7, 2005) (hereinafter "Dec. 7, 2005 Opinion").

In 2007 Ford chose to sell its heavy truck business to Freightliner/Sterling. Ford announced the sale to its heavy truck dealers on February 19, 1997. (Stmt. Of Mat'l Undisputed Facts [hereinafter "Ford Fact Stmt."] ¶ 10.) Ford received $300 million dollars for the sale. As a result of this sale, Ford stopped supplying heavy trucks to its dealers. Plaintiffs claim that, in ceasing to supply heavy trucks, Ford breached the Agreements. On December 7, 2005, this Court agreed with Plaintiffs and granted the named Plaintiffs' motion for summary judgment with regard to liability for its breach of contract claim. The Court held that "Ford's failure to supply heavy trucks to Plaintiffs, in the absence of termination by Ford in accordance with the terms of the contract, was a breach of the Agreements." (Dec. 7, 2005 Opinion, at 18.) The court stated that, "to accept Ford's interpretation of the [Agreement], . . . would effectively allow Ford to completely change the nature and purpose of the contract unilaterally and without consequence despite express provisions to the contrary." (Id.)

A class of plaintiffs was subsequently certified on September 8, 2006. Plaintiffs' now seek to have the December 7, 2005 summary judgment breach of contract ruling applied to the class as a whole. Ford opposes this on two primary grounds, argued in separate motions: (1) that this Court's original breach of contract decision was incorrect, and (2) that there are individual issues related to thirty six class members which makes summary judgment against them appropriate. With respect to the first ground, Ford also has moved for summary judgment as to the class, seeking to overturn this Court's original holding. In its class summary judgment motion, Ford

also seeks summary judgment with respect to the class as to damages.

II. LEGAL STANDARD

A court shall grant summary judgment under Rule 59(c) of the Federal Rules of Civil Procedure "if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). The moving party first must show that no genuine issue of material fact exists. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). The burden then shifts to the non-moving party to present evidence that a genuine issue of material fact compels a trial. *Id.* at 324.

III. DISCUSSION

The Court addresses the summary judgment motions separately–one set which deals with application of this Court's breach of contract summary judgment holding to the class and the

other motion which deals with the individual issues related to thirty six members of the class. In doing so, the Court notes that reference to the "class" in the discussion of the first set of motions includes only those dealers who are held in this Opinion to be class members. The Court recognizes that Ford objects to thirty six dealers as class members, and, to the extent that this Court rules below that such individual dealers are not appropriate class members, then its decision, applying the December 7,

2005 summary judgment decision to the class, does not apply to them.

A. Summary Judgment on Behalf of the Class

Plaintiffs' argue that this Court's December 7, 2005 summary judgment opinion, holding that Ford had breached its contract, should be applied to the class as a whole. It is "undisputed that each member of the proposed class had substantially similar [Agreements]." (Br. in Supp. of Pls.' Mot. for Partial Summ. J. on Behalf of Cert. Class [hereinafter "Pls.' Summ. J. Br."], at 2.) Additionally, both "parties agree that the question of breach is a common issue shared by each member of the class and that this Court can and should decide it on summary judgment." (Def. Ford Motor Co.'s Br. in Opp'n to Pls.' Mot. for Partial Summ. J. on Behalf of Cert. Class [hereinafter "Ford's Opp'n Br."], at 3; see also Reply in Supp. of Def. Ford Motor Co.'s Mot. for Summ. J. as to the Class [hereinafter "Ford's Reply"], at 14 ("Ford believed then and continues to believe that all former heavy truck dealers' claims of breach should be resolved consistently.").)

1. Applying this Court's December 7, 2005 Breach of Contract Decision to the Class

In a June 10, 2007 letter to this Court, Ford stated:

> **Ford's Recommendation on Summary Judgment Briefing**

> Now that a class has been certified, Ford believes that the most efficient course of action would be for the Court to set a briefing schedule for both parties to move for summary judgment with regard to the class. In doing so, Ford would not oppose plaintiffs simply re-filing the summary judgment motion (and the related reply brief) that was previously denied without prejudice. Moreover, *except for any unique issues related to individual class members that were not litigated when the three named plaintiffs moved for summary judgment, Ford would not oppose the Court's December 7, 2005 summary judgment rulings on liability be deemed applicable to all class members as long as all appellate rights are preserved*.

(Ltr. from Ford's counsel, Dennis LaFiura, dated June 11, 2007, at 2 (italics emphasis added, other emphasis in original).) In its current briefing, Ford references another prior letter to the Court in which it stated that it "clearly retains the right to raise issues related to dealers that have now become plaintiffs as a result of class certification or that arise in discovery, *issues that were not and could not have been presented before that time*." (Ford's Reply, at 14 15 (emphasis added).)

Despite such representations to the Court, with the exception of its argument that summary judgment should be granted against the class as to damages (discussed below), it is clear that Ford's opposition to Plaintiffs' partial summary judgment motion and its own class summary judgment motion

papers, totaling sixty three pages, seeks nothing more than an opportunity to re-litigate issues that were or could have been presented to this Court as part of the original summary judgment cross motions in 2005. For example, Ford states: (1) "[Ford] urge[s] this Court to give [its December 7, 2005 summary judgment] ruling a second look before applying it to over a hundred other plaintiffs because, with respect, it makes no sense," (Ford's Opp'n Br., at 1); (2) "[W]ith respect, Ford submits that the Court's prior ruling was erroneous under settled law, and the Court is by no means required to grant summary judgment for the class based on an earlier incorrect ruling," (Ford's Opp'n Br., at 5); and (3) "[T]his Court could still rule as the law requires to avoid trial and likely reversal on appeal," (Ford's Reply, at 13).

Apparently Ford believes that it has a right to reconsideration of a prior Court order at any time of its choosing. In its present briefing it notes:

> [A]s Ford [previously] explained to the Court . . ., it has always maintained (with respect) that the Court's breach-of-contract ruling in its Summary Judgment Order "was wrong," and it has always made clear that, because of its belief that the Court's original contract ruling was wrong, Ford "may well seek reconsideration at some point."

(Id., at 15 (quoting from a letter from Ford's Counsel, Mr. LaFiura, to Magistrate Judge Cecchi dated February 1, 2008, at page 2).) Ford further states that Magistrate Judge Cecchi "[s]id[ed] with Ford." (Id.) Magistrate Judge Cecchi agreed with Ford that

limited discovery should take place and that, based on the findings of that discovery, Ford could submit a summary judgment motion addressing individual issues uncovered in discovery. (See CM/ECF No. 229, Letter Opinion & Order, at 3 (July 14, 2008).) She did not permit Ford to re-litigate the previously decided issues; as noted above, Ford had not made any such request, specifically representing that it would not seek to do so.

"Reconsideration is an extraordinary remedy" and should be "granted 'very sparingly.'" See L.Civ.R. 7.1(i) cmt.6(d); see also Fellenz v. Lombard Investment Corp., Nos. 04-3993, 04-5768, 04-3992, 04-6105, 2005 WL 3104145, at *1 (D.N.J. Oct. 18, 2005). A party seeking reconsideration shall file its motion within ten business days after the entry of the order on the original motion. L. Civ. R. 7.1(i). A motion for reconsideration must "set[] forth concisely the matter or controlling decisions which the party believes the Judge or Magistrate Judge has overlooked." Id. When the assertion is that the Court overlooked something, the Court must have overlooked "some dispositive factual or legal matter that was presented to it." McGovern v. City of Jersey, No. 98-5186, 2008 WL 58820, at *2 (D.N.J. Jan. 2, 2008).

As noted above, Ford does not dispute that any summary judgment ruling should be applied across the class–the issue on which Plaintiffs' presently move. Instead, except with regard to its damages argument, it seeks reconsideration of this Court's original summary judgment decision almost four years after the decision and after a class has been

certified. It goes without saying that such a request is untimely.

Even if not untimely, Ford's opposition and its own motion do not set forth any facts or controlling law that were presented to but overlooked by this Court. Instead, it presents several arguments for why, in its view, the Court was wrong. First, Ford states that "Plaintiffs cannot dispute that when presented with the very same theory of breach based on the very same contracts and the very same Freightliner sale at issue here, this Court found no breach." (Ford's Reply, at 1 (citing Fette Ford, Inc. v. Ford Motor Co., Civil Action No. 97-4311 (D.N.J. Sept. 15, 2000) (Lifland, J.) as "this Court").) It further states that "contrary to the holding in [Fette], the Court upheld the named plaintiffs' breach-of-contract claim." (Mem. of Supp. of Def. Ford

Motor Co.'s Mot. for Summ. J. as to the Class [hereinafter "Ford's Summ. J. Br."], at 7.) Ford states: "[I]t is difficult to conceive of a precedent more clearly on point than [Fette]," and "[u]nless this Court adheres to this District's prior ruling in [Fette], the United States District Court for the District of New Jersey will effectively be addressing the exactly same dispute in exactly opposite ways." (Ford's Reply, at 2, 4-5.) Ford further argues: "With respect, that is exactly the sort of disparate outcome that the doctrine of stare decisis and ordinary respect for the rulings of other judges is aimed at preventing." (Id. at 5.) Ford continues: "Of course, if this Court adheres to its ruling as to the named plaintiffs, then [an] absurd disparity will exit between two rulings in this very Court, this one and [Fette]." (Id.)

One would think such wild mis-characterizations of our judicial system mere hyperbole, but given that Ford makes similar statements repeatedly throughout its voluminous briefing on the class summary judgment issue, the Court assumes Ford is serious. However, the Court doubts that Ford has ever made such an argument in a case where its opponent relied on a factually similar district court opinion with which it disagreed, conceding an issue to avoid disparities in district court rulings.

In fact, neither other district court opinions nor *non-precedential* Third Circuit opinions are binding on this Court. Black's Law Dictionary defines "persuasive precedent" as "precedent that is not binding on a court, but that is entitled to respect and careful consideration; [f]or example, if the case was decided in a neighboring jurisdiction, the court might evaluate the earlier court's reasoning without being bound to decide the same way." Black's Law Dictionary 1296 (9th ed. 2009). Thus, depending on the similarity of the facts, the law applied, and the analysis engaged in by the court, be it thorough or merely cursory, this Court may be more or less persuaded by a non-binding opinion of another court. Our system of justice does not find conflicting district court positions or even circuit splits an "absurd disparity" that is intolerable. Instead, such disagreements or errors are addressed and corrected, if necessary, through the appellate process. This Court clearly considered the Fette decision in its original summary judgment opinion. It did not find it persuasive, and it will not revisit that decision here.

Ford also argues that this Court improperly held that Ford had "a legal duty to unilaterally terminate

its heavy truck dealers," and that such a holding "makes no sense." (Ford's Summ. J. Br., at 10; Ford's Opp'n Br., at 1.) Ford mis-characterizes this Court's holding. Ford had agreements with its dealers involving the sale of heavy trucks. For business reasons, Ford decided that it wanted to sell its heavy truck business. It made $300 million dollars from the sale. In seeking to exit the heavy truck business, Ford had options, one of which, under the Agreements, was termination. In other words, had it terminated the Agreements, it would have had no obligation to continue to supply heavy trucks to its dealers. Ford argues that, in some situations, termination of the Agreements did not make sense for either Ford or the dealer. In such a case, Ford was free to work out a mutually agreed new arrangement. This Court's holding was merely that the course of action Ford chose–to simply stop selling all heavy trucks to its dealers–was a breach of the Agreements. As Plaintiffs state, Ford was not free to stop supplying heavy trucks, while "retain[ing] the benefit of the contract and avoid[ing] paying termination costs." (Pls.' Fact Stmt. ¶ 48.)

Next, Ford argues that the plain language of the contract does not support a finding of breach. This is the exact issue previously litigated and will not be revisited here.

Finally, Ford also argues that "new facts have emerged that contradict the Court's original ruling." (Ford's Opp'n Br., at 5.) These alleged new facts are facts related to the thirty six individual dealers obtained through damages discovery and the fact that Ford continued to supply smaller trucks to its dealers and that the dealers continued to receive

benefits from their Agreements through warranty work. (Id. at 16-17.) With respect to the individual arguments, those are addressed separately and are not relevant to Ford's argument that the original decision was incorrect. With respect to its argument regarding the supply of small trucks, a relationship *not covered by the Agreements at issue* and an argument not originally presented, or any continued benefits the dealers received under the Agreements, these facts can hardly be considered newly discovered. Surely Ford knew what it was supplying to its dealers at the time of the original motions and the details of any ongoing relationships. For the first time now it wishes to argue that the Court should have looked at the entire Ford relationship with its dealers not simply the relationship governed by the Agreements at issue. This issue could have been presented before, it was not, and this Court will not entertain it here at this stage of the litigation. Additionally, its allegations regarding benefits the dealers continued to receive are more appropriately made in connection with its damages arguments.

