Court of Appeals No. 68374-8-I

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

GMAC, aka ALLY FINANCIAL INC., a Delaware corporation,

Appellant,

v.

EVERETT CHEVROLET, INC., a Delaware corporation, JOHN REGGANS, and JANE DOE REGGANS,

Respondents.

APPELLANT'S ANSWER TO PETITION FOR REVIEW

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I. INTRODUCTION

Discretionary review by this Court is reserved for those few cases that meet one or more of the criteria of RAP 13.4(b).[1] This case is not one of them.

Respondent Everett Chevrolet[2] ("EC") petitions this Court for discretionary review under RAP 13.4(b)(1) incorrectly asserting that the decision of the Court of Appeals is at odds with this Court's opinions set forth in *Rekhter*[3] and *Eastwood*.[4] As set forth in detail below, this assertion is not correct. The Court of Appeals interpretation of the contract at issue was based upon the application of well-settled Washington law approved by *Rekhter*.

EC also seeks discretionary review under RAP 13.4(b)(1) and (4) on the basis that the Court of Appeals misapplied *Badgett*[5] and *Allied*[6] in two respects: 1) the law was allegedly misapplied in the context of a

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[1] A petition for discretionary review will be accepted by this Court only: "(1) [i]f the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or (2) [i]f the decision of the Court of Appeals is in conflict with another decision of the Court of Appeals; or (3) [i]f a significant question of law under the Constitution of the State of Washington or of the United States is involved; or (4) [i]f the petition involves an issue of substantial public interest that should be determined by the Supreme Court." RAP 13.4(b).

[2] Additional Respondents include John and Carmenlydia Reggans (John Reggans was EC's sole shareholder and personally managed its affairs). RP Vol X 105:4-5.

[3] *Rekhter v. State, Dep't of Soc. & Health Servs.*, No. 86822-1, 2014 WL 1321008 (Wash. Apr. 3, 2014).

[4] *Eastwood v. Horse Harbor Found., Inc.*, 170 Wn.2d 380, 241 P.3d 1256 (2010).

[5] *Badgett v. Sec. State Bank*, 116 Wn.2d 563, 807 P.2d 356 (1991).

[6] *Allied Sheet Metal Fabricators, Inc. v. Peoples Nat'l Bank of Wash.*, 10 Wn. App. 530, 518 P.2d 734, *review denied*, 83 Wn.2d 1013, *cert. denied*, 419 U.S. 967 (1974).

"modern day automobile wholesale flooring process";[7] and 2) the Court of Appeals failed to distinguish a demand note from a demand obligation. However, as discussed below, under the Uniform Commercial Code ("UCC") and relevant case law, there is no distinction between a demand note and a demand obligation. "Demand" obligations are expressly approved by the UCC, are routinely used in commercial financing, and are enforceable in the context of automobile floor plan financing.

Finally, EC asserts that review should be accepted because the Court of Appeals substituted its judgment in the place of the trial court's judgment.[8] On the contrary, the Court of Appeals opinion turned on legal, not factual, rulings. After repeated opportunities over the past five years, EC has been unable to identify any material factual dispute requiring a trial. As GMAC previously explained and as the Court of Appeals has held, under well-established law, there is no duty of good faith governing the demand obligation in the Wholesale Security Agreement ("WSA"), and EC failed, after numerous opportunities, to identify any specific contract term GMAC did not perform in good faith. Accordingly, the Court of Appeals correctly held that, following standard summary judgment procedure, summary judgment was proper.

EC's petition for discretionary review should be denied.

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[7] Petition, p. 2.

[8] *Id.*

II. RESTATEMENT OF THE ISSUES

1. Should this Court accept review where the Court of Appeals decision does not conflict with this Court's decision in *Rekhter*?

2. Should this Court accept review where the Court of Appeals correctly applied long-standing Washington law as set forth in *Allied* and *Badgett*?

3. Should this Court accept review where the Court of Appeals correctly applied the UCC to hold that demand obligations are expressly authorized and that the UCC contains no requirement or limitation that demand obligations can exist only as demand promissory notes?

4. Should this Court accept review where the Court of Appeals decision does not discuss or conflict with this Court's decision in *Eastwood*?

5. Should this Court accept review where the Court of Appeals correctly determined that summary judgment was proper as EC failed to show that there was any genuine dispute of material fact?

