

No. 63331-7-1

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

GMAC, A Delaware corporation,

Petitioner,

v.

EVERETT CHEVROLET, a Delaware corporation,
JOHN REGGANS, AND JANE DOE REGGANS

Respondents

RESPONDENTS' BRIEF (CORRECTED)

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COURT OF APPEALS
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I. STATEMENT OF THE CASE

A. The Parties

General Motors Acceptance Corporation (“GMAC”) was an automobile financing company.¹ Everett Chevrolet, Inc. (“EC”) is an automobile dealership that operated successfully in Everett since 1996. VR 2:14-16.² John Reggans is the President and owner of EC. VR 2:14-15.

Mr. Reggans started the dealership business with an 80 percent investment from Motors Holdings, a division of General Motors Company, and twenty percent of his own capital. VR 2:16-19. Mr. Reggans was able to acquire 100 percent ownership in 1999, solely through the use of dealer profits. RP Vol. X 68 14-69:13.³

B. GMAC Wholesale Financing

EC obtained wholesale floor plan financing⁴ from GMAC commencing in December, 1996. GMAC and EC entered into the floor plan financing

¹ General Motors Acceptance Corporation no longer exists, as the corporation was converted to a limited liability company, GMAC, LLC, on July 20, 2006. GMAC, LLC was converted to GMAC, Inc, a Delaware corporation, on June 30, 2009.

²VR” refers to the Verbatim Report of Proceedings on April 11, 2009 (Appendix A). “RP” refers to the Report of Proceedings at the replevin hearing,

³ The Motors Holdings program allows a junior investor to buy out the larger company interest within a certain amount of time. VR 2: 20-22. EC’s performance was much better than projected in its pro forma plan (7 years). VR 2-23–3-2.

⁴ In the automobile industry, “floor plan financing” is a method of financing a dealership’s inventory of new and used vehicles in which the dealer gives a security interest in the inventory to the lender.

arrangement by executing a Wholesale Security Agreement. R. Ex. 3. EC's used vehicles were added to the floor plan arrangement pursuant to an Amendment to Wholesale Security Agreement. R. Ex. 6. GMAC and EC executed an Agreement Amending the Wholesale Security Agreement to conditionally authorize the sale of new floor plan vehicles on a delayed payment privilege basis. R. Ex. 7.⁵

In 1999, EC received a working capital loan of \$500,000 from GMAC and repaid it in full in five years. VR 3:14-16. GMAC and EC entered into a Revolving Line of Credit Agreement on October 16, 2000. R. Ex. 8. EC complied with the payment terms of GMAC's revolving credit line by making the required interest payments from 2000 through 2008. R. Ex. 8; RP Vol. I 57:13-23; VR 3:16-18. Later in 2008, while the dealership was in a down market, GMAC unilaterally changed the interest only payment terms by demanding principal reduction payments of \$10,000 a month. RP Vol. I 70:15-23; VR 3:18-20.

EC was profitable every year from 1996 to 2006. VR 3:4-5. RP Vol. I 58: 18-20. EC averaged new car sales of 70 per month from 1996 to 1999. VR 3:8-10. The Dunn and Bradstreet report for EC indicated that high year sales were approximately 40 million dollars. R. Ex. 92; RP Vol. IX 34:1-37:5; VR

⁵ The Agreement Amending the Wholesale Security Agreement to Conditionally Authorize the Sale of New Floor Plan Vehicles on a Delayed Payment Privilege Basis (R. Ex. 7) is referred to herein as the "Delayed Payment Amendment".

3:5-7. Although new car sales dropped after a competing dealership opened, EC still averaged about 40 to 60 new cars sold a month. RP Vo. X 79:22-80: 2; VR 3:10-13.

After 2006, when ECI earned approximately \$700,000 in net profit, the car industry began to decline. VR 3:21-23. The market was substantially down during 2007 and 2008. RP Vol. II 87:8-13. EC's net profit in 2007 was only about \$28,000. VR 3:23-24. Yet the dealership remained profitable through October, 2007. RP Vol. I 59:15-17.

In September of 2007, Mr. Jerry Vick became GMAC branch manager for the Pacific Northwest region. RP Vol. I 16:15-23; VR 3:25-4:1. Mr. Vick, whose job included getting dealers to use GMAC's floor plan and establishing loans, became the primary field employee having contact with EC. RP Vol. I 16:24-17:5; RP Vol. I 18:3-19. Mr. Vick believed that EC needed to expand its revolving line of credit from \$500,000 to \$800,000. RP Vol. I 18:24-19:24; VR 4:1-5. Mr. Reggans proactively requested an increased credit line to provide additional funds for dealership operations. RP Vol. I 18:17-22; RP Vol. I 19:11-18; VR 4:6-7. GMAC responded by increasing the credit line by \$300,000 to \$800,000. RP Vol. I 19:19-24.