For these reasons and because Ford agrees that "the question of breach is a common issue shared by each member of the class," the Court grants Plaintiffs' motion for partial summary judgment and denies Ford's motion for summary judgment as to the class with regard to liability. This Court's December 7, 2005 Opinion finding in favor of the named Plaintiffs as to liability on its breach of contract claim shall be applied to all class members.

2. Summary Judgment on Damages

Ford argues that "[e]ven if the Court holds that Ford's exit from the heavy truck business constituted a breach of the Heavy Truck Agreements, plaintiffs' inability to offer admissible evidence that class members sustained *any* damages as a result of the so-called breach renders summary judgment on damages appropriate." (Ford's Summ. J. Br., at 23 (emphasis added).) The evidence of damages in this case consists of expert reports as well as damages discovery, as noted above and discussed in Ford's motion to decertify the damages class. In its motion for decertification, Ford states that the report of Dr. Manuel, Plaintiffs' expert, notes that "some [Plaintiffs] benefited [sic] and others allegedly were harmed." (Mem. in Supp. of Def. Ford Motor Co.'s Mot. to Decertify Damages Class [hereinafter "Ford's Decert. Mot."], at 3.) Thus, Ford recognizes that Dr. Manuel found that at least some dealers suffered damages. In fact, Ford puts significant emphasis in arguing for decertification of the damages class on its argument that there are class conflicts due to evidence showing that some Plaintiffs benefitted from Ford's sale to Freightliner while others were allegedly harmed. Ford's conflict argument in its decertification motion is not based solely on Dr. Manuel's report, but also on information obtained through the damages discovery. (See id. at 26.) As pointed out by Ford, Thomas Reynolds testified that Peach State's truck dealership lost profits due to the transition to Freightliner. (Id. (citing Cert. of Erica M. Knievel, Esq. in Supp. of Def. Ford Motor Co.'s Mot. to Decert. Damages Class, Ex. 17, Tr. 221:4-8).) Therefore, this Court finds that there are genuine

issues of material fact as to the amount of damages suffered by plaintiffs as a result of Ford's breach. Ford's motion for summary judgment as to the class on the issue of damages is denied. The real issue with respect to damages, as addressed by Ford's decertification motion, is whether the damage issue should be resolved on a class-wide or individual basis, an issue that goes beyond Ford's argument in its summary judgment motion.

B. Thirty Six Dealers Individually Challenged by Ford

Plaintiffs agree that six of the thirty six dealers challenged by Ford should be dismissed. (Pls.' Counter-Stmt. to Ford's L. Civil R. 56.1 Stmt. in Supp. of its Mot. for Summ. J. as to Claims of Thirty-Six Class Members [hereinafter "Pls.' Fact Counter-Stmt."], at ¶ 7.) These dealers are: Diesel Truck Sales, Inc., Grappone Ford Truck Center, GSTC, Riverside Truck Center, TCFS, and Max Larsen, Inc. (Id.) Therefore, summary judgment in favor of Ford is granted for these dealers' claims.

Of the remaining thirty dealers, Ford argues that twenty nine should be dismissed because they previously released Ford from any claims. Twenty eight of these dealers resigned their Ford heavy truck franchises and "elected to demand its termination benefits or, in some cases, to assign them to a successor dealer, in written resignation letters to Ford, which Ford accepted." (Stmt. of Mat'l Undisputed Facts [hereinafter "Ford Fact Stmt. as to Thirty-Six Class Members"], at ¶ 15.) As part of this process, these dealers executed general releases. These dealers are referred to herein as the

"Resigning Dealers."[2] The other dealer who executed a release, which Ford argues bars any claim here, is W.W. Wallwork, Inc. ("Wallwork"). Wallwork entered into a settlement agreement with Ford in connection with a dispute separate from the instant action. (Id. at ¶ 26.) All of the releases at issue for these twenty-nine dealers were executed after Ford's announcement of the sale of its heavy truck business in February 1997 but before September 8, 2006, when the class in this case was certified. Finally, Ford argues that Sooner State, the last dealer at issue in this motion, is barred from bringing a claim because it did not have a heavy truck Agreement until after the breach at issue occurred.

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[2] The Resigning Dealers referred to here are: (1) Bayou City Ford Truck Sales, Inc.; (2) Bob Rice Ford, Inc.; (3) Crosstown Ford Sales, Inc.; (4) Dave Gill Trucks, Inc.; (5) Duthler Ford Truck, Inc.; (6) Eagle Truck Sales of Wisconsin; (7) East Bay Truck Center; (8) Holman Commercial Truck; (9) Lacy Motors, Inc.; (10) Lake Erie Ford Truck Center; (11) Lakeland Truck Center, Inc.; (12) Long Lewis of Cullman, Inc.; (13) Martin Automotive Group, Inc.; (14) Mike Pruitt Ford; (15) National Car Sales, Inc.; (16) Northwest Truck and Trailer Sales, Inc.; (17) O'Connor Truck Sales, Inc.; (18) Roberts Ford Trucks; (19) Rock River Ford, Inc.; (20) Ron Blackwell Ford, Inc.; (21) Ruxer Ford Lincoln Mercury, Inc.; (22) Sacramento Valley Ford Truck Sales, Inc.; (23) Sea Tac Ford Truck Sales, Inc.; (24) Southwest Truck Sales, Inc.; (25) Tar Heel Ford Truck Sales, Inc.; (26) Whiteford Ford Trucks, Inc.; (27) Whiteford Truck Center FW, Inc.; and (28) Wolf Motor Company. (See Ford Fact Stmt. ¶ 16; Cert. of Erica M. Knievel, Esq. in Supp. of Def. Ford Motor Co.'s Mot. for Summ. J. as to the Claims of Thirty-Six Class Members [hereinafter "Knievel Cert. as to Thirty-Six Class Members"], Exs. 47-77.)

1. Resigning Dealers

The Agreements for all of the Resigning Dealers contained the following provision:

> TERMINATION BENEFITS FULL COMPENSATION; GENERAL RELEASE
>
> 23. In the event of termination or nonrenewal of this agreement by the Company, the Company**,** within thirty (30) days after the effective date thereof, shall submit to the Dealer (1) a written tender of the benefits provided for in paragraph 21 (and in paragraph 22 where applicable) and (2) a form for the Dealer to use to elect either to reject all of such benefits or to accept one or more of them as full and complete compensation for such nonrenewal or termination. The Dealer shall have thirty (30) days after receipt of such form to return the same to the Company evidencing his election. If the Dealer fails to return the form stating such election within such thirty (30) days, the Dealer shall be deemed to have elected to accept such benefits. *Upon the Dealer's election to accept any of such benefits, or upon the Dealer's demand of any such benefits upon any termination or nonrenewal by the Dealer, the Company shall be released from any and all other liability to the Dealer with respect to all relationships and actions between the Dealer and the Company, however claimed to arise except any liability that the Company may have under subparagraph 19(f) and said*

> *paragraphs 21 and 22, and except for such amounts as the Company may have agreed in writing to pay to the Dealer.* Simultaneously with the receipt of any benefits so elected or demanded, the Dealer shall execute and deliver to the Company a general release with exceptions, as above described, satisfactory to the company.

(Knievel Cert. as to Thirty-Six Class Members, Ex. 7., ¶ 23 (emphasis added).) The letters for all of the Resigning Dealers terminating their Agreements with Ford stated that the resignation was being conducted pursuant to the provisions of the Agreements. (See id., Exs. 47-77.) All but two, the letters from Ruxer Ford and Wolf Motor, specifically reference Paragraph 23 of the Agreements. (Id.) For example, the resignation letter for Bayou City states:

> [I]n accordance with Paragraph 23 of the Ford Sales and Service Agreement, we hereby release Ford from all other liability to us, except for such amounts as Ford may have agreed in writing to pay us, and will furnish Ford a satisfactory general release.

(Id., Ex. 47.) The other letters specifically referencing Paragraph 23 are substantially similar if not identical. (See Exs. 48-77, except the letters for Ruxer & Wolf.) All of the Resigning Dealers thereafter executed general releases.

Ford argues that "when the Resigning Dealers 'demand[ed]' in their written resignation letters that

Ford give them the termination benefits outlined in their Heavy Truck Agreements, or allow them to assign those same termination benefits to a successor dealer, this unambiguous release language in paragraph 23 was automatically triggered, and 'any and all' of the Dealers' claims of liability against Ford were released." (Mem. in Supp. of Def. Ford Motor Co.'s Mot. for Summ. J. as to the Claims of Thirty-Six Class Members [hereinafter "Ford Summ. J. Br. For Thirty-Six Class Members"], at 11.) Plaintiffs', in their 42 page opposition to Ford's motion, do not address this argument that Paragraph 23 bars the Resigning Dealers claims. In fact, they do not even mention Paragraph 23 in their brief. Needless to say, they also provided no law supporting a position that Paragraph 23 is unenforceable or supporting an alternative interpretation of this provision than the one argued for by Ford. In their counter-statement of facts, Plaintiffs simply state that "Paragraph 23 of the Heavy Truck Agreements . . . speaks for itself." (Pls.' Fact Counter-Stmt. ¶ 12.) With reference to the resignation letters, Plaintiffs again simply state "that the written resignation letters . . . speak for themselves." (Id. at ¶ 16.)

Instead of opposing Ford's primary argument, Plaintiffs argue that the general releases executed after resignation of the Agreements by the dealers are ambiguous and were not intended to release Ford from the claims presented in this class action. They also argue that the general releases violate Rule 23 of the Federal Rules of Civil Procedure.

As noted above, Michigan law applies to the interpretation of the Agreements. Under Michigan law, "[i]f the language of a release is clear and

unambiguous, the intent of the parties is ascertained from the plain and ordinary meaning of the language." Batshon v. Mar-Que Gen. Contractors, Inc., 624 N.W.2d 903, 905 n.4 (Mich. 2001). "[A] contractual provision is ambiguous if the language of a written contract is subject to two or more reasonable interpretations or is inconsistent on its face." DeValk Lincoln Mercury, Inc. v. Ford Motor Co., 811 F.2d 326, 330 (7th Cir. 1987) (applying Michigan law) (internal quotations omitted). Ford

argues that Paragraph 23 is unambiguous and bars the Resigning Dealers' claims.

In DeValk, the Seventh Circuit was faced with the same question that this Court faces: whether Paragraph 23 is ambiguous and whether it bars future claims relating to the Agreement. See id. The plaintiffs in DeValk "contend[ed] that the requirement of a written general release by the dealer at the time benefits are received modifies the earlier nebulous release granted by the dealer at the time benefits are demanded[;] [i]f the initial release is automatic and absolutely effective at the time the dealer makes the demand, plaintiffs ask, why does paragraph 23 discuss the requirement of a written release in the very next sentence?" Id. On the other hand, like Ford does here, the defendants in that case argued that Paragraph 23 is unambiguous and that this "initial release is controlling as to any and all liability on Ford's part," being "absolute in its effect." Id. at 331. They further argued that "[a]ny subsequent written release executed by the dealer merely memorializes the initial release and reminds the parties of their respective obligations." Id. The Seventh Circuit agreed with the defendants, finding

that "when the dealer . . . demands the benefits of returning inventory, 'the Company shall be released from any and all other liability to the Dealer.'" Id. (quoting Paragraph 23). The DeValk court stated: "We can scarcely conceive of a more clearly written release of liability[;] [t]he subsequent requirement for a written document simply allows the parties to memorialize an automatic release already in effect." Id.

This Court agrees with the DeValk court. Contrary to Plaintiffs' framing of the issue, the issue here does not involve the conditions surrounding the actual execution of the general releases; those releases were merely memorializing an earlier agreement. All of the Resigning Dealers entered into Agreements with Ford, agreeing to a contract that included Paragraph 23. As Ford states in its brief: "From the very moment these Dealers first signed their Heavy Truck Agreements, they knew that a general release in Ford's favor would result if they resigned and sought termination benefits." (Reply in Supp. of Def. Ford Motor Co.'s Mot. for Summ. J. as to the Claims of Thirty-Six Class Members [hereinafter "Ford's Reply as to Thirty-Six Class Members"], at 1.) The Resigning Dealers decided to resign their heavy truck dealerships and accept or assign the contractual termination benefits. In exchange for these benefits, as they agreed at the time they entered the Agreements with Ford and as noted in almost every resignation letter, they provided Ford with a general release in accordance with Paragraph 23. Therefore, as Plaintiffs state, Paragraph 23 and the resignation letters speak for themselves–they clearly provide that upon acceptance of the termination benefits under the

Agreements, they released Ford from any and all claims related to the heavy truck Agreements.