III. RESTATEMENT OF THE CASE

A. Relevant Facts Giving Rise to GMAC's Lawsuit

1. EC's Loans from GMAC Were Payable upon Demand

EC was a car dealership in Everett, Washington. GMAC financed EC's acquisition of vehicles by a wholesale floor plan financing

arrangement that provided EC loans to buy new and used car inventory. EC gave GMAC a security interest in EC's car inventory and its other assets. As the Court of Appeals recognized in its October 11, 2010 unpublished opinion addressing GMAC's first appeal in this case, the core document in this proceeding was the WSA, which allowed GMAC to require full payment on demand.[9]

2. EC's Deteriorating Financial Condition Led GMAC to Ask EC to Restructure the Loan

As the Court of Appeals has also already recognized, and as EC's financial records and the testimony of Mr. Reggans showed, EC's decline began in 2007 when car sales began to fall, coinciding with the general nationwide contraction of the automobile sales industry.[10] EC's available funds to pay creditors, including GMAC, were severely constricted by this nationwide economic downturn. Indeed, by December 2008, EC, despite

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[9] The pertinent clause states: "We [EC] agree upon demand to pay to GMAC the amount it advances or is obligated to advance to the manufacturer or distributor for each vehicle with interest at the rate per annum designated by GMAC from time to time ... ." R. Exs. 3, 6.

> The core document for this financing arrangement is a Wholesale Security Agreement (Agreement), executed in 1996. The Agreement provides that any and all credit lines GMAC supplies to EC are subject to the Agreement. The Agreement requires EC to repay to GMAC the amounts GMAC advances "on demand". The Agreement was amended in March 2000. The amendment did not change the "on demand" provision of the Agreement... . In 2000, GMAC agreed to provide additional financing to EC under a revolving line of credit. This Agreement provides terms for payments in the ordinary course of business but also allows GMAC to require full payment on demand.

GMAC v. Everett Chevrolet, Inc. (GMAC I), 158 Wn. App. 1004 (table), 2010 WL 4010113, at *1 (2010).

having received a $500,000 loan from Motors Holdings in October 2008,[11] sought an additional $540,000 loan just to pay ordinary business expenses.[12]

The evidence of EC's severe financial problems as a result of the economic downturn was in the record before the trial court and the Court of Appeals. EC's annual profit shrank from $700,000 in 2006 to just $28,000 in 2007.[13] EC's own financial reports[14] showed that this substantial contraction in profitability became a trend of operating losses in 2008.[15]

EC's financial problems caused Reggans, in late 2007, to seek and obtain from GMAC a $300,000 increase (from $500,000 to $800,000) in the credit limit on the dealership's Revolving Line of Credit Agreement

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[10] Reggans testified that the U.S. auto sales industry suffered a substantial downturn in 2007 and "went off a cliff" in 2008. RP Vol. X 103:19-21, 99:7-100:13.

[11] RP Vol. X 125:1-7; Vol. XIV 46:21-47:7.

[12] Reggans testified that on December 5, 2008, he asked Motors Holdings for $540,537 "to pay current and due expenses of $358,715 as well as $175,000 in payroll and taxes due December 2008 and January 2009." App F, CP 78, Reggans' Decl. Ex. 4 to Beaver Decl., ¶ 27 (references to "App" refer to the appendices to GMAC's opening appellate brief).

[13] RP Vol. X 100:1-7.

[14] EC submitted monthly financial statements to GM available to both GM and GMAC. RP Vol. I 25:16-26:9; *see* R. Ex. 79. A year-to-date monthly profit or loss summary is contained on the lower center portion of the front page of each report.

[15] EC had five straight months of substantial operating losses. R. Ex. 79 (March ($111,899); April ($104,010); May ($78,218); June ($87,405); July ($87,040)). Monthly losses continued through December. Rebecca Iverson, EC's long-time controller (1996-Sept. 2008), testified to EC's severe financial problems starting in 2007 and its problems paying bills in 2008. RP Vol. III 4:23-25, 7:19-8:2, 10:2-12, 12:4-13:3, 18:1-15.