C. Delayed Rejection of Real Estate Loan

In August, 2007, Mr. Reggans requested that GMAC assist in financing the purchase of the real estate leased by EC. VR 4:8-11. EC had an option to

purchase the ground and building where the dealership operated at a favorable price. RP Vol.1 20:20-21:14-23. The loan was critical to the profitability of his business because EC was facing a dramatic increase in lease payments. RP Vol. I 61:10-14; VR 4:11-14. The property purchase would enable EC to avoid an escalation in lease payments of nearly fifty percent. VR 4:15-16. The collateral is extremely valuable real estate in Everett, and the sale price was \$1 million under the appraised value (\$5,990,000). RP Vol. 1 61:15-25; Vol. X 113:12-14; VR 5:2-3.

Mr. Reggans discussed the real estate loan with Mr. Vick and the Regional Vice President of GMAC. RP Vol. I 65:1-13. He made it clear that the real estate deal had to close by December 31, 2007. RP Vol. I 21:17-20; 4:17-19. GMAC never responded to this loan request in writing. VR 4:20-21. Mr. Vick verbally rejected the request in March or April, 2008. RP Vol. I 22:25-23:9; 66:14-67:14.153:4-154:8; VR 4:19-20.⁶

The trial court observed that from a business standpoint, GMAC's position was unreasonable, and that GMAC appeared to have dragged its feet. VR 5:8-10. GMAC delayed its decision regarding the financing of the real estate transaction until 90 to 120 days after the December 31, 2007 closing date.

⁶ Mr. Vick testified that the loan request was rejected because there was no positive cash flow. RP Vol. I 22:6-11; VR 4:22-23. However, the loss shown in the April, 2008 financial statement was for only the first quarter, and GMAC had just increased the revolving credit line. VR 4:24-5:1. Several other Chevrolet dealers in Mr. Vick's branch lost money. RP Vol. I 56:13-18. Under these facts and circumstances, Mr. Vick's testimony was not credible. VR 5:47.

This inexplicable delay was worse than a swift rejection because it denied the dealer the time and opportunity to pursue other options in a timely manner. A delayed financing decision is even more significant if it is a pattern of behavior. VR 5:13-15.

D. GMAC's Accelerated Demands and Bad Faith Conduct

To exert more pressure on EC, GMAC seized upon the dealership's April, 2008 financial statement showing a first quarter loss of \$163,042. VR 5:16-17.⁷ During a meeting with Mr. Reggans on June 10, 2008, Mr. Vick asserted GMAC's demand for a personal guarantee. RP Vol. I 27:18-20, 27:25-28:1; VR 5:17-18.⁸ GMAC wanted Mr. Reggans and his wife to personally guarantee almost \$7 million. RP Vol. I 70:24-72:1.

Mr. Vick later sent a July 31, 2008 letter to Mr. Reggans declaring that due to early 2008 losses, EC was required to make an \$800,000 cash injection and provide a personal guarantee by October 31, 2009. R. Ex 1; RP Vol. I 34:12-25; VR 6:8-11. If these requirements were not achieved by October 31,

⁷ GMAC admitted that the market had been a very challenging for the automobile industry in 2008. RP Vol. I 56:9-12. In fact, GMAC lost money in 2008 and obtained a \$6.4 billion bailout loan from the U.S. government under the Troubled Asset Relief Program (TARP). RP Vol. I 56:19-57:12; 146:19-147:8.

⁸ Mr. Vick claimed that the meeting covered capital injection, increased floor plan rate, and other subjects later raised in his July 31, 2008 letter. R. Ex. 1, RP Vol. I 27:18-28:18. Mr. Reggans testified that the meeting was dominated by GMAC's demand for the personal guarantee, and virtually none of the other topics in the July 31, 2008 letter. VR 5:21-6:1. The testimony of Mr. Vick, who could not recall Mr. Reggans' response to the demand for an \$800,000 cash injection, was not credible. RP Vol. I 32:11-17; VR 6:3-7.

GMAC threatened to suspend or terminate the dealership's wholesale credit line. VR 6:11-15. In the auto dealership business, this is known as a "drop dead" letter, communicating to the reader that the relationship is over and it is just a matter of time before the end. VR 7:9-13.

Rejecting GMAC's explanations, the trial court found that the drop dead letter attempted to mask GMAC's intent by justifying its actions based upon credit trends and performance. VR 7:6-8, 13-17. In fact, credit trends and dealer performance had not been established as of April, 2008. High overhead businesses generally show losses at the beginning of the year until they reached their breakeven point in sales later in the year. VR 7:17-20.

The 50-day delay between the June 10, 2008 meeting and the July 31, 2008 demand letter was significant. RP Vol. I 34:22-35:7. The trial court observed that "in the world of finance, 60 days is a lifetime." VR 6:24-25. A dealer would want those 50 days to meet new conditions, but GMAC deprived EC of the time necessary to adjust to its demands. VR7:1-4.

Observing that Mr. Reggans had wide ranging contacts that could have been used to pursue other financing solutions, the trial court found that GMAC prevented him from making the maximum use of his time by Misleading him, manipulating and withholding information, and resting on a reservation of rights. VR 7:20-8:2.

