STATE OF MICHIGAN

IN THE SUPREME COURT

FORD MOTOR COMPANY,

Plaintiff-Appellant,

v

DEPARTMENT OF TREASURY,

Defendant-Appellee.

Supreme Court Case No. 146962

Court of Appeals Case No. 306820

Court of Claims No. 06-000182-MT

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AMICUS CURIAE BRIEF OF THE MICHIGAN MANUFACTURERS ASSOCIATION

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STATEMENT OF INTEREST OF *AMICUS CURIAE*

Amicus curiae Michigan Manufacturers Association ("MMA") is an association of Michigan businesses, organized and existing to study matters of general interest to its members, to promote the interests of Michigan businesses and of the public in the proper administration of laws relating to its members, and otherwise to promote the general business and economic climate of the State of Michigan. Through effective representation of its membership before the legislative, executive, and judicial branches of government on issues of importance to the manufacturing community, MMA works to foster a strong and expanding manufacturing base in Michigan. A significant aspect of MMA's activities involves representing the interests of its members before the state and federal courts, United States and Michigan legislatures, and state and federal administrative agencies. MMA appears before this Court as a representative of approximately 2,400 private business concerns, all potentially affected by the dispute currently at issue in this case.

The interests of manufacturers are coextensive with the interests of the citizens of Michigan, insofar as manufacturing is the backbone of Michigan's economy, and is an industry that has grown over the past year. Manufacturing is the largest sector of the Michigan economy generating 18% of the gross state product; it employs 563,000 Michigan residents. Since the U.S. recession ended in June 2009 through November 2013, employment in Michigan's manufacturing sector rose by 124,600 jobs (28.4%). Manufacturing has always contributed substantially to Michigan job growth and economic output, and the promotion of a thriving manufacturing sector in Michigan is of the utmost importance to the future economic survival of this state. In fact, manufacturing accounts for 13.8% of total nonfarm employment in Michigan and 44% of nonfarm jobs added in Michigan since the recession ended have been in the

manufacturing sector. Michigan is the national leader in new manufacturing job creation since the recession ended, outpacing the next closest states by about 50%.[1] Accordingly, the issues in this case substantially affect not only the manufacturing sector, but also the economy of the State of Michigan as a whole, including employment levels, economic growth, tax revenue, and the ability of Michigan industries to compete in the regional, national, and global marketplaces.

Michigan businesses enter into transactions, commit financial resources, employ persons and develop future plans every day in reliance on the current state of the law. Businesses require certainty to grow and expand and they require a system of taxation that encourages growth and innovation rather than stifling it. And it is critical that tax laws be applied fairly to all taxpayers. As the principal voice of industry in the State of Michigan, MMA has a strong interest in ensuring that the Michigan courts and taxation authorities apply the legislatively-adopted tax law correctly and fairly.

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[1] See generally http://www.bls.gov/eas/eag.mi.htm (accessed on 1/21/14); http://www.data.bls.gov/timeseries/SMS26000000000000001?data_tool=XGtable (accessed on 1/21/14); CNBC, Top U.S. States for New Manufacturing Jobs, 6/25/13.

STATEMENT OF THE BASIS OF JURISDICTION

MMA adopts Plaintiff-Appellant Ford Motor Company's ("Ford") statement.

STATEMENT OF QUESTIONS PRESENTED

This Court defined two issues for the parties to consider, at a minimum, in its September 25, 2013 order granting leave in this case. MMA concurs with Ford's Statement of Questions Presented, which encompasses the issues this Court identified. But MMA asks the Court to consider a question with broader implications for Michigan manufacturers:

> The controlling statute provides that a tax refund accrues interest beginning 45 days after a "claim" is made but does not indicate what constitutes a "claim" for this purpose. The parties agree that a claim has been made when the Department of Treasury has adequate notice of the claim. In the case of an audit, where the Department of Treasury and the taxpayer have identified a possible overpayment of taxes as a disputed issue, is the taxpayer required to take any further steps to be entitled to recover interest when it is later determined that an overpayment was made?
>
> Plaintiff-Appellant answers "No."
>
> Defendant-Appellee answers "Yes."
>
> The Court of Claims answered "No."
>
> The Court of Appeals answered "Yes."
>
> *Amicus curiae* Michigan Manufacturers Association answers "No."

STATEMENT OF FACTS

MMA adopts Ford's Statement of Facts.

ARGUMENT

When, in the course of an audit, Treasury and a taxpayer dispute whether the taxpayer has made an overpayment, nothing more is required to entitle the taxpayer to interest beginning 45 days after Treasury becomes aware of the dispute.