("RLCA").[16] But by May 2008, EC had used virtually all of those additional funds to pay bills, while its losses continued to accumulate.[17]

By spring 2008, GMAC was very concerned about EC's financial problems.[18] GMAC's branch manager discussed GMAC's concerns with Reggans in June 2008. On July 31, 2008, GMAC sent EC a letter detailing its concerns and explaining that, for GMAC to continue the wholesale line of credit, EC would need to increase its capitalization by $800,000, and Reggans would have to provide a personal guaranty of EC's obligations. *Id.*; R. Ex. 1. The letter gave EC until October 31 (90 days) to comply and notified EC that if it did not, "GMAC may suspend or terminate [EC's] wholesale credit lines." GMAC also declined another request by EC to advance additional funds.[19]

EC never met GMAC's requests. EC never injected $800,000 of unencumbered capital into the corporation and Reggans never provided a personal guaranty.

EC's monthly losses continued.[20] EC's long-time controller resigned in September 2008 because of her concern over potential

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[16] RP Vol. I 18:17-20:16 (Vick); R Exs. 1, 8, 54.

[17] Id.

[18] RP Vol. I 24:13-32:25, 140:7-141:10.

[19] "GMAC is unable to increase the limit of the Dealership's Revolving Line of Credit or extend a working capital loan to the Dealership." R. Ex. 1.

[20] R. Ex. 79. EC's monthly loss in August 2008 was $73,095; in September 2008, $78,413; and in October 2008, $96,291.

personal liability for EC's unpaid state sales tax.[21] Audits of EC showed that EC could not timely make payments.[22]

In October 2008, EC received $500,000 of funds from Motors Holdings.[23] But EC's existing losses forced EC to use those funds to pay amounts in arrears to GMAC and other creditors rather than holding the funds as working capital. *Id.*

It was very troubling to GMAC that even after a $500,000 cash injection, EC still had a negative cash position.[24] GMAC was faced with a borrower that was suffering substantial monthly operating losses, that was repeatedly "out of trust,"[25] and that was unwilling or unable to meet the terms that GMAC offered to continue its financing of the dealership.

Nevertheless, GMAC extended EC's wholesale credit line until November 30, 2008, to give EC additional time to address its financial problems.[26] EC was unable to do so. By the end of November 2008, EC's total year-to-date operating losses had worsened to $717,552. R. Ex. 79.

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[21] RP Vol. III 15:18-17:10.

[22] GMAC's audits of the dealership had shown numerous late payments by EC to GMAC in August, September, October, and November 2008. *See* R. Exs. 66, 140-142; R. Ex. 88 (last page); R. Ex. 89 (last page); R. Ex. 90 (last page); R. Ex. 91.

[23] RP Vol. X 125:1-7; Vol. XIV 46:21-47:7.

[24] RP Vol. VII 24:8-25:7.

[25] Selling "out of trust" is an industry term referring to an auto dealer's failure to pay timely its wholesale lender the "floor plan" amount after a retail sale of a vehicle. RP Vol. I 44:3-17 (Vick); R. Ex. 3.

[26] RP Vol. VII 29:2-35:7; R. Ex. 9.

3. Because EC's Financial Condition Continued to Worsen, GMAC Eventually Made Demand for Payment

By early December, despite having just obtained $500,000 in October, Reggans needed an immediate loan of an additional $540,000 for EC just to pay its ordinary business expenses.[27] EC's severe cash shortage caused it to go "out of trust" on three occasions in the span of approximately two weeks.[28] GMAC then twice agreed to "floor" additional vehicles for EC.[29] On December 8, GMAC suspended EC's wholesale credit line.[30] In mid-December, GMAC terminated its financing arrangements with EC and made demand for full payment.[31] When a few days later EC again went "out of trust"[32] and then made no provisions to pay,[33] GMAC demanded full payment immediately. *Id.*[34]

B. Procedural History

In response to GMAC's demand for immediate payment in full, EC stopped paying GMAC completely, even for vehicles it sold. EC sold

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[27] Footnote 12 *supra.*

[28] RP Vol. VII 38:4-42:8; R. Ex. 76.

[29] This effectively loaned additional funds to EC so it could pay the delinquency due GMAC. RP Vol. I 39:23-47:21, 119:2-120:14; Vol. VII 52:18-53:15; R. Exs. 10, 23, 32.

[30] R. Ex. 76; R. Ex. 6. On December 4, 2008, GMAC also gave notice to GM on its "open account" with EC. R. Ex. 56.

[31] $5,629,294.89 was owed on the floor plan financing and $738,000 on the RLCA (total $6,367,294.89). R. Ex. 77.

[32] RP Vol. VII 60:19-67:24; R. Ex. 14.