Plaintiffs' arguments regarding Rule 23 do not change this conclusion. Plaintiffs argue that Ford improperly obtained the releases via unsupervised, unilateral communication with the putative class members, in order to diminish the size of the class and undermine the purposes behind the class action rule. Plaintiffs also argue that while Ford and the Resigning Dealers were in an ongoing business relationship, Ford's unilateral communication scheme was both abusive of Rule 23 and coercive.

Plaintiffs argument again focuses only on the timing of the execution of the general releases, ignoring that the subject of a release in exchange for termination benefits was agreed to well before the current dispute arose. Additionally, it is undisputed that the resigning dealers resigned before the class action was certified. (Cert. of Erica M. Knievel, Esq. in Supp. of Def. Ford Motor Co.'s Reply in Supp. of its Mot. for Summ. J. as to the Claims of Thirty-Six Class Members, Ex. 1, at 7.; see also Ford's Fact Stmt. ¶ 8.)

"Because the advantage of class action litigation comes at the cost of binding absent class members through the res judicata effect of litigation over which they lack control, the district courts must closely monitor the notice process and take steps to safeguard class members from unauthorized [and] misleading communications from the parties or their counsel." In re Cmty. Bank of N. Va. & Guar. Nat'l Bank of Tallahassee Second Mortg. Loan Litig., 418 F.3d 277, 310 (3d Cir. 2005) (internal quotation omitted, alteration in original). Thus, "Rule 23(d)

provides: 'In the conduct of actions to which this rule applied, the court may make appropriate orders: . . . (3) imposing conditions on the representative parties or on intervenors . . . [and] (5) dealing with similar procedural matters.'" Id. (quoting Fed. R. Civ. P. 23(d)). While Rule 23 deals with class members, courts have held that it also applies to contacts with putative class members, allowing courts to "issue Rule 23 orders to prevent abuses of the class action *process*." See Jenifer v. Del. Solid Waste Auth., Nos. 98-270/98-565, 1999 U.S. Dist. LEXIS 2542, at *8-9 (D. Del. Feb. 25, 1999) (emphasis added) (citing In re School Asbestos Litig., 842 F.2d 671, 680 (3d Cir. 1988)). But, "before a class action is certified, it will ordinarily not be deemed inappropriate for a defendant to seek to settle individual claims." Id. at *10. Thus, the situation presented here where the releases were negotiated as part of the original Agreements and executed prior to class certification are distinguishable from the cases relied on by Plaintiffs. See, e.g., Kleiner v. First Nat'l Bank of Atlanta, 751 F.2d 1193, 1197-98 (7th Cir. 1985) (involving communications with *class members* trying to persuade them from withdrawing from the class).

For the foregoing reasons, this Court finds that Paragraph 23 of the Agreements in which the Resigning Dealers agreed to release Ford from all claims related to the Agreements in the event they accepted or demanded termination benefits, is enforceable and bars the claims of the twenty-eight Resigning Dealers. Summary judgment in favor of Ford for these dealers is granted.

2. W.W. Wallwork, Inc.

Wallwork, Inc. entered into a settlement agreement with Ford in connection with a dispute separate from the instant action. (Ford's Fact Stmt. as to Thirty-Six Class Members ¶ 26.) Plaintiffs' assert that "[i]t is undisputed that the releases were executed in connection with litigation against Ford over Wallwork's car franchise, and had no reference to its heavy truck franchise." (Br. in Opp'n to Def. Ford Motor Co.'s Mot. for Summ. J. as to the Claims of Thirty- Six Class Members, at 43.) In fact the Wallwork settlement agreement contained numerous references to the Interim Ford Heavy-Duty Truck Sale and Service Agreement executed between Ford and Wallwork. (See, e.g., Knievel Cert. as to Thirty Six Class Members, Ex. 45, at 1.) Additionally, Paragraph 5 provides: "Within 30 days of the execution of this Agreement, Ford shall withdraw its Notice of Non-Renewal of Wallwork's Heavy-Duty Truck Sales and Service Agreement." (Id. ¶ 5.) The settlement agreement also contained the following release provision:

> The Wallwork Parties release and forever discharge Ford . . . from all claims, actions, causes of actions, rights, or obligations, whether known or unknown, whether contingent or liquidated, of every kind, nature and description which arise directly or indirectly from any act or omission, or alleged act or omission, by each or any of the Ford Released Parties that occurred on or prior to the date of this Agreement which the Wallwork Parties . . . has, had or may have against [Ford], including, without limitation, all allegations made or which could have been

> made in the Action and any and all liability, actions, claims, demands, causes of action, or suits arising out of, or resulting from, or in any manner pertaining to, damages, loss of enjoyment, loss of services, loss of business, loss of business opportunities, loss of profits, contractual rights, torts and any and all claims which might hereinafter result to the Wallwork Parties, arising out of or in any way connected with the Wallwork Parties' operation of the Ford dealership and other operations in Fargo, North Dakota, provided that (i) third-party claims brought for personal injury, product liability, breach of warranty; (ii) the obligations set forth under paragraphs 19, 21 and 23 of Wallwork's Ford Sales and Service Agreement for car and light truck; and (iii) Ford's obligation to make customary payments or grant customary credits for transactions between Ford and Wallwork in the ordinary course of business, are not released.

(Id. at ¶ 1.) The settlement agreement provides that it "shall be governed by and construed under the laws of the State of North Dakota." (Id. at ¶20.)

Under North Dakota law, "[i]f [a] contract is unambiguous, the intentions of the parties are to be ascertained from the contract alone." First Nat'l Bank & Trust Co. v. Scherr, 435 N.W.2d 704, 706 (N.D. 1989). Ambiguity exists "when a rational argument can be made for different positions about its meaning." Id. (Internal quotations omitted). Here, the settlement agreement refers both to Wallwork's

Agreement with Ford authorizing it to sell and service cars and light trucks as well as the Agreement to sell and service Ford heavy trucks. (Knievel Cert. as to Thirty-Six Class Members, Ex. 45, at 1.) And, the settlement agreement clearly indicates that Wallwork is releasing Ford from any and all past, present, or future claims "in any way connected with the Wallwork Parties' operation of the Ford dealership and their other operations in Fargo, North Dakota," except for the three specifically enumerated exceptions. The Court finds that this release is unambiguous and bars Wallwork's present claims regarding its heavy truck dealership. Therefore, the Court grants Ford's summary judgment motion with respect to Wallwork.

3. Sooner State Ford

It is undisputed that Sooner State Ford purchased its heavy truck franchise from a dealership wholly owned by Ford and entered into its own Heavy Truck Agreement with Ford on March 20, 1998. (Ford's Fact Stmt. ¶ 67.) It is also undisputed that, while Sooner State later sold its dealership and resigned its Heavy Truck Agreement in 2002, it did not execute a general release in favor of Ford. (Id. at ¶ 68.) Indeed, Ford does not argue that Sooner State's claims are barred due to execution of a release. (Ford's Reply as to Thirty-Six Class Members, at 20.) In moving for summary judgment, Ford argues that Sooner State Ford does not have a breach-of-contract claim because it did not hold a heavy truck Agreement at the time of the breach in this case. Again, Plaintiffs' opposition completely ignores Ford's argument. Instead, Plaintiffs'

opposition centers on its argument that a release does not bar Sooner's claim–an argument that

Ford did not make.

In the statement of facts submitted with their summary judgment motions, Plaintiffs state: "Members of the certified class of Ford Heavy Truck dealers all held Ford Heavy Duty Truck Sales and Service Agreements ("Agreements") in December 1997 and they all subsequently signed a franchise agreement with Freightliner/Sterling." (Pls.' Fact Stmt. ¶ 1.) A dealer who undisputedly did not hold an Agreement in 1997 is not covered by Plaintiffs' own statement. The Court is not clear why Ford and Sooner would enter a Heavy Truck Agreement in 1998, after Ford ceased producing heavy trucks, but such a question is beyond the scope of the present litigation. Therefore, summary judgment in favor of Ford with respect to Sooner is granted. The Court expresses no opinion on whether Sooner has other claims against Ford, outside those covered by this class action.

IV. CONCLUSION

For the foregoing reasons, this Court grants Plaintiffs' motion for partial summary judgment on behalf of the class, denies Ford's motion for summary judgment as to the class, and grants Ford's motion for summary judgment with respect to the thirty six individual dealers. These motions resolve all issues of liability in this case. An appropriate Order accompanies this Opinion.

DATED: November 16, 2009

/s/ Jose L. Linares
JOSE L. LINARES
UNITED STATES
DISTRICT JUDGE

APPENDIX D

NOT FOR PUBLICATION

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

BAYSHORE FORD TRUCK SALES, INC., et al.,	)	
Plaintiffs,	)	Civil Action No. 99-CV-
v.	)	0741 (JLL)
	)	**OPINION**
FORD MOTOR COMPANY, Defendant.	)	

LINARES, District Judge

This matter comes before the Court by way of Plaintiffs' motions to alter judgment pursuant to Federal Rule of Civil Procedure 59(f) or, in the alternative, for relief from judgment pursuant to Federal Rule of Civil Procedure 60. The Court has considered the submissions made in support of and in opposition to Plaintiffs' motions and decides this matter without oral argument pursuant to Federal Rule of Civil Procedure 78. For the reasons set forth below, Plaintiffs' motions are denied.

I. BACKGROUND

As the Court writes exclusively for the parties, only those facts germane to Plaintiffs' pending motions are set forth herein.

On December 8, 2005, this Court granted summary judgment as to Plaintiffs' breach of contract claim in favor of Plaintiffs. The Court subsequently held a trial as to eleven bellwether Plaintiffs' entitlement to damages between May 29 and June 26, 2012. The jury returned a verdict awarding damages to each of the eleven bellwether Plaintiffs on June 26, 2012.

On September 25, 2012, Defendant filed a motion for judgment as a matter of law which this Court denied on November 21, 2012.

Defendant filed a timely appeal on November 29, 2012. On August 26, 2013, the Third Circuit reversed this Court's grant of summary judgment in favor of Plaintiffs, with instructions to enter judgment on Plaintiffs' breach of contract claim in Defendant's favor. On September 9, 2013, Plaintiffs informed the Court that they filed a Third Circuit petition for a panel rehearing and for a rehearing *en banc*. Pursuant to Federal Rule of Appellate Procedure 41 (d)(1), the Third Circuit's mandate to this Court was stayed "until disposition of [Plaintiffs'] petition" for a panel rehearing and for a rehearing *en banc*. Plaintiffs notified the Court that the Third Circuit rejected their petition in its entirety on September 25, 2013. Having seen no reason for further delay in satisfying the Third Circuit's mandate, this Court entered judgment on Plaintiff's breach of contract claim in Defendant's favor on September 27, 2013.

II. LEGAL STANDARDS

A. Motion to Alter Judgment Pursuant to Federal Rule of Civil Procedure 59(e)

A Rule 59(e) motion to alter judgment is "a device to relitigate the original issue decided by the district court, and [it is] used to allege legal error." *United States v. Fiorelli*, 337 F.3d 282, 288 (3d Cir. 2003). "To prevail on a Rule 59(e) motion, the moving party must show one of the following: (1) an intervening change in the controlling law; (2) the availability of new evidence that was not available when the court issued its order; or (3) the need to correct a clear error of law or fact or to prevent manifest injustice." *Erwin v. Wailer Capital Partners, LLC*, No. 10-3283, 2012 U.S. Dist. LEXIS 38142, at *3 (D.N.J. Mar. 20, 2012) (citing *Max's Seafood Cafe V. Quinteros*, 176 F.3d 669, 677 (3d Cir. 1999)).

B. Motion for Relief from Judgment Pursuant to Federal Rule of Civil Procedure 60

In relevant part, Rule 60 states that "[o]n motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; . . . (4) the judgment is void; or (6) any other reason that justifies relief. The Third Circuit has "cautioned that relief from a judgment under Rule 60 should be granted only in exceptional circumstances." *Boughner v. Sec of Health, Educ. & Welfare*, 572 F.2d 976, 977

(1978). Furthermore, "[t]he party seeking relief has the burden of showing that absent such relief, an 'extreme' and 'unexpected' hardship will result. *Id*. at 978.