After imposing the severe new conditions on July 31, 2008, GMAC continued to add new requirements for EC financing, including an arbitrary charge of \$500 per audit which is not a contract term in any of the parties' agreements, and a principal reduction payment of \$10,000 per month on the revolving line of credit. R Ex. 2-8; VR 6:15-20. GMAC demanded the change in payment terms from interest only to a \$10,000 principal payment while the dealership was in a down market. RP Vol. I 70:15-23.

Daily audits occurred for a substantial number of months, and the dealership was charged \$500.00 per day, totaling \$15,000 per month. RP Vol. VIII 66:13-68:21; VR 12:14. GMAC constantly interrupted Mr. Reggans and EC employees and interfered with their performance of duties. RP Vol. I 100; 14-101:9; 81:14-82:8; Vol. II 130:1-13; 131:5-16; VR 15:12, 15-20.⁹ GMAC's daily presence interfered with EC's vehicle sales and dealings with customers. RP Vol. II 130:14-25; 132:6-133:9. 21.

GMAC informed EC that the dealer's "breakeven" point is determined based upon units, and it instructed the dealership to reduce inventory ("sell more cars") to meet GMAC goals. VR 12:9-13. What Mr. Reggans did not

⁹ EC's new car manager testified that GMAC employees were on site interfering with business operations from November 14, 2008 until he left on January 28, 2009. RP Vol. I 58:9-12, Vol. II 132:20-133:3; 136:14-19. Mr. Vick spent a substantial amount of time at the dealership during most days when he participated in audits. RP Vol. I 133:2-17; Vol. II 135:12-21. Customers and EC employees overheard conversations when GMAC reps came into the car manager's office and demanded information. VR 15:21. The trial court found that GMAC testimony regarding "polite" audit procedures was not credible. VR 14:23-25.15:23-16:1.

know was that GMAC was undertaking a very sophisticated financial analysis on his business. VR 8:4-6. GMAC's wholesale accounts manager, Michelle Smith, reviewed EC's April and July, 2008 financial statements and used a computer system to prepare a credit profile of the dealership. RP Vol. VI 150:24-151:1, 153:8-19.¹⁰

Mr. Reggans was never informed that GMAC's desired debt to equity ratio is 3 to 1. RP Vol. VI 168: 12-16; 169:10-170:5-8; Vol. VI 47. Despite knowing that EC's April debt to equity ratio was 9.73 to 1, and that the dealership could not reach the target in July 2008, Ms. Smith never disclosed the required ratio to Mr. Reggans. VR 8:4-11, 14-16.

The \$800,000 cash injection demand was based upon the April, 2008 financial statement. RP Vol. VIII 15:24-16:7. GMAC failed to submit evidence that the required cash injection would actually achieve the 3 to 1 debt equity ratio. VR 8:11-13. Ms. Smith admitted that the target cash injection of \$800,000 was no longer valid when it was requested in July, 2008, but GMAC failed to inform Mr. Reggans of the invalid target. VR 8:24.

¹⁰ Ms. Smith compared EC's April, 2008 financial statement (R. Ex. 60) to the July, 2008 financial statement (R. Ex. 59), and then applied the raw financial data to specific ratios using a computerized Credit Analysis Risk System ("C.A.R.S."). RP Vol. VI 153:24-154:3; 155:4-10; 156:24-157:12; 157:17-12; 158:6; 164:14-165:14. C.A.R.S. creates an Asset Quality and Leverage Report which determines the debt to equity ratio (liability versus report total net worth). RP Vol. VI 168:12-16. The ratio for EC was calculated to be 9.73 to 1. RP Vol. VI 169:10-170:5, 9-10.

When EC made the cash injection of \$500,000 in October, 2008, hoping to convince GMAC to lift the personal guarantee condition, EC still could achieve a debt to equity ratio of 18 to 1. R. Ex. 18; RP Vol. I 69:16-70:1; Vol. VII 18:22-19:4; VR 8:16-20.¹¹ GMAC set a cash injection target that could not be attained, or if reached, would not bring EC into compliance with a 3 to 1 debt equity ratio. RP Vol. VII 19:19-21; VR 12:5-8.

GMAC's July 31, 2008 letter arbitrarily demanded that EC comply with GMAC's stated terms by October 31 or face suspension or termination of the wholesale credit line. RP Vol. I 36:5-12. GMAC often set targets and deadlines without justification or prior notice to the dealership. VR 9:9-11.

E. Demand for Personal Guarantee

GMAC materially altered EC's financing requirements by demanding that Mr. Reggans give a personal guarantee after doing business with GMAC for 12 years. A personal guarantee was not required on the floor plan, revolving credit line, or other agreements. R. Ex. 2-8; RP Vol. I 72:16-73:1; VR 9:11-13.¹²

¹¹ GMAC calculated a cash injection of \$800,000 to be paid by the October 31 deadline. VR 8:24-9:1. Given increased losses, EC would only achieve a debt to equity ratio of 10.73 to 1. VR 9:2-3. Ms. Smith knew that ECI could not meet GMAC hidden goals, but never shared the financial analysis with him. VR 9:3-8.