[33] Despite knowing for two days that $206,000 would come due on December 18, EC made no arrangements of any kind on either the 18th or the 19th (or any day thereafter) to pay GMAC. RP Vol. VII 64:1-65:12; Vol. VIII 5:10-9:1.

33 vehicles and pocketed every penny of the sales proceeds, $778,774.80, instead of repaying GMAC, as agreed, the amounts it had lent EC to acquire those vehicles.[35] To halt this misapplication of sale proceeds, GMAC filed this action on December 31, 2008, and obtained a temporary restraining order prohibiting all sales by EC. Several weeks later, the order was modified to an injunction that allowed EC to sell cars but ordered it to pay GMAC the proceeds of cars as they were sold.[36]

In March and April 2009, the trial court held a three-week hearing on GMAC's motion for replevin, but denied that motion based upon GMAC's alleged "bad faith." GMAC sought discretionary review and the Court of Appeals Commissioner found the "bad faith" ruling to be "probable error" and granted review. In October 2010, the Court of Appeals reversed the order denying replevin and remanded.[37]

In November 2011, GMAC filed its motion for summary judgment on EC's bad faith counterclaims and defenses based upon the two leading Washington cases, *Allied* and *Badgett*, in effect asking the trial court to correct its "probabl[y] erro[neous]" prior ruling. But the trial court again

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[34] R. Ex. 83. When EC defaulted by not paying upon demand, GMAC was entitled to have EC make its collateral available for GMAC's immediate possession. R. Ex. 3, ¶ 9.

[35] RP Vol. VI 27:14-30:22; Vol. VIII 9:2-16; R. Ex. 52. EC converted proceeds of $778,774.80 instead of paying GMAC as the parties' contract required. *Id.*

[36] R. Ex. 13. In March and April 2009, while the replevin hearing was proceeding, and despite the outstanding injunction requiring EC to pay GMAC when it sold vehicles, EC sold another 18 vehicles without paying any proceeds to GMAC. R. App. E.

[37] *See GMAC I*, 2010 WL 4010113 (reversing all of the trial court's other rulings on related issues as well).

ruled that GMAC had acted in "bad faith," now basing its ruling upon a completely new basis that was not even argued by EC, and based upon the trial court's speculation instead of "specific facts" as required by CR 56(e), and denied GMAC's motion. GMAC again sought discretionary review and the Court of Appeals issued an order granting review on August 16, 2012.[38] On January 27, 2014, the Court of Appeals reversed the trial court and remanded the proceeding with instructions to enter summary judgment in favor of GMAC.[39] EC's motion for reconsideration was denied on March 17, 2014. EC filed the instant petition for discretionary review on April 16, 2014.

IV. ARGUMENT

A. The Court of Appeals Opinion Does Not Conflict with This Court's Decision in *Rekhter*

Without providing analysis or explanation, EC asserts that the Court of Appeals decision is somehow inconsistent with this Court's recent ruling in *Rekhter*. But *Rekhter* is inapposite, because this Court in *Rekhter* was addressing a substantially different contract than the contract at issue in this case. In *Rekhter*, this Court reaffirmed its prior ruling in *Badgett*, that the implied covenant of good faith and fair dealing cannot add or contradict express contract terms and does not impose a free-

[38] *GMAC v. Everett Chevrolet, Inc. (GMAC II)*, No. 68374-8-I, 2012 WL 3939863 (Wash. Ct. App. Aug. 16, 2002).

floating obligation of good faith on the parties – "the duty [of good faith and fair dealing] arises only in connection with terms agreed to by the parties." *Badgett*, 116 Wn.2d at 569.[40] *Rekhter* 2014 WL 1321008 *9.

This Court in *Rekhter* confirmed the rule of good faith as expressed in *Badgett* and similar cases, but addressed the duty of good faith as applied to a distinctively different contract term: a contract provision where one party to the contract retained the discretionary authority to determine a future contract term.[41]

In contrast, the contract in the instant case does not contain any term by which GMAC retained the discretionary authority to determine a future contract term. Rather, this case addresses a contract term, a right to make demand for payment, that the UCC expressly authorizes and expressly provides is not subject to any duty of good faith. *Allied,* 10 Wn. App. at 536. Thus, when GMAC made demand, GMAC not only took an action expressly authorized by the contract, it took an action that the UCC expressly provides is not subject to any duty of good faith.