III. DISCUSSION

The crux of Plaintiffs' argument as to why they are entitled to an alteration of judgment or relief from judgment is: (I)the Third Circuit's mandate applies only to eleven bellwether Plaintiffs, and cannot apply to the remaining sixty-three Plaintiffs as the Third Circuit lacked appellate jurisdiction over them, and (2) the Third Circuit committed errors of fact and law in reaching its decision. Neither of these arguments have merit.

The mandate rule "binds every court to honor rulings in the case by superior courts." *Casey v. Planned Parenthood*, 14 F.3d 848, 856 (3d Cir. 1994). Under the mandate rule, "a trial court must comply strictly with the mandate directed to it by the reviewing court." *Ratay v. Lincoln Vat'l Li/h fns. Co.*, 405 F.2d 286, 288 (3d Cir. 1968). The U.S. Supreme court has "consistently held that an inferior court has no power or authority to deviate from the mandate issued by an appellate court." *Casey*, 14 F.3d at 856 (quoting *Briggs v. Pennsylvania R. Co.*, 334 U.S. 304, 306 (1948)). The reason for the mandate rule is to avoid "anarchy... within the federal judicial system." *See Hutto v. Davis*, 454 U.S. 370, 375 (1982). In complying with the mandate of a reviewing court, "[a] trial court must implement both the letter and spirit of the mandate, taking into account the appellate court's opinion and the circumstances it embraces."

Blasband v. Rales, 979 F.2d 324, 327 (3d Cir. 1992).

In this case, the 'Third Circuit specifically held that "[Defendant] did not breach the Sales and Service Agreement," and directed this Court to enter judgment in Defendant's favor. (Third Circuit Op. at 7. 9.) As the Third Circuit plainly held that Defendant did not breach the Sales and Service agreement, it would be an exercise in futility and a waste of judicial resources to hold any further trials as to the remaining sixty-three Plaintiffs' entitlement to damages for Defendant's breach of that agreement. Moreover, this Court is not empowered to remedy any error the Third Circuit may have committed in reaching its decision. Thus, there is no basis for this Court to alter its judgment complying with the Third Circuit's mandate, or to grant any Plaintiff relief from judgment.

IV. CONCLUSION

For the foregoing reasons, Plaintiffs' motions to alter judgment pursuant to Federal Rule of Civil Procedure 59(f) or, in the alternative, for relief from judgment pursuant to Federal Rule of Civil Procedure 60, are denied. An appropriate Order follows.

DATED: 13 OF DECEMBER, 2013.

/s/ Jose L. Linares___
JOSE L. LINARES
UNITED STATES
DISTRICT JUDGE

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 12-4342

BAYSHORE FORD TRUCK SALES, INC., a Delaware corporation; MOTOR CITY FORD TRUCKS, INC., a Delaware corporation; COLONY FORD TRUCK CENTER, INC., a Rhode Island corporation, individually and on behalf of all others similarly situated

v.

FORD MOTOR COMPANY,
Appellant

(D.C. Civ. No. 2-99-cv-00741)

SUR PETITION FOR REHEARING

Present: McKEE, Chief Judge, RENDELL, SMITH, FISHER, CHAGARES, JORDAN, HARDIMAN,

GREENAWAY, JR., VANASKIE, SHWARTZ and [*]ROTH, Circuit Judges

The petition for rehearing filed by appellees in the above-entitled case having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the judges of the circuit in regular service not having voted for rehearing, the petition for rehearing by the panel and the Court en banc, is denied.

BY THE COURT,

/s/ Jane R. Roth
Circuit Judge

Dated: September 24, 2013
DWB/cc:

Ronald J. Campione, Esq.
Eric L. Chase, Esq.
Paul J. Halasz, Esq.
Christopher T. Handman, Esq.
Dennis LaFiura, Esq.
Genevieve K. LaRobardier I, Esq.
Elizabeth M. Leonard, Esq.
Jean E. Lewis, Esq.
Sean M. Marotta, Esq.
Gordon A. Rehnborg Jr., Esq.

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[*] Judge Roth's vote is limited to panel rehearing only.

James P. Ulwick, Esq.
William A. Kershaw, Esq.
Steven M. Klepper, Esq.

APPENDIX F

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Case No. 12-4342

BAYSHORE FORD TRUCK SALES, INC., *et al.*,
Plaintiffs-Appellees,

v.

FORD MOTOR COMPANY,
Defendant-Appellant.

On Appeal from the United States District Court
for the District of New Jersey, No. 2:99-cv-00741
District Judge Jose L. Linares

APPELLEES' PETITION FOR PANEL REHEARING AND FOR REHEARING EN BANC

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* * * * *

L.A.R. 35.1 STATEMENT OF COUNSEL

I express a belief, based on a reasoned and studied professional judgment, that the panel decision is contrary to decisions of the United States

Court of Appeals for the Third Circuit and the Supreme Court of the United States, and that consideration by the full court is necessary to secure and maintain uniformity of decisions in this court, *i.e.*, the panel's decision is contrary to the decision of this court and the Supreme Court in *Wood v. Milyard*, 132 S. Ct. 1826 (2012), *Vento v. Dir. of V.I. Bur. of Internal Revenue*, 715 F.3d 455 (3d Cir. 2013), *United Artists Theatre Cir., Inc. v. Twp. of Warrington, Pa.*, 316 F.3d 392 (3d Cir. 2003), *Otis Elevator v. George Washington Hotel Corp.*, 27 F.3d 903 (3d Cir. 1994), and *Buono Sales, Inc. v. Chrysler Motors Corp*., 363 F.2d 43 (3d Cir. 1966) (en banc).

/s/ *James P. Ulwick*

SUMMARY OF ARGUMENT

The Court's decision rests on a ground it raised *sua sponte*: that "Ford continued to manufacture and distribute parts and accessories to the Dealers," which the Court held to satisfy Ford's contractual obligation to provide COMPANY PRODUCTS. Op. at 7-8. On this sole ground, the Court set aside these 11 Dealers' $29 million jury verdict, obtained after 13 years of litigation.

The Dealers had no notice that the appeal might be decided on this ground, and they had no opportunity to be heard. Ford did not merely fail to raise that point below or on appeal; it argued that it exercised its right to discontinue the "HN80 and its associated parts and accessories." *See* Open. Br. at 22, 32-33; Reply Br. at 5. Ford's narrow argument reflected the 2009 ruling below—unchallenged on appeal—confining Ford to its 2005 summary

judgment arguments and precluding it from advancing a different COMPANY PRODUCTS argument. A27-34.

Shortly after the panel identified this new issue at argument, the Dealers requested leave to file a short supplement to address it. Mot. File Supp. Br. at 2. But the Court denied the motion "as unnecessary." Order at 1. The Court's *sua sponte* rationale, arrived at without hearing what the Dealers had to say, is substantively wrong and counter to the principle that summary judgment should not be granted on such a ground without giving the opposing party notice and an opportunity to respond. *Otis*, 27 F.3d at 910; *Chambers Dev. Co. v. Passaic Cnty. Util. Auth.*, 62 F.3d 582, 584 & n.5 (3d Cir. 1995); Fed. R. Civ. P. 56(f).

Reversing a judgment based on non-jurisdictional grounds raised *sua sponte* is generally an abuse of discretion. *Wood*, 132 S. Ct. at 1834. This Court ordinarily will not address new points, *sua sponte* or raised by a party, where the "parties are sophisticated and were represented by able counsel." *Vento*, 715 F.3d at 469-70.

Ford did not raise the theory because of its fatal factual and legal flaws. Factually, when Ford exited the new heavy truck business, it exited the related heavy truck parts business at the same time. It dismantled its parts manufacturing operation and ceased taking parts orders from the Dealers. *Infra* § II.1; A589; SA6, SA1, D.N.J. Doc. 280-9 at 12 (definition of "Heavy Truck Business") and 33-37 ("Article VI, Transfer of Spare Parts Business Assets"). Legally, Ford promised to continue to sell the Dealers "COMPANY PRODUCTS," a term

unmistakably defined in the conjunctive as "(1) new trucks and chassis … and (2) parts and accessories therefor." A182. *Infra* § II.2; *Mayer v. Credit Life Ins. Co.*, 202 N.W.2d 521, 523 (Mich. App. 1972) ("the ordinary meaning of the conjunctive 'and' is to denote joinder or union," creating "one term"); *see Buono*, 363 F.2d at 46 (Chrysler, although still providing parts, failed to "ship DeSoto and Plymouth passenger cars and DeSoto and Plymouth passenger car parts and accessories").

Even if it were appropriate to disturb the judgment below on grounds raised *sua sponte*, remand would be in order. Where an issue was "raised by the panel on its own at argument and was not briefed by the parties," the Court normally will "le[ave] this issue for consideration in the first instance by the District Court and then, if necessary, by a subsequent panel." *United*, 316 F.3d at 397-98.

Given *Buono*, given the conjunctive definition of COMPANY PRODUCTS, and given the definition of the singular HEAVY DUTY TRUCK to mean "any" and not "all," the District Court's interpretation is at least sufficiently reasonable to trigger the principle that the "meaning of an ambiguous contract is a question of fact that must be decided by the jury." *Klapp v. United Ins. Group Agcy., Inc.*, 663 N.W.2d 447, 453-54 (Mich. 2003). The Court should grant rehearing to affirm the judgment below or to remand for further proceedings on liability.

ARGUMENT

I. IT WAS NOT APPROPRIATE TO REVERSE ON WAIVED GROUNDS THAT THE COURT RAISED *SUA SPONTE*.

1. Appellate courts are not quick to declare lower courts wrong. "[I]f the decision below is correct, it must be affirmed, although the lower court relied upon a wrong ground or gave a wrong reason." *Helvering v. Gowran*, 302 U.S. 238, 245 (1937) (Brandeis, J.). Harmless errors must be disregarded at every stage. Fed. R. Civ. P. 61. An appellee may prevail without even filing a brief. Fed. R. App. P. 31(c). Appellate courts sometimes appoint amici to defend judgments when no party will do so. *U.S. v. Providence Journal Co.*, 485 U.S. 693 (1988). They may affirm based on reasons apparent from the record but not presented below. *Schweiker v. Hogan*, 457 U.S. 569, 585 n.24 (1982).

Reversal is a different story. "This court has on occasion reversed *sua sponte* on the basis of plain or fundamental error respecting the charge." *Trent v. Atl. City Elec. Co.*, 334 F.2d 847, 859 (3d Cir. 1964). The last occasion was 50 years ago. *Id.* (citing *Mazer v. Lipschutz*, 327 F.2d 42 (3d Cir. 1963)). The Court's discretion to notice error *sua sponte* "is exercised sparingly in order to prevent only what is deemed to be a miscarriage of justice." *Id.* Plain-error review, whether initiated by the Court or on appellant's request, is ordinarily inappropriate where "parties are sophisticated and were represented by able counsel." *Vento*, 715 F.3d at 469-70.

"The premise of our adversarial system is that appellate courts do not sit as self-directed boards of legal inquiry and research, but essentially as arbiters

of legal questions presented and argued by the parties before them." *Carducci v. Regan*, 714 F.2d 171, 177 (D.C. Cir. 1983) (Scalia, J).

A Court of Appeals may abuse its discretion by reversing on non-jurisdictional grounds raised *sua sponte*. A "federal court does not have *carte blanche* to depart from the principle of party presentation basic to our adversary system." *Wood*, 132 S. Ct. at 1833. "For good reason, appellate courts ordinarily abstain from entertaining issues that have not been raised and preserved in the court of first instance." *Id*. at 1834. "That restraint is all the more appropriate when the appellate court itself spots an issue the parties did not air below, and therefore would not have anticipated in developing their arguments on appeal." *Id.*

This Court rigorously enforces rules of waiver as to appellants. An appellant must identify where it raised each issue below, but an appellee need not. L.A.R. 28.1(a)(1), 28.2. An issue, even if raised below, is waived if appellant fails to identify it in the "issues presented" and cite legal authority in support of its position. *Free Speech Coal., Inc. v. Att'y Gen.*, 677 F.3d 519, 545 (3d Cir. 2012). A reply brief cannot raise a new argument absent exceptional circumstances. *Hoxworth v. Blinder, Robinson & Co.*, 903 F.2d 186, 204 n.29 (3d Cir. 1990) ("Appellants may … present these arguments to the district court on remand, at a time when appellees will have fair opportunity to respond to them.").