¹² GMAC does not hold a personal guarantee on every dealership. RP Vol. I 30:7-17; VR 9:13-15. The GMAC Policy and Procedures Manual does not require a dealer to sign a personal guarantee on the floor plan or the revolving line of credit. RP Vol. I 73:2-12.

Ms. Smith testified that she was promoted to the position of a “high risk manager”.¹³ RP Vol. VI 150:24-151:1. Her primary responsibilities were collections and shutting down companies, which did not require a high degree of financial analysis. VR 10:1-5. When Mr. Reggans asked why he had to provide a personal guarantee, Ms. Smith stated he needed to have some “skin in the game.”¹⁴ Ms. Smith claimed that a “personal guarantee shows level of commitment.” VR 11:10-13. This is a false statement in the credit world.” VR 10:16-19.¹⁵

In this instance, EC’s business had significant value. VR 10:25; 11:1. Reggans was able to obtain a \$500,000 loan from Motors Holding after GMAC sent the July 31, 2008 demand letter. R. Ex. 1; RP Vol. I 67:24-68:1. Motors Holdings was also prepared to invest \$2.5 million dollars business, casting doubt on the requirement for a personal guarantee. RP Vol. I 122:21-123:5; VR

¹³ “High risk manager” is a credit collection position that does not require a high level of financial analysis. VR 10:5. VR 11:2-3. Ms. Smith’s official job title was Operations Manager for Commercial Lending Dealers, Wholesale Accounts, High Risk. RP Vol. VI 150:24-151:1. In other businesses, it is called special credits– a division of a firm that a client goes to when all credit is about to be cancelled and all debts called due. VR 10:5-9

¹⁴ The trial court found this comment to be highly insulting to a person who has earned his ownership via hard work and profit over a 12 year period. VR 10:13-16. Most small business owners start with a personal guarantee and struggle to escape this risk by building the net worth of their business. VR 11:5-7.

¹⁵ A personal guarantee is required, so that “the lender can take your house if the business fails to pay its debt. VR 10:22-25. GMAC wanted Mr. Reggans and his wife to personally obligate themselves to almost \$7 million of debt by signing a personal guarantee. RP Vol. I 70:24-72:1.

11:2-4. (As part of its due diligence, Motors Holdings conducted an extensive audit of the dealership. RP Vol. I 70:8-14; VR 11:3-4).

F. Unilateral Change in Payment Terms

GMAC claimed that EC's payments for the dealership's sold inventory were due and payable to GMAC three business days after the vehicle was sold. RP Vol. I 38:25-39:18. GMAC materially changed the financing conditions again on December 8, 2008, when it demanded for the first time that EC payoff sold vehicles with cashier's checks. GMAC demanded that EC pay for vehicles sold on the same day the customer took delivery of the vehicle, revoking the three day remittance/release period. RP Vol. I 126:11-15. The cashier's check requirement of GMAC placed a financial hardship on EC. RP Vol. I 126:11-127:15; 127:16-131:1.

The three-business day remit rule in this context is used to assault working capital. When the business most needs flexibility, the rule is strictly if not arbitrarily, enforced. VR 14:6-7; R. Ex. 7. The three-day remit rule is not a contract term in the flooring agreement, nor is it uniform among dealers. VR 14:9-10. A dealer with a five day remit period has a distinct advantage over one who has a three day remit. VR 15:4-6. The trial court found that the rule is

commercially unreasonable because it not based on any contract term or clearly articulated policy. VR 14:14, 17; 15:6-8.¹⁶

GMAC demanded a new inventory reduction charge¹⁷ of \$22,299 on October 9, 2008. RP Vol. VII 10:13-19. The October, 2008 demand for principal reductions was paid by EC. (R. Ex. 63, 68). RP Vol. VII 17:17-22. GMAC demanded an inventory reduction charge on used vehicles of \$37,609. RP Vol. VII 11:8-12:2; R. Ex. 68. GMAC caused further hardship by imposing a \$10,000 monthly principal reduction charge. VR 12:15-16. On October 16, 2008 GMAC issued a letter notifying EC of the termination of the revolving line of credit and an increased interest rate due to “market conditions”, without identifying any specific market condition or contract term. R. Ex. 69; RP Vol. VII 13:15-14:1. VR 12:25-1. The trial court held that this arbitrary action was not commercially reasonable. VR 13:3.

On November 6, 2008, GMAC demanded payment of an inventory reduction charge of \$172,279. R. Ex. 74; RP Vol. VII 27:10-19; VR 13:5-6.

¹⁶The three business day release period was not contained in the Agreement Amending the Wholesale Security Agreement and Conditionally Authorizing the Sale of New Floor Plan Vehicles on a Delayed Payment Privilege Basis (the “Delayed Payment Amendment”). R. Ex. 7; RP Vol. I 95:15-23. RP Vol. I 96:12-98:1. There was no testimony concerning how it was applied or who received a three or five-day payment delay privilege. VR 14:11-13.