A. Standard of Review

The standard of review in this case is *de novo* because the questions before the Court involve statutory construction. *Klooster v City of Charlevoix*, 488 Mich 289, 295-96; 795 NW2d 578 (2011).

B. Treasury advances extra-statutory requirements for a "claim" under MCL 205.30(3).

The Department of Treasury ("Treasury") argues that the words "claim" and "petition" in MCL 205.30 are unambiguous. According to Treasury, the words unambiguously require an affirmative request for a specific amount of money based on a precisely articulated basis. While the Legislature could have included any or all of these requirements, it did not do so. The statute does not dictate that the taxpayer "affirmatively request" a refund, or that the taxpayer state a specific amount sought, or identify the precise basis of the request. Instead, the statute merely requires that there be a claim, and provides no requirements about the form and content of a qualifying claim.

In support of the extra-statutory requirements Treasury would have this Court impose, on pages 12-13 of its brief, Treasury looks to the definitions of various words in The American Heritage Dictionary and Black's Law Dictionary, particularly the meanings of "claim" and "petition." Treasury's dictionary-based analysis is flawed in at least two respects.

First, the words "claim" and "petition" can be used as both nouns and verbs. MCL 205.30 uses "claim" as a noun and "petition" as a verb. Treasury either ignores or misses this because it relies in part on definitions of "claim" as a verb and "petition" as a noun.

Second, both "claim" and "petition" are nuanced words with varying meanings. Treasury has selectively chosen meanings that suit its purposes here to the exclusion of meanings that do not favor its position.

- While "claim" can mean "the sum of money demanded" as Treasury asserts, The American Heritage College Dictionary says that "claim" can also mean "a statement of something as a fact; an assertion of truth; to assert's one's right to or ownership of." And Black's Law Dictionary includes as one meaning of "claim" "any right to payment or to an equitable remedy, even if contingent or provisional." In other words, "claim" does not necessarily denote either an affirmative request or a request for a specific amount.
- Treasury argues that "petition" means "request formally" such that it requires a "formal document." But The American Heritage College Dictionary makes clear that this is not always the case when it gives the meaning "to make a request, esp. formally." The fact that the request will generally be made formally necessarily means that sometimes it is not.

Treasury's attempt to impose extra-statutory requirements is also based on its argument on pages 19-20 that tax returns, informal-conference requests, and complaints in court cases must be in writing and meet specific requirements. The flaw with these analogies is that applicable statutes or court rules dictate the form and content of these other documents. Specifically, MCL 206.311(1) requires a taxpayer to use the tax return form that Treasury prescribes, MCL 205.21(2)(c) requires a "written notice" and details the necessary contents of that notice, and MCR 2.113 dictates the form of a court complaint and MCR 2.111(B) dictates the complaint's contents. Treasury's use of these analogies does not support its argument that a

"claim" under MCL 205.30 requires certain specific requirements. Quite the opposite, they show that the Legislature (and Court, in the case of the court rules) knows how to impose specific requirements when it wants to do so. In fact, the predecessor to MCL 205.30 required that a refund request by made "in writing." As Ford observes (p. 22, n. 5), "the Legislature intended to make the requirements of Section 30 even *less* formal than they once were – even an oral communication to Treasury can give Treasury adequate notice that the taxpayer seeks a refund." The fact that MCL 205.30 does not impose specific requirements on a "claim" is yet another reason the Court should refuse Treasury's invitation to impose extra-statutory requirements.

C. Treasury's proposed requirements are unworkable in all-too-common situations.

In the real world, Treasury's proposed extra-statutory requirements are impractical and unfair. While Treasury's position may make sense for overpayments raised outside the context of an audit, it makes no sense – and creates unfair results – when applied to overpayments identified in the context of an audit.

In a situation where Treasury initiates an audit and ultimately challenges the manner in which the taxpayer treats a taxable event – that is, an event or transaction that has a particular tax consequence – Treasury has adequate notice from the beginning that the taxpayer has reached a contrary conclusion. In the course of the audit, Treasury and the taxpayer invariably identify multiple disputed issues and they often involve both alleged underpayments and alleged overpayments. When an overpayment arises in the context of an audit, Treasury cannot possibly assert that it was taken by surprise that it may need to return the overpayment. In that circumstance, the "claim" for refund should be treated as being made when Treasury and the taxpayer identify the overpayment as a disputed issue.

Moreover, there is no reason that the taxpayer would make a formal demand for return of an overpayment identified in the course of an audit because Treasury is already fully aware of the disputed issue. Besides, in many situations, like the first scenario described below, the taxpayer could not make a formal claim as long as it continues to maintain that it is correct about the disputed issue. In other words, it simply is not realistic to require a formal, written demand for repayment as events unfold in the course of an audit. MMA offers an example to illustrate this point.