2. Ford moved in 2004 for summary judgment, arguing that ¶ 13 allowed it to terminate all COMPANY PRODUCTS. D.N.J. Doc. 107-4 at 17-21. When the Plaintiffs cross-moved for summary

judgment, D.N.J. Doc. 137, Ford rested on the same argument, and the District Court ruled for the Plaintiffs on December 8, 2005. A11-18. Ford identified that 2005 order in its notice of appeal. A79.

In 2009, Ford moved for summary judgment as to the certified class. D.N.J. Doc. 280. Its lead argument was that Ford discontinued all COMPANY PRODUCTS, and that such a course was permissible under ¶ 13. *Id.* The closest that Ford came to arguing the point on which this Court ruled was as part of a bizarre substitute performance argument. D.N.J. Doc. 280-1 at 19-22. Ford did not suggest that the definition of COMPANY PRODUCTS could be read in the disjunctive or was severable, but that Freightliner's "Sterling" brand trucks, existing stores of Ford HN80s, and non-heavy Ford trucks supplied under different agreements could substitute for future production of Ford "new trucks" under that two-prong definition. *Id.* The District Court rejected Ford's 2009 motion as a belated motion for reconsideration of the December 8, 2005 ruling, A27-34, and it declined to reach the argument. A34 ("This issue could have been presented before, it was not, and this Court will not entertain it here at this stage of the litigation. Additionally, its allegations regarding benefits the dealers continued to receive are more appropriately made in connection with its damages arguments.").

Importantly, Ford did not challenge on appeal—and thereby waived—the District Court's decision not to consider additional arguments. A party must establish error in the denial of reconsideration itself to obtain review. *N. River Ins. Co. v. CIGNA Reins. Co.*, 52 F.3d 1194, 1203, 1218-20 (3d Cir. 1995). Ford,

however, unequivocally abandoned any such theory on appeal. It adhered strictly to its 2005 theory that ¶ 13 permitted it to discontinue all "COMPANY PRODUCTS." It characterized its obligation as follows:

> [The] Agreement "establish[es]" each dealer "as an authorized dealer in COMPANY PRODUCTS including HEAVY DUTY TRUCKS." A143. In the Agreement, Ford committed to "sell COMPANY PRODUCTS to the Dealer" and the dealer committed to "purchase COMPANY PRODUCTS from" Ford. A145. COMPANY PRODUCTS were defined *as new heavy-duty trucks and the parts and accessories that went along with them.* A182.

Open. Br. at 10 (emphasis added). *Id.* at 6, 8-9 (citing only 2005 motion on Iss. 1).

Rather than assert it continued to supply COMPANY PRODUCTS, Ford relied on ¶ 13: "The HN80 and its associated parts and accessories are indisputably 'any' HEAVY DUTY TRUCK or COMPANY PRODUCT. Ford therefore had the power to discontinue them at any time without breaching its obligations. The District Court should have stopped there." *Id.* at 22. Ford argued it was error not to recognize that the "right of Ford to discontinue 'any' product includes the right to discontinue or cease producing *all* products." *Id.* at 23. Ford even differentiated between Ford-made parts and Freightliner-made parts, asserting the Dealers "were able to sell their *remaining inventories* of HN80s and Ford genuine parts at a profit rather than back to Ford at cost." *Id.* at 32-33 (emphasis added).

Naturally, in reviewing the massive record in this case for oral argument, the Dealers did not prepare themselves to rebut a theory that Ford did not raise on appeal—particularly since Ford had abandoned the one remotely similar theory it belatedly attempted to raise below. Soon after the Court raised the issue at oral argument, the Dealers requested leave to submit a supplemental brief on that point. Mot. File Supp. Br. at 2. The Court denied the motion "as unnecessary." Order at 1. This Court's ultimate opinion, declining to address Ford's actual argument for reversal, Op. at 8 n.4, rested on that very theory, raised *sua sponte* at oral argument, which Ford had waived and which was inconsistent with Ford's representations in its briefs and the actual facts.

This ruling at the very least constituted an abuse of discretion, and, under the circumstances of this case, rises to a denial of due process. U.S. Const. amend. V; *see* Milani & Smith, *Playing God: A Critical Look at Sua Sponte Decisions by Appellate Courts*, 69 Tenn. L. Rev. 245, 304 (2002) (an appellate court "should grant the losing party's request for rehearing as a matter of right … [or else] the end result is a violation of due process because there was no opportunity to be heard before or after judgment").

In *Wood*, 132 S. Ct. at 1829, the Supreme Court found an abuse of discretion for the Tenth Circuit to reverse on an issue raised *sua sponte*, even though that court ordered supplemental briefing. Nowhere did this Court identify any exceptional circumstances that would justify reversal on grounds raised *sua sponte*, or to consider arguments either waived below or abandoned on appeal. Ford was represented by

able counsel at all stages, and there is no manifest injustice in holding Ford to its selection of the grounds for opposing summary judgment and for challenging the summary judgment ruling on appeal.

The Dealers suffered great prejudice from this *sua sponte* ruling. They had a right to expect that the Court would "refuse[] to consider [a new] theory on appeal, [even if] the evidence in support of the theory was presented to the district court." *Gardiner v. V.I. Water & Power Auth.*, 145 F.3d 635, 647 (3d Cir. 1998). For the Court to disregard its "general rule and consider on appeal a new argument in opposition to summary judgment," a party must demonstrate something "unusual, like an intervening change in the law or the lack of representation by an attorney, [that] prevented [it] from raising this issue below." *Id.* Neither situation is present.

Compounding this prejudice is the direction that summary judgment be entered against the Dealers. Had the Dealers known that summary judgment might be entered on the ground that "Ford continued to manufacture and distribute parts and accessories to the Dealers," they would have marshaled below and on appeal all facts and law to show that Ford was not entitled to summary judgment on that ground. *See* Fed. R. Civ. P. 56(c). A party must have "notice and a reasonable time to respond" before a court may "grant the motion on grounds not raised by a party[.]" Fed. R. Civ. P. 56(f)(2). The prejudice, and due process violation, is particularly acute because the procedurally forfeited theory was wrong. *Infra* § II.

The *sua sponte* ruling also is an injustice to the District Court. After conducting four years of

proceedings in accordance with its 2005 ruling, the District Court correctly declined to entertain new theories. Ford could not and did not challenge that ruling on appeal. After three more years of pretrial proceedings, the District Court finally tried these 11 Dealers' claims. The District Court, like the Dealers, relied on Ford's 2005 framing of its liability challenges. Thus, even putting aside that the Court's conclusion was wrong on the merits, the Court's mere consideration of that issue justifies rehearing.

II. ON THE MERITS, FORD DID NOT COMPLY WITH ITS OBLIGATION TO SUPPLY COMPANY PRODUCTS.

1. Although Ford's obligation to supply trucks and parts was not severable, *infra* § II.2, the Court erred in holding that "Ford continued to manufacture and distribute parts and accessories to the Dealers." Op. at 7. As a matter of actual fact, when Ford sold the new heavy truck business it also sold the related parts business.

Although this issue was not framed or litigated below, there is overwhelming record evidence to this effect. When Ford's Chairman sought Board approval of the sale, he stated the sale would include "the service parts business for the Louisville/Aeromax (HN-80) Heavy Trucks[.]" SA6. When Ford announced the sale to its dealers it told them "Ford's heavy truck parts business will be transferred to Freightliner." SA1.

The final contract required Ford to ship its existing parts inventory from Ford warehouses to Freightliner warehouses. *See* Bus. Transfer & Asset Purch. Agr., D.N.J. Doc. 280-9 at 33-34. Ford agreed to "remove access by Ford's dealers and other

customers to [Ford's] ordering system with respect to all Ford part numbers for all Spare Parts, and Ford will cease taking orders for those Spare Parts." *Id.* at 34. Ford could not "market, manufacture or sell any commercial vehicle with a gross vehicle weight exceeding 33,000 pounds [a heavy truck] *or Spare Parts for any such vehicle*" for 10 years. *Id.* at 49 (emphasis added).

Ford thus exited the heavy truck parts business just like it exited the new heavy truck business. Its trial representative agreed that the sale "encompasses … the heavy truck business, which is the following things: The HN80 heavy truck product … together with the related service parts business[.]" A589. Likewise, Freightliner's head testified that his company would "acquire" the "spare parts business, including existing inventory[.]" A699.

The record thus does not support the Court's factual finding that "even though Ford no longer produced heavy trucks, Ford continued to manufacture parts and accessories for heavy trucks." Op. at 4. Upon the exhaustion of existing Ford parts—the existing inventory on the Dealers' shelves, plus parts that Ford shipped to Freightliner for distribution to the Dealers—the Dealers could purchase only Freightliner-made parts. *See* Trial. Tr. at 7.63:3-12; D.N.J. Doc. 280-9 at 33-34. In short, Ford was no longer a manufacturer or supplier of heavy-truck parts.

Because the Court raised the COMPANY PRODUCTS issue *sua sponte*, the appendix materials lacked critical context. Even so, the record establishes that Ford ceased to supply all COMPANY PRODUCTS—both heavy trucks and the parts and

accessories therefor—just as Ford conceded on appeal. At a minimum, the Dealers deserve a remand, so that they can present a complete record on this issue, for resolution on new summary judgment briefing or at trial. *Sewak v. I.N.S.*, 900 F.2d 667, 673 (3d Cir. 1990) ("As an appellate court we do not take testimony, hear evidence or determine disputed facts in the first instance. Instead, we rely upon a record developed in those fora that do take evidence and find facts.").

2. Under the contractual language and Michigan law, moreover, it would not have been enough for Ford to continue manufacturing and supplying heavy truck parts. Ford promised that "the Company shall sell COMPANY PRODUCTS to the Dealer," A145, until the agreement was "terminated by either party under the provisions of paragraph 17 [not ¶ 13] hereof." A146. COMPANY PRODUCTS was defined to "mean such (1) new trucks and chassis of series 850 or higher designations ***and*** (2) parts and accessories ***therefor***[.]" A182 (emphasis added).

Ford has offered a dizzying array of arguments in this litigation, but never has it contended that "and" means "or." Michigan law requires that this definition "must be viewed as one term because the ordinary meaning of the conjunctive 'and' is to denote joinder or union." *Mayer*, 202 N.W.2d at 523 (citing *Mich. Pub. Serv. Co. v. Cheboygan*, 37 N.W.2d 116 (Mich. 1949)); *see also City of Rome v. United States,* 446 U.S. 156, 172 (1980), *West v. Lincoln Ben. Life Co.*, 509 F.3d 160, 165 (3d Cir. 2007), *and Reese Bros., Inc. v. U.S.*, 447 F.3d 229, 235-36 (3d Cir. 2006). The "therefor" language further drives home the interconnectedness of these two obligations.

The context here compels the conclusion that "and" is being used in its ordinary conjunctive sense. The stated purpose of the Agreement is to "establish [each] dealer as an authorized dealer in COMPANY PRODUCTS *including HEAVY TRUCKS*." A143 (emphasis added). The Agreement is entitled a "HEAVY TRUCK SALES *AND* SERVICE" agreement. A182 (emphasis added). To illustrate, if an employer promised its employees "COMPENSATION," defined as salary and health benefits, it would be a breach for the employer to refuse to pay a salary despite continuing to provide health benefits.

Ford's own representative recognized that obligations as to trucks and parts were not severable. A592 (admitting that dealers sustained losses when they could not sell parts for the heavy trucks they did not sell). Ford's own brief recognized that "COMPANY PRODUCTS were defined as new heavy-duty trucks and the parts and accessories that went along with them." Open. Br. at 10.

The Court's interpretation of COMPANY PRODUCTS also contravenes *Buono*, which involved conjunctive language: "[Chrysler] agrees to ship De Soto and Plymouth passenger cars *and* De Soto and Plymouth passenger car parts and accessories to [dealer] only on [dealer's] order." 363 F.2d at 46 (emphasis added). The breach-of-contract claim arose when "Chrysler discontinued its production of DeSoto passenger automobiles." *Id.* at 44. Reflecting that Chrysler continued to provide parts, the dealers sued Chrysler for tortious interference, not for breach of contract, for urging customers to use Dodge dealers for service. *Id.* at 49. Even the dissent recognized

that the obligation to provide autos and parts were interdependent. *Id.* at 52 (Forman, J., dissenting). Since the agreement would have allowed Chrysler to "discontinue any or all parts," the dissent found it anomalous to require Chrysler to keep producing autos. *Id.* Here, the Agreement eliminated even the dissent's arguable anomaly by stating that Ford could "discontinue any HEAVY DUTY TRUCK or other COMPANY PRODUCT" and by defining the singular "HEAVY DUTY TRUCK" to mean "any" and not "all." A182.