¹⁷ Principal reductions and curtailments (also known as inventory reduction charges) are synonymous. RP Vol. VII 10:19-22; RP Vol. VII 12:6-10. EC made at least one curtailment payment. RP Vol. II 14:24-15:8.

The prepayment demand had no basis in the Wholesale Security Agreement, which states: “As each vehicle is sold or leased, we will faithfully and promptly remit.” VR 13:6-8. There is no term in the contract between GMAC and EC which provides for inventory reduction charges. R Ex. 2-8. The charge is paid directly out of working capital without being earned. VR 13:8-9. The trial court concluded that the calculation of the charge was arbitrary and commercially unreasonable. VR 13:13-15.¹⁸

G. Refusal to Floor Unencumbered Vehicles

In November, 2008, GMAC refused to floor unencumbered new and used vehicles of EC because the inventory was over the credit limit. RP Vol. VIII 10:19-11:19; 12:1-13; 143:4-16. GMAC’s policy is that a dealership can go over its floor plan line of credit limit if the floor plan is not suspended. R. Ex. 76; RP Vol. VIII 143:20-23. As of November, 2008, the floor plan was not suspended. This flooring would have had maximum positive effect on EC at a time when the dealership was proactively addressing business needs, VR 13:16-20.

On December 4, 2008, GMAC further strangled the dealership by making demand on the dealership’s open account with GM. R. Ex. 56. GMAC took \$80,000 out of EC’s open accounts. This precipitous action severely

¹⁸ The charge is arbitrary because the calculation did not utilize metric and it appears to assume depreciation of a vehicle that is not being used when all depreciation rules are based on use. VR 13:9-13. .

impacted not only working capital, but also the dealer's cash position by diverting and freezing these critical funds. VR 16:2-5.

H. Suspension/Termination of Credit Lines

On December 8, 2008, GMAC sent a letter which suspended EC's wholesale credit limit. R. Ex. 76; RP Vol. VII 36:18-37:11. When the suspension letter was sent, GMAC violated its own policy by floor planning EC's unencumbered vehicles after the floor plan had been suspended pursuant to GMAC's December 8, 2008 letter. R. Ex. 76. GMAC violated its policy again by placing unencumbered used vehicles on the floor plan on December 11, 2008. RP Vol. VIII 143:24-144:7.

On December 15, 2008, GMAC terminated and demanded payment on all credit lines with a deadline of March 13, 2009. RP Vol. VII 55:1-15; VR 16:6-7; R. Ex. 77. On December 19, 2008, just four days later, GMAC demanded immediate payment of \$6,367,294.89 for balances on all credit lines referenced in the December 15 letter. R. Ex. 83; RP Vol. VIII 8:7; VR 16:8-11. The only logical explanation for these actions occurring within four days of each other is that GMAC intended to stop the Motors Holdings investment. VR 16:11-13.

I. False Allegations Regarding Out of Trust Sales

GMAC had referred to an "out of trust" situation occurring in

December, 2008.¹⁹ However, GMAC's rendition of the facts is inaccurate, incomplete, and misleading.

On December 5, 2008 a wholesale audit was conducted in which GMAC performed an inventory and claimed that the dealership was unable to pay for vehicles that were previously sold. RP Vol. I 36:23-37:2. When the dealership did not pay for the vehicles on December 5, the dealership was considered to be out of trust. RP Vol. I 44:15-17. GMAC claimed that more vehicles were out of trust on December 8. RP Vol. I 45:13-23.

The out of trust transactions of December 5 and December 8 were cured on December 9, 2008. RP Vol. I 44:15-25. RP Vol. I 113:6-14. RP Vol. I 112:6-113:1.²⁰ The cure was accomplished by GMAC offering to floor plan some vehicles for which floor planning had been previously denied in November, 2008. RP Vol. II 21:6-10; VR 13:21-23. A GMAC employee simply had to walk around the dealership lot, identify the new vehicles that were unencumbered, and place them on the floor plan to free up funds to pay the out of trust amount. RP Vol. I 116:6-117:19.

¹⁹ An "out of trust" sale is defined as when vehicles are sold and they have not been paid by the dealership by the end of the release privilege. RP Vol. I 44:3-11. The release privilege for EC was three business days. RP Vol. I 105:8-13; 144:8-14.

²⁰ The December 5, 2008 audit was performed by Scott Modrzjewski. RP Vol. II 161:2-162:5. The curing of the out of trust December 9, 2008 is not shown on the audit (R. Ex.22), but it is shown on 10. The vehicles at the top of Exhibit 10 were used to pay off the 14 vehicles at the bottom of Exhibit 10 plus \$93,000 balance which is Exhibit 23. RP Vol. V 36:4-37:13.

This adjustment violated GMAC's own rule that no flooring would be done once the floor plan was suspended. VR 13:23-25. GMAC had suspended EC's floor plan in its December 18, 2008 letter to EC. R. Ex. 76. In the December instance, the additional flooring helped GMAC by obtaining more of EC's assets (i.e., placing unencumbered vehicles on flooring), and harmed the dealership because only his earlier proactive approach would have enabled him to avoid the out of trust position. VR 14:1-5. Another audit on December 12, 2008 indicated that the dealership did not owe any money for out of trust sales. RP Vol. I 121:9-17.