Given that the contract at issue in this case contains no similarities to the contract before this Court in *Rekhter* and that the Court of Appeals

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[39] *GMAC v. Everett Chevrolet, Inc. (GMAC III)*, 179 Wn. App. 126, 317 P.3d 1074 (2014).

[40] *Johnson v. Yousoofian*, 84 Wn. App. 755, 762, 930 P.2d 921 (1996).

[41] *Goodyear Tire & Rubber Co. v. Whiteman Tire, Inc.*, 86 Wn. App. 732, 738, 935 P.2d 628 (1997) ("the duty of good faith and fair dealing arises "when the contract gives one party discretionary authority to determine a contract term.")

decision properly follows *Badgett*, its ruling does not conflict in any respect with *Rekhter*.

B. The Ruling on Appeal Is Correct Under *Allied* and *Badgett*

The Court Appeals did not misapply *Allied* or *Badgett* (the two leading cases in Washington on the central issues in this case). *Badgett* and *Allied* both address commercial financing issues and are part of a well-established and nationwide body of UCC law.

The material fact under the applicable law was that GMAC had the right to make demand for payment at any time and for any reason. As the facts show, the EC automobile dealership was in dire shape because of the nationwide economic contraction. Regardless, as in *Allied*, the financial condition of the borrower does not prevent or limit exercise of a demand obligation.[42] The specific fact allegations in EC's affirmative defenses/counterclaims and articulated by the trial court in denying GMAC's summary judgment motion (again recited in EC's Response Brief on appeal [EC's Response Brief, p. 13, n.11, 31[43]]), even taken as

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[42] "'Demand notes with the security agreements here executed indeed put the bank in a position where if it takes action, as a practical matter, the company is in trouble because it has lost its financing, but that is the agreement that the parties made by appropriate written instruments.'" *Allied,* 10 Wn. App. at 534 (quoting trial judge).

[43] The Appellate Court considered these facts as articulated in its Opinion when it stated, "EC argues that *Badgett* presents no bar to its claim because 'GMAC's conduct of which Everett Chevrolet complains stems directly from the rights and obligations expressly stated in the WSA and RLCA (i.e., the circumstances under which a default may properly be declared and the circumstances under which a default, left uncured, can lead to a demand).' But, as we discussed earlier in this opinion, this general claim simply falls short of *Badgett*'s requirements." *GMAC III*, 179 Wn. App. at 150-51 & n.87 (quoting response brief).

true, do not identify any material factual issues that change the legal conclusions made by the Court of Appeals that: 1) the WSA contains a demand obligation; 2) GMAC had the legal right to make demand for payment at any time for any reason or no reason at all;[44] 3) GMAC's exercise of the demand feature of the WSA is not barred or limited by any good faith obligation;[45] 4) the duty of good faith exists only in relation to performance of a specific contractual term;[46] and 5) after five years of litigation, EC has been unable to identify any specific contract term to support any affirmative defenses or counterclaim based upon any duty of good faith.[47]

Rekhter does not change the requirement that the duty of good faith only exists in relation to the performance of a specific contract term and does not exist in relation to a demand obligation. EC's petition has not explained how the Court of Appeals misapplied *Badgett* or *Allied* and has not identified any specific contract term that meets the requirements of *Badgett*. Indeed, EC denied it had any obligation to do so.[48]

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[44] "Here, as in *Allied*, the 'upon demand' provision gave GMAC a right to make a demand for payment of all accrued amounts for any reason or no reason. This is so even if GMAC chose, as in this case, to specify reasons in its December 15, 2008 letter why it was making demand. Moreover, as in *Allied*, possible detriment to EC's business did not bar the right to make demand." *Id.* at 147.

[45] "In sum, GMAC's demand was not barred by the duty of good faith." *Id.*

[46] *Badgett*, 116 Wn.2d at 570.

[47] *GMAC III*, 179 Wn. App. at 150-51.

[48] At the summary judgment argument, EC denied that *Badgett* required it to show that any specific contract provision was implicated: "The Court ... I don't think you identified a contract provision that you could argue that GMAC breached ... Mr. Beaver:

Rekhter reaffirmed *Badgett*, but addressed a contract term not present in the instant case – discretionary authority to determine a future contract term. *Allied* and *Badgett* follow the UCC rules, and are part of a body of commercial law cases nationwide that reach the same result. In other words, the Court of Appeals opinion follows well-established law and there is no issue in the Court of Appeals opinion that meets the requirements of RAP 13.4(b).