III. ON REHEARING, THIS COURT SHOULD AFFIRM OR REMAND FOR FURTHER PROCEEDINGS ON LIABILITY.

The Dealers urge the Court to affirm outright on rehearing, because Ford's actual arguments on liability simply rehash the arguments of the dissent in *Buono*, 363 F.2d at 51-55 (Forman, J. dissenting). Ford declined the Court's invitation at oral argument to request en banc rehearing to reject *Buono*. And Ford's arguments on damages were not even adequately preserved, much less meritorious.

At a minimum, however, a jury question exists on whether Ford supplied parts and on the meaning of the contract. *See Klapp*, 663 N.W.2d at 459 ("The interpretation of a contract whose language is ambiguous is a question of fact for the jury to decide."). The majority view of the en banc Court in *Buono* is at least reasonable compared to the dissenting view. *Buono* holds particular force because the "general rule is that contracts are interpreted in accordance with the law in effect at the time of their formation." *McDonald v. Farm Bur. Ins. Co.*, 747 N.W.2d 811, 818 (Mich. 2008). At the time of

contracting, *Buono* and *Karl Wendt Farm Equip. Co. v. Int'l Harvester Corp*., 931 F. 2d 1112, 1116 (6th Cir. 1991), were authoritative declarations of Michigan law. Ford repeatedly amended the dealer agreements without contracting around these decisions. A155-78. Rather, Ford defined singular HEAVY DUTY TRUCK to mean "any" and not "all." A182.

WHEREFORE, the Court should, on rehearing, (a) affirm, or (b) remand for further summary judgment proceedings or, if appropriate, a jury trial on liability.

Dated: September 9, 2013 Respectfully submitted:

/s/ James P. Ulwick

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Trucks, Inc., and West Gate Ford Truck Sales, Inc.

APPENDIX G

Ford Division

District: Philadelphia

FORD HEAVY DUTY TRUCK
SALES AND SERVICE AGREEMENT

AGREEMENT made as of the 25th day of *June*, 1976, by and between (Name of Entity) Bayshore Ford Truck Sales, Inc. (State whether an individual, partnership or corporation) Corporation (If the latter, show name of the state in which incorporated) Delaware doing business as (Trade Name) Bayshore Ford Truck Sales, Inc. and with a principal place of business at (Street Address) 4003 N. DuPont Blvd. (City) New Castle (County) New Castle (State) Delaware (Zip Code) 19720

* * * * *

PREAMBLE

The purpose of this agreement is to:

(i) establish the Dealer as an authorized dealer in COMPANY PRODUCTS including HEAVY DUTY TRUCKS (as herein defined),

(ii) set forth the respective responsibilities of the Company in producing and selling those products to the Dealer and of the

Dealer in reselling and providing service for them; and

* * * * *

In turn, each of the Company's franchised dealers in COMPANY PRODUCTS makes important investments or commitments in specialized heavy duty truck retail sales and service facilities and equipment, in working capital, in inventories of heavy duty trucks, parts and accessories, and trained sales and service personnel based on annual planning volumes for their markets. These investments must be substantially larger in relation to unit sales volume than for other automotive dealerships and the dealer's organization must be more highly trained technically in effective merchandising, financing and service.

* * * * *

IN CONSIDERATION of the mutual agreements and acknowledgments hereinafter made, the parties hereto agree as follows:

* * * * *

B. Subject 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.

C. The Ford Division Ford Heavy Duty Truck Sales and Service Agreement Standard Provisions (Form FD 925A-HT GEN. SALES 8-73"), a duplicate original of which is attached to

the Dealer's duplicate original of this agreement, have been read and agreed to by the Company and by the Dealer, and such Standard Provisions and any duly executed and delivered supplement or amendment thererto, are hereby made a part of this agreement with the same force and effect as if set forth herein in full.

* * * * *

G. (Strike out either subparagraph (1) or (2) whichever is not applicable.)

(1) This agreement shall continue in force and effect from the date of its execution until terminated by either party under the provisions of paragraph 17 hereof.

~~(2) This agreement shall continue in force and effect for a term commencing on the date of its execution and expiring _____ unless sooner terminated under the provisions of paragraph 18 hereof.~~

* * * * *

Ford Division

FORD HEAVY DUTY TRUCK SALES AND SERVICE AGREEMENT

STANDARD PROVISIONS

DEFINITIONS

1. As used herein, the following terms shall have the following meanings, respectively:

1. (a) "COMPANY PRODUCTS" shall mean such

(1) new trucks and chassis of series 850 or higher designations and

(2) parts and accessories therefor,

as from time to time are offered for sale by the Company to Authorized Ford Heavy Duty Truck dealers as such for resale, plus such other products as may be offered for sale by the Company to the Dealer from time to time. The Company reserves the right to offer any new, different and differently designed truck or chassis and any other product, bearing any trademarks or brand names used or claimed by the Company or any of its affiliates, including the name "Ford," to selected Authorized Ford Heavy Duty Truck dealers or others under existing or separate new agreements.

1. (b) "HEAVY DUTY TRUCK" shall mean any truck or chassis, and "HEAVY DUTY TRUCKS" shall

mean all trucks or chassis included in this agreement pursuant to paragraph 1(a) above.

* * * * *

RESPONSIBILITIES WITH RESPECT TO HEAVY DUTY TRUCKS

2.(a) *Sales*. The Dealer, directly and through Authorized Ford Truck dealers in the DEALER'S LOCALITY, shall promote, vigorously and aggressively the sale at retail (and, if the Dealer elects, the leasing and rental) of HEAVY DUTY TRUCKS to private and fleet customers within the DEALER'S LOCALITY, and shall develop energetically and satisfactorily the potentials for such sales and obtain a reasonable share thereof; but the Dealer shall not be limited to the DEALER'S LOCALITY in making sales. To this end, the Dealer shall develop, maintain and direct a trained quality truck sales organization and shall conduct throughout each model year aggressive advertising and sales promotion activities, making use of the greatest feasible extent of the Company's advertising and sales promotion programs relating to HEAVY DUTY TRUCKS.

The Dealer's performance of his sale responsibility for HEAVY DUTY TRUCKS shall be measured by such reasonable criteria as the Company may develop from time to time, including:

* * * * *

2. (d) *Stocks*. The Dealer shall maintain stocks of current models of such lines or series of HEAVY DUTY TRUCKS, of an assortment and in quantities

as are in accordance with Company GUIDES therefor, or adequate to meet the Dealer's share of current and anticipated demand for HEAVY DUTY TRUCKS in the DEALER'S LOCALITY. The Dealer's maintenance of HEAVY DUTY TRUCK stocks shall be subject to the Company's filling the Dealer's order therefor.

2. (e) *Demonstrators*. The Dealer shall maintain at all times in good condition and running order for demonstration and loan to prospective purchasers, such numbers of the latest model of such lines or series of HEAVY DUTY TRUCKS as are in accordance with Company GUIDES therefor.

* * * * *

RESPONSIBILITIES WITH RESPECT TO GENUINE PARTS

3. (a) *Sales*. The Dealer shall promote vigorously and aggressively the sale of GENUINE PARTS to service, wholesale and other customers within the DEALER'S LOCALITY, and shall develop energetically and satisfactorily the potentials for such sale and obtain a reasonable share thereof; but the Dealer shall not be limited to the DEALER'S LOCALITY in making sales. To this end, the Dealer shall develop, maintain and direct a trained quality parts sales organization and shall conduct aggressive advertising and sales promotion activities, making use to the greatest feasible extent of the Company's advertising and sales promotion programs relating to GENUINE PARTS. The Dealer shall not sell or offer for sale or use in the repair of any COMPANY PRODUCT, as a GENUINE PART, any part or accessory that is not in fact a GENUINE PART.

* * * * *

RESPONSIBILITIES WITH RESPECT TO SERVICE

4. The Dealer shall develop, maintain and direct a trained, quality service organization and render at the DEALERSHIP FACILITIES prompt, workmanlike, courteous and willing service to owners and users of COMPANY PRODUCTS, in accordance with the standards and procedures set forth in the applicable CUSTOMER SERVICE BULLETIN, including without limitation all service to which a purchaser of a COMPANY PRODUCT from any Authorized Ford Truck or Heavy Duty Truck dealer may be entitled. The Dealer shall require each Authorized Ford Truck dealer to assume similar responsibilities as part of each sale of a Resale Unit.

* * * * *

4. (b) *Warranty and Policy and Campaign Service*.

(1) The Dealer shall perform all warranty and policy service on each COMPANY PRODUCT sold by the Dealer, or presented by owners of Resale Units of by "visiting owners" (those whose selling dealers has ceased to do business, or who are travelling, or have moved a long distance from their selling dealer or need emergency repairs), in accordance with the warranty and policy applicable thereto and the applicable provisions of the Warranty Manual and CUSTOMER SERVICE BULLETIN.

* * * * *

(3) The Dealer shall use only GENUINE PARTS in performing warranty, policy and campaign work, except as otherwise provided in the Warranty Manual, CUSTOMER SERVICE BULLETIN or

campaign instructions, and shall give precedence to all such work over other service work if the use of the unit in impaired. The Dealer shall promptly report to the Company, and seek the Company's assistance with respect to, any warranty or policy or campaign work which cannot be performed to the owner's or the Dealer's satisfaction. The Company shall give precedence to such requests over other service assistance. The Dealer shall provide the owner with a copy of the repair order for such work itemizing the work performed. The Dealer shall have such repair order signed by the owner except in unusual circumstances where it is not feasible to obtain such signature.

* * * * *

4. (c) *Maintenance and Repair Service*. The Dealer shall perform all other maintenance and repair services, including, where feasible, body repair services, reasonably required by owners and users of HEAVY DUTY TRUCKS and shall provide each customer a copy of the repair order itemizing the work performed and the charges therefor. The Dealer shall have the customer sign such repair order except in unusual circumstances where it is not feasible to obtain such signature.

4. (d) Service Tools and Equipment. The Dealer shall acquire and maintain for use in DEALERSHIP OPERATIONS such diagnostic equipment and other tools, equipment and machinery, comparable to the type and quality recommended by the Company from time to time, as are necessary to meet the Dealer's service responsibilities hereunder and substantially in accordance with Company GUIDES therefor and applicable CUSTOMER SERVICE BULLETIN.

* * * * *

RESPONSIBILITIES WITH RESPECT TO DEALERSHIP FACILITIES

5. (a) *Locations and Facilities*. The Dealer shall establish and maintain at the DEALERSHIP LOCATION approved by the Company DEALERSHIP FACILITIES of satisfactory appearance and condition and adequate to meet the Dealer's responsibilities under this agreement. The DEALERSHIP FACILITIES shall be substantially in accordance with the GUIDES therefor established by the Company from time to time.

* * * * *

OTHER DEALER AND COMPANY RESPONSIBILITIES

* * * * *

6. (b) *Personnel*. The Dealer shall employee and train such numbers and classifications of competent personnel of good character, including, without limitation, sales, parts, service, owner relations and other department managers, salesmen and service technicians, as will enable the Dealer to fulfill all his responsibilities under this agreement. The Company shall provide assistance to the Dealer in determining personnel requirements. In response to the training needs of the Dealer's personnel, the Dealer at his expense shall cause his personnel to attend training schools or courses conducted by the Company from time to time.

* * * * *

6. (d) *Capital*. The Dealer shall at all times maintain and employ in connection with his DEALERSHIP OPERATIONS separately from any

other business of the Dealer, such total investment, net working capital, adequate lines of wholesale credit and competitive retail financing plans for HEAVY DUTY TRUCKS as are in accordance with Company GUIDES therefor and will enable the Dealer to fulfill all his responsibilities under this agreement. The Dealer's net working capital shall not be less than the amounts specified in the Net Working Capital Agreement executed by the Dealer and the Company, as a part of and simultaneously with this agreement, as modified or superseded from time to time.

* * * * *

CHANGES IN COMPANY PRODUCTS

13. The Company 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. The Company may discontinue any HEAVY DUTY TRUCK or other COMPANY PRODUCT at any time without liability to the Dealer.