GMAC audits were arbitrary and inaccurate. GMAC had no records indicating that it inquired of the dealer as to what the sales dates were for various audits. RP Vol. IV 88:23-89:1. The court concluded that the sale date was applied in an arbitrary manner because cars were considered sold before the deal was closed and funded. VR 14:22-24.²¹

Even known unwinds are included in the audits as due and payable. VR 14:24-25. The word "unwind" is defined as a vehicle that was returned to the dealership unsold. RP Vol. III 58:1-9. This occurs when an attempted sale fails

²¹ Pedram Davoudpour testified that when there was a dispute about sales dates, GMAC's policy is to negotiate it with the Dealer. VR 14:18-20. Other testimony indicated that there would be no negotiating with the GMAC auditors. VR 14:20

because the customer cannot obtain financing. RP Vol. III 62:7-9.²² The inclusion of an unwind in the audit is a working capital assault because it requires the dealer to fund the GMAC floor plan payment out of his working capital rather than out of the sale. VR 15:1-4.

GMAC audits also identified several dealership transactions that were approved and funded by retail banks well after the date GMAC considered the subject vehicles as sold; the delay in bank approval was caused by previous bank rejections of the sales transactions²³

²² R. Ex. 33, an audit sheet prepared by a GMAC auditor (Mr. Modrzewski) contains a notation showing one vehicle (VIN 240090) as an unwind. RP Vol. III 54:17-57:21-25; RP Vol. III 58:10-60:2. The same vehicle is shown as sold to a customer (Mora) in the comments section of the December 5, 2008 audit. R. Ex. 20, page 9, line 169; RP III 71:23-72:5. Mr. Modrzewski admitted that he makes mistakes. RP Vol. V 138:4-25; 140:15-18.

²³ The August 22, 2008 audit erroneously included two dealership transactions: (1) Hall (GMAC sales date of August 12, 2008; sales contract approved by bank on August 14, 2008) RV Vol. XIII 48:1-55:18; and (2) Smith (sales date August 12, 2008; sales contract approved by bank August 20, 2008); RV Vol. XIII 55:22-60:1.

The September 23, 2008 audit erroneously included five dealership transactions; (1) Zucker (GMAC sale date of September 19, 2008; sale contract approved by bank on September 27, 2008); RP Vol. XIII 7:20-10-14); (2) Audra (GMAC sale date of September 21, 2008; sale contract approved by bank on September 26, 2008) RP Vol. XIII 10:15-21:15); (3) Adams (GMAC sales date September 11, 2008; sales contract approved by bank October 11, 2008. RP Vol. XIII 14:1-18:14) (4) Willbanks (GMAC audit of September 23, 2008; GMAC sales date September 14, 2008; sales contract approved by bank September 17, 2008) RP Vol. XIII 18:16-21:4; (5) Webb; GMAC audit of September 23, 2008; GMAC sales date September 20, 2008; sales contract approved by bank September 22, 2008. RP Vol. XIII 21:22-24:17. (6) Smith (GMAC audit of September 23, 2008; GMAC sales date September 20, 2008; sales contract approved by bank September 25, 2008). RP Vol. XIII 24:18-28:1.

J. Interference with EC's Bank Financing

GMAC compounded the damages to EC by sending demand notices to financing institutions. This assault stopped all financing of sales until relief was granted by the court on January 15, 2009. VR 16:17-19. Before December 2008, the dealership had 80 credit unions and 15 to 18 banks to perform retail customer financing. RP Vol. II 69:9-14. Financing arrangements with these banks is critical to the car sale process. RP Vol. II 70:16-22. Selling cars is a finance business, as cash customers represent a small percentage of the vehicle sales transactions. RP Vol. II 77:5-22.

GMAC letters announcing that it placed a hold on funds that would normally be sent by the banks to EC were mailed to Chase Auto Financial, Whidbey Island Bank, Washington State Employees Credit Union, America's Credit Union. (R. Ex. 16; RP Vol. II 73:8-75:25. GMAC employees even made efforts at the dealership to find out which banks EC did retail business with. RP Vol. II 82:9-12.

After receiving GMAC's letter, these retail lenders and banks, which had been doing business with EC for 12 years, stopped financing EC. RP Vol. II

(footnote 23, cont'd) The October 27, 2008 audit erroneously included three dealership transactions: (1) Rosalez (GMAC audit of October 27, 2008; GMAC sales date October 17, 2008; sales contract approved by bank October 25, 2008) RV Vol. XIII 29:6-32:22; (2) Hartlage (GMAC audit of October 27, 2008; GMAC sales date October 18, 2008; sales contract approved by bank October 20, 2008) RV Vol. XIII 32:23-36:22; (3) Amdal (GMAC audit of October 27, 2008; GMAC sales date October 19, 2008; sales contract approved by bank November 14, 2008) RV Vol. XIII 43:11-47:17.