C. An Enforceable Demand Obligation Does Not Need to Be Negotiable and Is Not Limited to a Demand Promissory Note

The UCC expressly provides for demand obligations.[49] The UCC provides that the duty of good faith does not limit a creditor's right to call for payment under a demand obligation because the "very nature" of "demand instruments or obligations" "permits call at any time with or without reason." UCC § 1-208 cmt. (*former* RCW 62A.1-208);[50] *see also*

"I would just simply have to say, Your Honor, I did not read that requirement out of *Badgett*." App. G at 31:14-21. "I don't get out of that the requirement that you must cite to a specific contractual term." App. G at 32:11-13.

[49] RCW 62A.3-108. As the Appellate Court correctly noted on the prior appeal, the WSA "requires EC to repay to GMAC the amounts GMAC advances 'on demand.'" *GMAC I*, 2010 WL 4010113, at *1. Likewise, the revolving line of credit agreement "allows GMAC to require full payment on demand." *Id.*

[50] Revised Article 1 of the UCC was approved by the National Conference of Commissioners on Uniform State Laws and The American Law Institute in 2001, but has not been adopted in Washington. Former Section 1-208 is now designated as Section 1-309 in revised Article 1 of the UCC, and this specific sentence in the comment has been relocated to the comments to Section 1-309 in revised Article 1 of the UCC. Washington had retained this sentence in its comments to RCW 62A.1-208. More recently, Washington revised its Article 1 of the UCC, eliminating Section 1-208 as of June 7, 2012. However, under the savings and application notes to RCW 62A.1-101, the former provisions of Washington's UCC remain the governing law in this case.

Allied, 10 Wn. App. at 536. Any attempt to apply the duty of good faith to a demand obligation fails as a matter of law.[51]

In ruling on this summary judgment motion, the trial court again refused to follow *Allied* and suggested the demand obligation rules did not apply to the WSA and the RLCA because they were not negotiable instruments. App B, 49:16-50:2.[52] But the "negotiability" of a demand instrument or contract is not relevant to the duty of good faith.[53] The duty of good faith does not apply to either "demand instruments or obligations."[54] It is the nature of "demand," not "negotiability," that

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[51] *Allied*, 10 Wn. App. at 536 n.3 ("Although these facts might raise questions as to the bank's business judgment, they create no factual issue as to the bank's right to do what it did, and so are not material facts. This is particularly so under our interpretation of what constituted the agreement between the parties, namely, the terms of the demand notes."); *see Larson v. Vermillion State Bank*, 567 N.W.2d 721, 723 (Minn. Ct. App. 1997); *Fulton Nat'l Bank v. Willis Denney Ford, Inc.*, 154 Ga. App. 846, 269 S.E.2d 916, 918 (1980); *Centerre Bank of Kansas City, N.A. v. Distributors, Inc.*, 705 S.W.2d 42, 47-48 (Mo. Ct. App. 1985); *Taggart & Taggart Seed, Inc. v. First Tenn. Bank Nat'l Ass'n*, 684 F. Supp. 230, 235-36 (E.D. Ark. 1988), *aff'd*, 881 F.2d 1080 (8th Cir. 1989); *Mirax Chem. Prods. Corp. v. First Interstate Commercial Corp.*, 950 F.2d 566, 570 (8th Cir. 1991).

[52] *See* Appendix B to GMAC's Opening Brief in the Court of Appeals.

[53] As the Court of Appeals stated in granting GMAC's motion for discretionary review:

> The analyses in *Allied* and *Badgett* did not depend on whether the demand feature was in a promissory note or in some other instrument. Rather, the analyses depended on the right of the holder of the instrument to demand immediate payment. EC does not contend that the security agreement that it signed lacks a demand provision. It clearly does. Nor does it argue that this demand provision is functionally or legally different from one in a note. It is not. Finally, it does not argue that it misunderstood the import of such a feature in the security agreement in this case. Thus, the factual distinction of what instrument contains the demand feature—security agreement or promissory note—is not material for purposes of our analysis in this case.

GMAC II, 2012 WL 3939863, at *4.