* * * * *

TERMINATION OR NONRENEWAL OF AGREEMENT

* * * * *

17. (f) *By Company at Will or Upon Failure to Hold a Ford Sales & Service Agreement or Ford Truck Sales & Service Agreement*.

(1) If this agreement is not for a stated term specified in paragraph G of this agreement, the Company may terminate this agreement at will at any time by giving the Dealer at least one hundred and twenty (120) days prior written notice thereof.

* * * * *

OBLIGATIONS UPON TERMINATION OR NONRENEWAL

19. Upon termination or nonrenewal of this agreement by either party, the Dealer shall cease to be an Authorized Ford Heavy Duty Truck dealer; and:

* * * * *

19. (f) Deliveries After Termination or Nonrenewal. If this agreement shall be terminated or not renewed by the Company (1) because of the death or physical or mental incapacity of any principal owner of Dealer pursuant to subparagraph 17(d) hereof, or (2) at will pursuant to subparagraph 17(f)(1) hereof, or (3) pursuant to subparagraph 17(f)(2) hereof because the Ford or Ford Truck Sales and Service Agreement between the Dealer and the Company was terminated either at will or by reason of the death or physical or mental incapacity of a principal owner of the Dealer, the Company shall use its best efforts to fill the Dealer's bona fide order for COMPANY PRODUCTS outstanding on the effective

date of termination or nonrenewal. The Company's fulfillment of such orders for HEAVY DUTY TRUCKS however, may be limited to the number and type of HEAVY DUTY TRUCKS delivered to the Dealer by the Company during the ninety (90) days immediately preceding such date, or the number and type of bona fide retail orders for HEAVY DUTY TRUCKS accepted by the Dealer and unfilled on such date, whichever is smaller. Deliveries under this subparagraph shall be made in substantial accord with the Company's normal delivery schedules for the area, unless the Company elects to make all such deliveries within thirty (30) days after the effective date of termination. The Dealer shall inspect, condition and repair such HEAVY DUTY TRUCKS in the manner specified in this agreement and in accordance with procedures outlined by the Company from time to time.

Except for deliveries required by this subparagraph 19(f), each order for a COMPANY PRODUCT received by the Company from the Dealer and unfilled on the effective date of termination or expiration of this agreement shall be deemed cancelled.

* * * * *

REACQUISITION OF COMPANY PRODUCTS AND ACQUISITION OF THE DEALER'S SIGNS, SPECIAL TOOLS AND EQUIPMENT, AND MAINTENANCE ITEMS.

21. Upon termination or nonrenewal of this agreement by the Company, the Dealer may elect as provided in paragraph 23 or, upon termination or nonrenewal of this agreement by the Dealer, the Dealer may demand in his notice of termination or

nonrenewal, to have the Company purchase or accept upon return from the Dealer, in return for his general release specified in paragraph 23:

21. (a) *Heavy Duty Trucks*. Each unused, undamaged and unsold HEAVY DUTY TRUCK (together with all factory-installed options thereon) in the Dealer's stock on the effective date of such termination or nonrenewal, provided such HEAVY DUTY TRUCK is in first-class salable condition, is of a then current model, has not been altered outside Ford Motor Company's factory, and was purchased by the Dealer from the Company or another authorized dealer in HEAVY DUTY TRUCKS prior to giving or receiving notice of such termination or nonrenewal. The price for such HEAVY DUTY TRUCK shall be its DEALER PRICE, plus the Company's charges for distribution, delivery and taxes, at the time it was purchased from the Company, less all allowances paid or applicable allowances offered thereon by the Company.

21. (b) *Genuine Parts*. Each unused, undamaged and unsold GENUINE PART, and each unopened item of appearance and maintenance materials and paints (hereinafter called "maintenance items") in the Dealer's stock on the effective date of such termination or nonrenewal, provided such GENUINE PART or maintenance item is offered for sale by the Company to authorized dealers in HEAVY DUTY TRUCKS in the Company's then current Parts and Accessories Price Schedules, is in first-class salable condition including reasonably legible and usable packaging and was purchased by the Dealer from the Company or another Company authorized dealer in normal volume prior to giving or receiving notice of

such termination or nonrenewal. Notwithstanding the foregoing, the repurchase of such GENUINE PARTS identified by the Company as accessories shall be limited to those so purchased by the Dealers within twelve (12) months preceding such date, or those sold to the Dealer by the Company for use in a HEAVY DUTY TRUCK that is a current model on such effective date. The price for each such GENUINE PART or maintenance item shall be the DEALER PRICE in effect on the effective date of termination or nonrenewal, less all allowances paid or applicable allowances offered thereon by the Company. The Dealer, at his own expense, shall carefully pack and box such of the eligible GENUINE PARTS and maintenance items as the Company may direct, and the Company shall pay the Dealer an additional five percent (5%) of the DEALER PRICE of the eligible GENUINE PARTS and maintenance items so packaged and boxed.

* * * * *

21. (d) *Special Tools and Equipment*. All special tools and automotive service equipment owned by the Dealer on the effective date of termination or nonrenewal which were designed especially for servicing HEAVY DUTY TRUCKS which are of the type recommended in writing by the Company and designated as "special" tools and equipment in this applicable CUSTOMER SERVICE BULLETIN or other notice pertaining thereto sent to the Dealer by the Company, which are in usable and good condition except for reasonable wear and tear, and which were purchased by the Dealer within the three (3) year period preceding the effective date of termination or nonrenewal. The price for each such special tool and

item of service equipment shall be its fair market value on such effective date as agreed by the Company and the Dealer, or, if they cannot agree, as determined by a qualified independent appraiser selected by the Company and the Dealer.

* * * * *

DEALERSHIP FACILITIES ASSISTANCE UPON NONRENEWAL OR CERTAIN TERMINATIONS BY THE COMPANY

22. (a) *Dealer Eligibility*. The Dealer may elect, as provided in paragraph 23, to have the Company assist the Dealer with respect to the Dealer's Eligible Facilities (as herein defined), in return for the Dealer's general release as specified in paragraph 23, upon nonrenewal of this agreement by the Company, or upon termination of this agreement by the Company, for the following reasons:

(1) Because of disagreement among persons named in paragraph F pursuant to subparagraph 17(b)(4) or because of the Dealer's failure with respect to prices or charges, terms or title or trademarks or trade names, or other sums due the Company pursuant to subparagraph 17(b)(6);

(2) Because of the Dealer's nonperformance of his responsibilities set forth in paragraphs 2, 3, 4 or 6 pursuant to subparagraph 17(c);

(3) Because of the death or physical or mental incapacity of a principal owned named in subparagraph F(i) pursuant to subparagraph 17(d) providing that a successor dealership is not appointed as provided under paragraph 20;

(4) Because of failure of the Dealer or the Company to be licensed pursuant to subparagraph 17(e); or

(5) At will pursuant to subparagraph 17(f)(1) if this agreement is not for a stated term specified in paragraph G of this agreement.

22. (b) *Eligible Facilities*. "Eligible Facilities" are hereby defined as only those DEALERSHIP FACILITIES which are listed in the Dealership Facilities Supplement in effect at the time or such nonrenewal or termination, are approved by the Company pursuant to paragraph 5, are owned or leased by the Dealer and are being used by the Dealer solely for fulfilling his responsibilities under this agreement (or under this agreement and one or more other vehicle sales agreement with the Company which are not renewed or are terminated by the Company at the same time as this agreement) at the time the Dealer received notice of such nonrenewal or termination.

22. (c) *Company's Obligation*. Subject to the provisions of subparagraph 22(d) hereof, if neither the Dealer nor the Company can arrange with a third party within ninety (90) days after the effective date of such termination or nonrenewal:

(1) In the case of Eligible Facilities which are owned by the Dealer, either a lease for one year commencing within such ninety (90) days at fair rental value or a sale within such ninety (90) days at fair market value; or

(2) In the case of Eligible Facilities which are leased by the Dealer, either an assignment of lease, or a sublease for one year (or for

> the balance of the term of the Dealer's lease if that is shorter) commencing within such ninety (90) days at the Dealer's rental rate (or, if the facilities are owned by an affiliate of the Dealer at fair rental value, if that is different);

the Company shall offer either to make monthly payments to the Dealer, commencing with the ninety-first day, pursuant to subparagraph 22(e) hereof, or to make a lump sum payment to the Dealer pursuant to said subparagraph 22(e), or to accept for itself on the ninety-first day such a lease or sale from the Dealer-owner or such an assignment or sublease from the Dealer-lessee.

For the purpose of this subparagraph 22(c), fair market or fair rental value shall mean value based on the use of the facilities in the conduct of DEALERSHIP OPERATIONS. In the event the Dealer and the company are unable to agree on the fair market or rental value of any Eligible Facilities, such value shall be determined by an independent real estate appraiser selected by the Dealer and the Company.

* * * * *

APPENDIX H

BUSINESS TRANSFER AND ASSET PURCHASE AGREEMENT

BUSINESS TRANSFER AND ASSET PURCHASE AGREEMENT, dated as of May 1, 1997 (the "Agreement"), among Freightliner Corporation, a Delaware corporation ("Freightliner"), HN80 Corporation, a Delaware corporation and a wholly owned subsidiary of Freightliner ("Sub"), and Ford Motor Company, a Delaware corporation ("Ford").

WHEREAS, Freightliner and Ford have previously entered into a non-binding letter of intent providing for the purchase by Freightliner and the sale by Ford of Ford's heavy duty truck business in accordance with the Business Principles, dated February 11, 1997, annexed thereto; and

* * * * *

ARTICLE I
CERTAIN DEFINITIONS

Section 1.1 Definitions. As used in this Agreement, each word or phrase beginning with a capitalized letter is generally a defined term, and such defined terms as used herein shall have the following meanings, respectively:

* * * * *

"**Cargo Spare Parts**" shall mean assemblies, components, accessories and any other part used in the Cargo, including without limitation special tools and diagnostic equipment used in servicing the

Cargo; *provided, however,* that is shall exclude any Common Part.

* * * * *

"**Common Parts**" shall mean those assemblies, components, accessories and any other part used for the HN80, the Cargo or any Discontinued Series, including without limitation special tools and diagnostic equipment used in servicing the HN80, Cargo or any Discontinued Series, and which, as of the date of this Agreement, are also currently being used by Ford for any other Ford product. "Common Productions Parts" shall mean every Common Part that would be a Production Part if it were not a Common Part, and "Common Spare Parts" shall mean every Common Part that would be a Spare Part if it were not a Common Part.

* * * * *

"**Discontinued Series Spare Parts**" shall mean assemblies, components, accessories and any other part used in any Discontinued Series, including without limitation special tools and diagnostic equipment used in servicing the Discontinued Series; *provided, however,* that is shall exclude any Common Part.

* * * * *

"**Heavy Duty Truck Business**" shall mean the manufacture, distribution and sale on a worldwide basis of the Product Lines (other than Cargo) and Spare Parts and Common Spare Parts for the Product Lines (other than Cargo Spare Parts and Common Spare Parts for the Cargo) which Ford currently conducts and the manufacture, distribution and sale of the Cargo, Cargo Spare Parts and

Common Spare Parts for the Cargo in the United States, Canada and Mexico.

* * * * *

"**HN80 Spare Parts**" shall mean assemblies, components, accessories and any other part used in the HN80, including without limitation special tools and diagnostic equipment used in servicing the HN80;l *provided, however,* that is shall exclude any Common Part.

* * * * *

"**Spare Parts**" shall mean the HN80 Spare Parts, the Discontinued Series Spare Parts and the Cargo Spare Parts collectively.

"**Spare Parts Business**" shall mean all aspects, including without limitation procurement, warehousing, sales, marketing and distribution, related to the sale of Spare Parts and Common Spare Parts for the Product Lines.

"**Spare Parts Closing**" shall have the meaning set forth in Section 3.1.

"**Spare Parts Closing Date**" shall mean the end of the business day of the date on which the Spare Parts Closing actually occurs and the transactions consummated thereat become effective.

"**Spare Parts Documentation**" shall mean the list of Spare Parts and Common Spare Parts referred to in Section 11.11(f).

"**Spare Parts Inventory**" shall mean Spare Parts inventories owned or held by Ford on the Spare Parts Closing Date wherever located.

"**Spare Parts Manufacturing Assets and Equipment**" shall have the meaning set forth in Section 6.6(c).

* * * * *

ARTICLE V

TRANSITION OF DEALER NETWORKS

Section 5.1 HN80 Dealer Franchises.