76:1-77:4. This caused a drastic decrease in EC's customer finance transactions. RP Vol. II 110:13-114:4. Other banks and retail financing sources for EC were notified by a similar GMAC letter. RP Vol. VI 17:4-13.

K. GMAC's False Targets and Masked Intentions

The trial court found the letter dated July 31, 2008 masked GMAC's intent by justifying GMAC's action based on credit trends and performance. VR 8:13-15. Ms. Smith admitted that the cash injection target of \$800,000 was no longer valid in July when it was requested in writing. VR 9:21-23. Although Ms. Smith knew that EC could not meet the false goals, GMAC failed to tell Mr. Reggans that the target was no longer valid. VR 9: 24. According to GMAC, both Mr. Vick and Ms. Smith engaged in detailed financial discussions with Mr. Reggans about the performance of the dealership, but the trial court noted that "yet not once did they share the financial analysis with him. VR 10:5-8. "Ms. Smith's explanation to the court and to Mr. Reggans was the first real proof of GMAC's hidden agenda." VR 12:10-12.

By failing to disclose the debt to equity ratio and other aspects of GMAC's sophisticated financial analysis, GMAC was able to create a false target for the dealer and mislead ECI about its future actions. VR 18:19-22. The trial court found that GMAC "withheld information on its true targets and metrics, while at the same time pushing the dealer to achieve the state targets by trying to increase sales, while at the same time depriving the dealer of the

The December 31 restraining order stopped virtually all dealership business, dramatically impacting its revenue. Customers coming into the dealership could not buy cars. RP Vol. II 107:19-109:19. On January 14, 2009, the court entered a modified Restraining Order which allowed GMAC to hold titles and MCO's for the vehicles at EC. (CP 28).

Before the lawsuit, GMAC knew that Mr. Reggans had in place a pre-investment contract with Motors Holdings due to close on January 9, 2009, which would have provided an equity cash injection of \$2.5 million into his business. VR 16:20-17:3.²⁵ GMAC interfered with the imminent cash injection by shutting the dealership down with a restraining order.

M. Replevin Hearing and Trial Court Decision

EC denied the allegations in GMAC's petition, asserted affirmative defenses, and alleged counterclaims against GMAC, including claims arising for breach of contract by wrongful acceleration, breach of good faith duties, tortious interference with EC's business expectancies (CP 65).

²⁵ GMAC became aware that the dealership made a request for funds from Motors Holding in September, 2008. RP Vol. I 59:22-60:5. In September 2008, Mr. Reggans met with people in Detroit to resolve the working capital situation. He discussed this action plan with Michelle Smith of GMAC, and later informed her in October, 2008 that he acquired \$500,000 from Motors Holding and deposited it into the dealership account. RP Vol. VII 9:12-10:1; 24:4-20; 25:1-4. Mr. Reggans again discussed the status of the pending Motors Holding transaction with GMAC in December, 2008. RP Vol. VII 28:20-29:11.

GMAC pursued the repossession of the vehicles at a replevin hearing commencing on March 13, 2008. After a four-week hearing involving extensive testimony, the trial court entered an Order Denying Plaintiff's Request for Replevin and Denying Motion to Amend Complaint. (CP 136; App. A). Based on extensive findings set forth in his oral opinion (App. B), the court ruled that GMAC breached its wholesale security agreement with EC by committing numerous acts of bad faith in violation of the Washington UCC and common law. (CP 136; App. A).

In ruling that GMAC breached its duty of good faith, the court explained that GMAC acted dishonestly in dealings with EC:

“There was a hidden agenda throughout the time from when Mr. Vick took control until the catastrophic demands of December. The goal of the team from GMAC in this case was to shut down the Dealer. The mechanism was to set a false target that could not be achieved and by so doing manufactured a default.” VR 18: 9-15.

“These actions taken by GMAC to assault the Dealer's working capital were designed to put him out of business. If GMAC had disclosed that it did not want to do business with ECI in the future openly and honestly, then he would have had recourse to alternatives. But instead the dealer was led to believe his past good relationship with GMAC still existed all the while secret actions were taken place, which damaged his ability to perform, and these actions escalated during 2008. In fact, the actions of December 15th and 19th seemed designed to block his financial from Motors Holding, which closing date was less than 30 days away.” VR 20:22-21:10.

“The law only requires GMAC to be honest with regard to its intentions and not attempt to manufacture defaults, put pressure on a business to fail, or block other contract opportunities. All these things were done...and all are acts of bad faith.” VR 22:1-6.

“ECI sold \$19 million dollars by October 2008. With these sales, if he had cut back his sales efforts and lowered his break-even point, he could have made a profit, but GMAC was pushing him to do just the opposite in order to engineer a default. This constitutes bad faith.” VR. 22:11-19

The trial court dissolved the January 14, 2009 restraining order due to GMAC’s bad faith conduct. GMAC’s untimely motion to amend the petition, filed near the end of the replevin hearing, was denied. (CP 125),

N. Attorney’s Fees Award

On July 28, 2009, the trial court entered an order awarding attorney’s fees of \$215,442.50 to defendants as a result of the wrongful injunctions. Superior Court Docket (SC Dkt. 214). The Commissioner’s ruling on July 31, 2009, stayed a trial court’s order requiring GMAC and/or the bonding company to deposit funds for the attorney’s fees award. SC Dkt. 217.