A common dispute between corporate taxpayers and Treasury involves in which tax year a taxable event occurs. For example, the taxpayer and Treasury may disagree about when a particular deduction should be taken. Suppose that the taxpayer has a deduction that arguably could be taken in either of two years; after applying the relevant factors, the taxpayer concludes that it can and should take the deduction in Year 1. Now suppose that, several years later – say, in Year 3 – Treasury begins an audit of the taxpayer; among the issues being considered is whether the taxpayer should have taken the deduction in Year 2 instead of Year 1. Treasury completes its audit in Year 5, finding that the taxpayer should have taken the deduction in Year 2. Treasury would conclude that the taxpayer underpaid its taxes in Year 1 and overpaid its taxes in Year 2 by the same amount as the Year 1 underpayment.

In this scenario, Treasury would argue that the taxpayer owes interest on the underpayment from the time the taxpayer's return was due in Year 1. But, because the taxpayer would not have filed a former claim for refund of an overpayment in Year 2 – the taxpayer, after all, believed that the deduction was properly taken in Year 1 so there would be no need or opportunity to assert an overpayment – Treasury would also argue that interest on the Year 2 overpayment would not start running until sometime after it completed its audit in Year 5, at the

earliest. In other words, if the dispute were resolved in Year 6, Treasury's position would be that it would owe interest for only one year (or less) while the taxpayer owes interest for five years.

Is this result fair? Of course not. Is it required by the language of MCL 205.30? No. If the dispute were ultimately resolved in favor of Treasury, the fair result would be for the taxpayer to pay no interest because the underpayment in Year 1 is offset by an equal overpayment in Year 2. At most, fairness would dictate that the taxpayer pay no more than one year of interest to reflect the time period between the underpayment in Year 1 and the "correction" in Year 2.

Thus, when, in the course of an audit, Treasury and a taxpayer dispute whether the taxpayer has made an overpayment, nothing more is required to entitle the taxpayer to interest. Of course, something more is required when the overpayment is discovered without an audit. In that situation, the overpayment will come to light only when the taxpayer later uncovers its mistake. Once it does so, it has two options: File an amended return or make a claim for the overpayment by notifying Treasury of the taxpayer's mistake. Either option will trigger the interest provision if the taxpayer ultimately establishes that it is entitled to return of the overpayment. In this situation, where Treasury would have no independent knowledge of the taxpayer's overpayment – unlike the audit situation – it makes perfect sense that a "claim" would require the taxpayer to demand the return of the overpayment, though there still is no basis for any of Treasury's extra-statutory requirements even outside the context of an audit.

D. Treasury's proposed requirements are bad policy.

In addition to the unfair consequences that would result from Treasury's position, there are policy reasons to reject Treasury's extra-statutory requirements, especially in the context of an audit.

First, while MMA members pay the taxes owed as best as they are able to determine, there are times when two positions about the amount owed can be justified factually and legally. If a taxpayer will not get interest on an overpayment, the taxpayer will be more likely to risk underpayment rather than risk overpayment in these 50/50 situations. This potentially delays Treasury's receipt of revenue, maybe for several years. Rejecting Treasury's position will give no disincentive for a taxpayer to make an overpayment in these situations – a sounder fiscal policy.

Second, Ford paid Treasury to fund future underpayments of disputed tax obligations in order to avoid late fees and underpayment interest. Some, though not most, Michigan manufactures do the same. Of course, this is very beneficial for Treasury – not only is the money readily available to pay disputed taxes, Treasury also collects and keeps interest on the prepaid money. If the Court upholds the Court of Appeals holding, the manufacturers that prepay money with Treasury will inevitably stop doing so. Not only will Treasury lose ready access to money for disputed tax obligations, it will also lose the interest on those deposits.

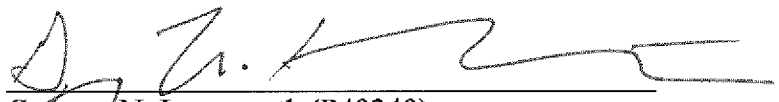
CONCLUSION

For the above-stated reasons, and for the reasons set forth in Ford's appeal brief, *amicus curiae* MMA asks this Court to reverse the judgment of the Court of Appeals and hold that Ford is entitled to interest on its tax refund beginning 45 days after August 3, 2005. MMA further asks this Court to hold that, when, in the course of an audit, Treasury and a taxpayer dispute whether the taxpayer has made an overpayment, nothing more is required to entitle the taxpayer to interest beginning 45 days after Treasury becomes aware of the dispute.

Respectfully submitted,

CLARK HILL PLC

Date: February 5, 2014

By: 

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