(a) As soon as practicable after the expiration or earlier termination of the applicable waiting period under the HSR Act, Ford will notify each of its dealers of the Product Lines and Spare Parts that Ford is withdrawing the HN80 from the product lines being offered to such dealer.

(b) Immediately following Ford's issuance of its notification pursuant to paragraph (a), Freightliner will offer to each Qualified Dealer a dealer sales and service agreement with respect to the HN80 franchise and Spare Parts and Common Spare Parts sales and service with respect to the HN80 and the Discontinue Series, substantially upon the terms and conditions currently set forth in Freightliner's Heavy Duty Truck Sales and Service Agreement (the "Freightliner Dealer Agreement"). Each Qualified Dealer which accepts an offer of the Freightliner Dealer Agreement as herein provided is referred to as an "HN80 Dealer." If a Qualified Dealer declines to accept an offer of a Freightliner Dealer Agreement from Freightliner with respect to an HN80 franchise and Spare Parts and Common Spare Parts sales and service for the HN80 and the Discontinued Series, Freightliner shall have no further Liability to such Qualified Dealer or to Ford, except as specifically set

forth in the next sentence. If a declining Qualified Dealer commences a proceeding against Ford alleging constructive or other termination of its Ford Dealer Agreement due to the withdrawal of the HN80 product line and that the Freightliner Dealer Agreement does not constitute a legally sufficient "successor contract" because of its terms, Freightliner and Ford shall share equally the expenses of defending such proceeding, and each of Ford and Freightliner shall pay 50% of any money damage judgment arising in such proceeding, but Freightliner shall have no obligation to participate in or contribute to any judgment or decree to the extent that is requires Ford to repurchase the dealer's franchise, business or real estate utilized in conducting such dealer's dealership. Ford shall be exclusively responsible for all Liabilities relating to all other claims alleged by a Qualified Dealer Agreement which declines to accept Freightliner's offer of the Freightliner Dealer Agreement, provided such claims do not alleged any wrongdoing by Freightliner or Sub. Ford shall be fully and exclusively responsible for all Liabilities arising out of claims by Ford dealers which are not Qualified Dealers; provided such claims do not alleged any wrongdoing by Freightliner or Sub.

(c) Ford and Freightliner will cooperate to maximize the prospects that Qualified Dealers enters in to a Freightliner Dealer Agreement and to minimize the respective exposures of Ford and Freightliner to any allegation of a Liability to any Qualified Dealer.

(d) Ford, Freightliner and Sub recognize that certain Qualified Dealers are part of Ford's dealer development program, which provides for dealership operators to purchase Ford's equity interest in the dealership corporation over time (the "Dealer Development Program"). The parties agree that the transactions contemplated by this Agreement shall not adversely affect in any manner the operations of a dealer participating in the Dealer Development Program; *provided, however,* that Ford shall ensure that each Qualified Dealer that is within the Dealer Development Program and which is offered a Freightliner Dealer Agreement shall accept the Freightliner Dealer Agreement so offered.

(e) Each of Ford and Freightliner acknowledges and agrees that it will not object to or otherwise impede any HN80 Dealer from maintaining a dealership franchise agreement with the other party. Freightliner will permit HN80 Dealers to perform warranty and other service on products in the Product Lines for which Ford has warranty responsibility or other service responsibility and will make available the necessary Spare Parts therefor. Upon request Freightliner will provide the prices of the Spare Parts sold for warranty or other service for which Ford has responsibility to allow Ford to verify the warranty charges made to Ford by HN80 Dealers. Ford will be responsible for all acts or omissions of HN80 Dealers which occur in the course of performance of warranty and other service pursuant to the Ford Heavy Duty Truck Sales and Service Agreement (the "Ford Dealer Agreement"), and Freightliner will be responsible for all acts or omission of HN80 Dealers which occur in the course

of performance of warranty and other service pursuant to the Freightliner Dealer Agreement.

* * * * *

ARTICLE VI

TRANSFER OF SPARE PARTS BUSINESS ASSETS

Section 6.1 Spare Parts Business Assumption. In accordance with the work plan developed by the Spare Parts Operational Team, Freightliner will assume the Spare Parts Business which is the subject of a Spare Parts Closing which will include the procurement, warehousing, sale and distribution of those quantities of Spare Parts and Common Spare Parts required to fulfill the reasonable expectations of vehicle owners of vehicles in the Product Lines for the useful life of such vehicles. Freightliner will make Spare Parts available to Ford to enable Ford or its designee to satisfy Ford's warranty obligations, as well as existing statutory or contractual obligations.

Section 6.2 Spare Parts Business Transfer Procedure.

(a) For the transfer of Spare Parts in Ford's inventory from Ford warehouses to Freightliner warehouses, Ford will ship the Spare Parts in one or more categories to be mutually agreed upon, by Spare Part number, and the Spare Parts Operational Team will determine a schedule for transferring Spare Parts based on the readiness of Freightliner's warehouses to receive, and systems to receive orders for, the Spare Parts. Each category of Spare Parts shall be transferred in two stages: the pre-stocking "first stage" and the remainder in the "second stage."

In each stage the Spare Parts will be shipped to the various warehouses in the quantities designated by Freightliner reasonably in advance of the shipping date. The volumes of Spare Parts in the first stage shipment for each category will be determined such that Ford has sufficient quantities of Spare Parts in the various categories to fulfill customer orders until Freightliner has stocked the first stage shipment in its warehouses and has notified Ford of the date on which Freightliner systems will be ready to receive customer orders and Freightliner will be ready to ship Spare Parts (such date being referred to herein as the "Cutover Date"). For purposes of this Agreement the Cutover Date shall be the Spare Parts Closing Date.

(b) Within a reasonable time in advance of each Spare Parts shipping date, Freightliner shall have the right to make a physical inspection of the Spare Parts to be shipped. Ford shall have the right to make a physical inspection of the Spare Parts upon their arrival at the Freightliner warehouse.

(c) Prior to each Spare Parts shipping date, Ford will arrange for shipment of the Spare Parts Inventory with carriers chosen by Ford. Ford will package and ship the Spare Parts, at its sole cost and expense, to the warehouses designated by Freightliner in its notices required by paragraph (a). Freightliner agrees to maximize the use of full truckloads for the shipment of Spare Parts on each shipment date in order to minimize Ford's costs of shipment.

(d) Freightliner will give Ford at least 30 days prior written notice of the Cutover Date. At the

Cutover Date, Ford will remove access by Ford's dealers and other customers to DOES II or other ordering system with respect to all Ford part numbers for all Spare Parts, and Ford will cease taking orders for those Spare Parts. At the Cutover Date, Freightliner will immediately begin taking orders from customers for the categories of Spare Parts in the first stage shipment.

(e) Following the Cutover Date, the parties will cooperate with respect to the shipment of the remaining Spare Parts from Ford to Freightliner with the target of completing the shipment of all remaining Spare Parts within 45 days following the Cutover Date, and Ford and Freightliner will use their best efforts to meet this target.

(f) During the period following the Cutover Date while Ford still retains Spare Parts pending second stage shipment, Freightliner may, in the event it is unable to fill an order for any such Spare Pare, direct Ford to ship, and Ford will, if it has the Spare Part, ship, the Spare Part to the customer. Freightliner agrees to reimburse Ford for the cost of shipment of such Spare Part plus a reasonable handling fee.

(g) Freightliner shall have no obligation to repackage Spare Parts shipped by Ford or Ford suppliers to Freightliner which are packaged in containers bearing the Ford name or trademark prior to shipping such Spare Parts to customers.

* * * * *

Section 6.5 Spare Parts Inventory. The aggregate dollar amount of Spare Parts Inventory to be transferred to Sub pursuant to the transfer procedures set forth in Section 6.2 shall be $57 million (valued at Ford's 1996 standard cost), not

including any Spare Parts returned to Ford pursuant to its Parts Inventory Protection Plan and not including any Spare Parts transferred pursuant to the next sentence. Prior to the Spare Parts Closing, Ford shall also acquire from Valk Industries Inc. ("Valk") all Spare Parts for both the Cargo and the HN80 that are subject to the Valk Agreement and shall transfer such Spare Parts Inventory to Freightliner at the Spare Parts Closing, free and clear of all Liens.

* * * * *

Section 10.11 Covenant Not to Compete: Confidential Information

(a) In order that Freightliner and Sub may have and enjoy the full benefit of the Acquired Assets, Ford agrees that, for a period of 10 years following the HN80 Commencement Date, it will not, directly or indirectly, anywhere in the Territory, market, manufacture or sell any commercial vehicle with a gross vehicle weight exceeding 33,000 pounds or Spare Parts for any such vehicle, except parts required to service Ford's pre-existing F-Series trucks and buses, or induce or attempt to induce any customers, suppliers or distributors of the Heavy Duty Truck Business to terminate their relationships with the Heavy Duty Truck Business; *provided, however,* that this Section 10.11(a) shall not prohibit the ownership by Ford of 10% or less of any outstanding class of equity securities of any publicly held corporation engaged in the manufacture or sale of commercial vehicles with a gross vehicle weight exceeding 33,000 pounds solely for investment purposes. Freightliner, Sub and Ford agree that the duration and geographic scope for which the covenant

not to compete set forth in this Section 10.11(a) is to be effective and reasonable. However, in the event that any court determines that the duration or geographic scope, or both of them, are unreasonable and that such covenant is to that extent unenforceable, Freightliner, Sub and Ford agree that the covenant shall remain in full force and effect for the greatest time period not longer than that duration and for the greatest area within the geographic scope set forth in this Section 10.11(a) that would not render it unenforceable. Freightliner, Sub and Ford agree that the covenant not to compete shall be deemed a series of separate covenants, one for each and every state, country, county and province within the entire Territory.

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APPENDIX I

[Ford Logo]

Ford Motor Company
Ford Customer Service Division

300 Renaissance Center
P. O. Box 43394
Detroit. MI 418243

February 11, 1998

To: All Ford/Sterling Heavy Truck Dealers

Subject: Heavy Truck Parts and Service Transition Plans

Background

Throughout the past year several teams within the Ford Customer Service Division have been working closely with the Freightliner Corporation to develop plans to transfer our inventory of heavy truck parts, as well as key parts and service support functions of the heavy truck business, to Freightliner. At the same time, we have worked to ensure that the necessary infrastructure to provide service and warranty support for owners of Ford branded heavy trucks remains in place within FCSD.

The purpose of this letter is to outline the important elements and timing of these plans for you.

Parts Transfer

Freightliner's purchase of Ford heavy truck assets includes our inventory of Ford heavy truck unique parts. Specifically, these are parts unique to the following product lines: AeroMax, Louisville, Cargo and all predecessor heavy trucks (L-Series, CL-Series, W-Series, etc.). On March 13, 1998 (the "cutover" date), part distribution responsibilities for these parts will transfer to Freightliner. The transfer of these parts is scheduled to occur in multiple stages to ensure adequate inventory levels remain at Ford prior to the cutover to Freightliner and that adequate inventories exist at Freightliner once that cutover occurs. This process will begin soon and take several weeks to complete.

Parts Ordering

FORD WILL ACCEPT ORDERS FOR HEAVY TRUCK PARTS UNTIL 4:00 PM EST ON THURSDAY, MARCH 12, 1998. All orders submitted after 4.00 pm EST on March 12 will not be processed. If a heavy truck unique part order is received after 4:00 pm EST on March 12, the DOES II system will assign Advice Code (K) along with a message to order the part(s) from Freightliner.

All existing backorders of unique heavy truck parts as of 4:00 pm EST on March 12 will be canceled within the Ford system and transferred to Freightliner for handling.

Beginning March 13, franchised Sterling dealers must order heavy truck parts from Freightliner using Freightliner systems. (Sterling Corporation is a subsidiary of the Freightliner Corporation and is the brand name under which the former Ford AeroMax/Louisville will be distributed). All Ford and Lincoln-Mercury dealers, as well as Ford Heavy Truck dealers who have not to signed a Sterling Sales and Service agreement, must obtain heavy truck parts through a Sterling dealer.

Part orders for car, light truck and medium truck applications should continue to be routed to Ford via DOES II. Some parts have applications that are common between heavy truck and other vehicle lines such as medium truck. light truck or car. Ford will continue to distribute these ‘common parts to meet the needs of these non-heavy truck applications.

Beginning March 13. all special heavy truck ordering policies and provisions (Daily Stock Orders, Extended Emergency Order Cutoff Times, Next Flight Out delivery option. etc.) will be discontinued.

* * * * *

Sincerely,

/S/
T. D. Wenzel
Customer Support
Transition Team Leader