[54] *Mirax Chemical* illustrates the point. It involved a line of credit agreement which provided that "'[d]ebtor promises to pay Secured Party, on demand, all or any part of the

permits call at any time with or without reason and thus excludes any duty of good faith.[55]

Enforcement of a demand obligation is not a "drastic" remedy. Demand financing is a long-standing, standard type of commercial financing. *See, e.g., Allied,* 10 Wn. App. 530 (a 1974 case). Nor is a demand obligation limited to a demand note. No such limitation appears in the UCC, and as set forth in GMAC's reply brief filed with the Court of Appeals, other courts addressing GMAC's WSA have held similarly. For example, in *Coffee v. GMAC*, 5 F. Supp. 2d 1365, 1377 (S.D. Ga. 1998), the court recognized that the demand provision of GMAC's WSA was fully enforceable even though it appeared alongside a related contract (a Loan Agreement, which is absent from this case) that required certain events of default before GMAC could terminate the dealership's line of credit.[56] *Coffee* therefore stands as authority for enforcing a "demand obligation" under the plain language of the WSA even though other terms

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debit balance at any time.'" 950 F.2d at 568 (brackets in original). There was no promissory note. Yet the court held that the agreement was a "demand obligation" to which the duty of good faith, as codified in UCC § 1-208 (now § 1-309), did not apply. *Id.* at 570; *cf. Larson,* 567 N.W.2d at 723 (explaining why imposition of a duty of good faith would impair the utility of demand instruments and raise the cost of lending); *Solar Motors, Inc. v. First Nat'l Bank of Chadron*, 249 Neb. 758, 545 N.W.2d 714, 720 (1996) (same).

[55] What distinguishes negotiable instruments from other contracts is the manner in which rights in instruments may be transferred and the defenses an obligor may assert against a transferee. *See* RCW 62A.3-201, .3-305.

[56] By comparison, GMAC's WSA with EC does not contain "default contingencies" governing either the "payable on demand" provision or provisions governing termination or suspension of the lending contract. Thus, the default contingencies in the WSA at issue here apply only to GMAC's exercise of its remedies against its collateral.

and conditions may also apply to a dealership's financing.[57] As in *Allied*, GMAC properly made demand as a matter of law.

D. No Conflict with This Court's Decision in *Eastwood*

EC claims that the Court of Appeals "apparently applied the economic loss rule to bar ECI's tort claims based upon demand language as it denied ECI's motion for reconsideration." EC's Petition p. 19. First, nowhere in the Appellate Court's opinion or in the Order Denying Motion for Reconsideration is there any mention of the economic loss rule. Bald speculation about a legal theory not even mentioned in the Court of Appeals' opinion cannot provide a basis or reason for Supreme Court review.

Second, the Court of Appeals granted summary judgment as to EC's tort counterclaims against GMAC because these claims were based upon GMAC's alleged bad faith conduct in making demand for payment[58] and EC cannot base tort claims upon such contractually authorized conduct. In *Eastwood*, this Court confirmed that the economic loss rule did not apply to limit a tenant's recovery to contract remedies for breach

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[57] *See also Zeno Buick-GMC, Inc. v. GMC Truck & Coach*, 844 F. Supp. 1340, 1350 (E.D. Ark. 1992) ("Under the circumstances of this case, that is, the default by Zeno Buick and the demand feature of the Wholesale Security Agreement, the Court concludes that GMAC's summary judgment motion on the plaintiff's claim for breach of the duty of good faith is well taken and the same will be granted."), *aff'd*, 9 F.3d 115 (8th Cir. 1993); *Mirax Chem.*, 950 F.2d 56.

[58] *GMAC III*, 179 Wn. App. at 151.

of a lease where the landlord owed an *independent* duty to the tenant not to commit waste on the real property. 170 Wn.2d at 399.

But "[w]hen no independent tort duty exists, tort does not provide a remedy." *Id.* at 389. In the context of the commercial lending relationship in this case, the law is clear – no *independent* duty of good faith arises when the lender is negotiating a workout with a borrower,[59] and merely requiring performance of a lending agreement according to its terms cannot trigger a breach of the duty of good faith.[60] As the Court of Appeals held, GMAC, in making demand, was exercising its *contractual* right that the UCC expressly recognizes as necessarily free of any duty of good faith. The Court of Appeals correctly determined that the EC's tort claims asserted no independent duty owed by GMAC outside those owed under the contract, which GMAC did not breach in any event. Thus, EC

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[59] *Badgett* itself is a leading case for the proposition that a lender has no duty of good faith to cooperate in efforts to restructure a loan. *Badgett*, 116 Wn.2d at 570. Numerous other courts agree. *Rosemark Gardens Funeral Chapel-Cemetery, Inc. v. Trustmark Nat'l Bank*, 330 F. Supp. 2d 801, 811 (S.D. Miss. 2004) ("A number of courts have implicitly recognized, in fact, that a duty of good faith and fair dealing does not arise even where a lender begins negotiations towards restructuring an existing loan."); *see also Price v. Wells Fargo Bank*, 213 Cal. App. 3d 465, 261 Cal. Rptr. 735, 742 (1989) *overruled on other grounds, Riverisland Cold Storage, Inc. v. Fresno-Madera Production Credit*, 291 P.3d 316 (2013) (covenant of good faith and fair dealing is not breached when lender takes "hard line" in loan repayment negotiations since "[c]ontracts are enforceable at law according to their terms"); *Carney v. Shawmut Bank, N.A.*, No. 07-P-858, 2008 Mass. App. Unpub. LEXIS 458, at *9 (Mass. App. Ct. Sept. 19, 2008) ("While Shawmut was free to negotiate with Carney, it was under no obligation to do so, and was equally free to exercise the rights which it had acquired under the loan agreements."); *Glenfed Fin. Corp. v. Penick Corp.*, 276 N.J. Super. 163, 647 A.2d 852, 857-58 (App. Div. 1994).

[60] *See Badgett*, 116 Wn.2d at 570 ("[T]here cannot be a breach of the duty of good faith when a party simply stands on its rights to require performance of a contract according to its terms.").

did not claim or show that there was any independent duty owed to it by GMAC that could be breached.

E. No Material Facts Disputing the Demand Feature of the WSA

The responding party to a summary judgment motion "must set forth specific facts" showing that there is a genuine issue for trial. CR 56(e).[61] Neither the responding party, nor the trial court, can rely "merely on conclusory allegations, speculative statements or argumentative assertions."[62] There is no purpose to have a trial unless there is a genuine issue of material fact in dispute. Otherwise a trial is "useless."[63]

Here, the issues presented in GMAC's summary judgment motion were whether EC's claims and defenses based upon assertions of "bad faith" conduct by GMAC apply to a demand obligation or otherwise exist only "in relation to performance of a specific contract term."[64] GMAC argued that (1) the duty of good faith did not apply to the WSA demand obligation and (2) EC had failed to identify any specific contract term to which the duty of good faith applied.[65]

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[61] After the moving party has submitted adequate affidavits, the burden shifts to the nonmoving party to set forth specific facts sufficiently rebutting the moving party's contentions and disclosing the existence of a material issue of fact. *Seven Gables Corp. v. MGM/UA Entm't Co.*, 106 Wn.2d 1, 13, 721 P.2d 1 (1986).

[62] *Las v. Yellow Front Stores*, 66 Wn. App. 196, 198, 831 P.2d 744 (1992).

[63] "The purpose of summary judgment is to avoid a useless trial when there is no genuine issue of any material fact." *Olympic Fish Prods., Inc. v. Lloyd*, 93 Wn.2d 596, 602, 611 P.2d 737 (1980).

[64] *Badgett*, 116 Wn.2d at 570; *Keystone Land & Dev. Co. v. Xerox Corp.*, 152 Wn.2d 171, 177, 94 P.3d 945 (2004).

[65] CP 506.

As the Court of Appeals noted,[66] instead of identifying specific facts showing that a "specific contract term" to which the duty of good faith applied, EC denied it had any obligation to do so.[67] Accordingly, the Court of Appeals properly reversed the denial of summary judgment and dismissed any affirmative defenses and counterclaims based upon GMAC's alleged lack of good faith. Nothing contained in EC's petition offers any indication that the Court of Appeals failed to properly follow black-letter summary judgment law.

V. CONCLUSION

The Court of Appeals ruling in this case followed Washington precedent and well established UCC commercial law as followed by courts across the country. There is no basis for, or purpose to be served by, discretionary review by this Court. RAP 13.4(b). GMAC respectfully requests that this Court deny EC's petition for review.

DATED this 16th day of May 2014.

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[66] *GMAC III*, 179 Wn. App. at 151.

[67] Footnote 45 *supra*.

CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury under the laws of the State of Washington that I caused a true and correct copy of the foregoing document, **APPELLANT'S ANSWER TO PETITION FOR REVIEW** to be served on the following counsel of record by PDF/EMAIL & U. S. MAIL:

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Please find: Appellant's Answer to Petition for Review - filed by
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