O. EC Motions to Release Titles and Proceeds

After the April 10, 2009 decision, GMAC refused to release the titles to vehicles that it obtained as a result of an injunction. EC filed motions for release of titles held by GMAC. (CP 170; CP 182). On June 25, 2009, the trial court denied the second motion on jurisdictional grounds due to the pending appeal. (CP 197). On July 28, 2009, this Court entered an order granting the trial court authority to rule on EC’s motion for release of titles. EC then had to focus its efforts on obtaining the release of proceeds from vehicle sales.

On June 5, 2009, when discretionary review was accepted, the Court of Appeals entered an Order modifying the Commissioner's ruling denying GMAC's emergency motion for an injunction. The June 5 Order requires EC to deposit proceeds from vehicle sales into the Superior Court registry, and authorizes the trial court to release funds upon a showing of good cause. EC has complied with the June 5 Order by depositing proceeds in the registry.

None of the funds have been released by the trial court. EC filed two motions requesting the release of funds so that the dealership could pay operating expenses and hopefully stay in business. (CP 170; CP 182). On August 5, 2009, the trial court denied motions by EC and GMAC without prejudice. (CP 229). On September 18, 2009, the trial court denied respondents' motion on jurisdictional grounds due to the pending appeal. (CP 251). EC has continued to incur operating expenses without receiving proceeds, causing further financial damages and the loss of all employees.

In December, 2009, respondents filed an emergency motion seeking an order affirming the trial court's authority to decide whether good cause exists to release funds to EC.²⁶ On October 29, 2009, the Commissioner denied the emergency motion, concurring with the trial court's interpretation that "good cause" under the June 5 Order does not include substantive issues raised in this appeal. Respondents' motion to modify is currently pending with a three judge panel. Meanwhile, under

²⁶ Respondents also appealed the trial court's September 18, 2009 decision and filed a Motion for Discretionary Review that is pending in Appeal No. 64336-3-1.

pressure from GMAC, EC agreed to transfer most of its remaining inventory to another dealership which assumed floor plan obligations.

P. Motion to Dismiss Appeal

On December 8, 2009, respondents filed a motion to dismiss this appeal on the grounds that petitioner is not an aggrieved party entitled to bring an appeal under RAP 3.1. GMAC, a Delaware corporation, never existed as an entity. General Motors Acceptance Corporation was converted to GMAC, LLC on July 20, 2006. GMAC, LLC was later converted to a Delaware corporation on June 30, 2009, and renamed “GMAC, Inc.”

The plaintiff’s name was never corrected in the pleadings or the case caption. The bond posted as security was issued to GMAC, LLC, a limited liability company that was not a party in the lawsuit. GMAC, LLC and GMAC, Inc. have been joined or substituted for petitioner in this appeal.

Under RAP 3.1, only an aggrieved party may seek review by the appellate court. *City of Tacoma v. Taxpayers of City of Tacoma*, 108 Wn.2d 679, 743 P.2d 793 (1987). Petitioner GMAC, a Delaware corporation, does not exist and has no pecuniary interest in the case. *Cooper v. City of Tacoma*, 47 Wn.App. 315, 734 P.2d 541 (1987). Petitioner is not an aggrieved party and cannot maintain this appeal under RAP 3.1.

Under RAP 3.2(b), a party with knowledge of the transfer of a party's interest in the subject matter of the appeal must promptly move for a substitution of parties. Petitioner has never moved for a substitution of parties under RAP 3.2(b).

II. ISSUES PRESENTED ON REVIEW

1. Under Washington law, do contracting parties have an implied duty of good faith and fair dealing which obligates them to cooperate in the performance of contractual duties?
2. Does the duty of good faith under §1-203 of the Uniform Commercial Code ("UCC") apply to the performance and enforcement of the contract between GMAC and EC?
3. Is the trial's court's decision that GMAC breached its duties of good faith under the UCC and common law supported by the substantial evidence and applicable law?
4. Is GMAC obligated to act in good faith in exercising rights and remedies of a secured creditor under Article 9 of the UCC?
5. Is the Wholesale Security Agreement a demand note or a negotiable instrument under Article 3 of the UCC?
6. Can GMAC rely upon demand note cases like the *Allied* case to avoid any obligation to act in good faith, where its bad faith conduct is

intended to manufacture a default, assault the dealer's working capital, and drive EC out of business?

7. Should this Court, like the federal court in the *Coffee* case, construe all provisions of the Wholesale Security Agreement together and find that the default contingencies apply to GMAC's default and repossession actions against EC?

8. Does the *Badgett* case negate GMAC's duty of good faith, where the duty pertains to performance and enforcement of the contract and does not interject a new term?

9. Are GMAC's claims for replevin and injunctive relief barred under equitable principles of estoppel, duress, and coercion?

11. Did the trial court properly exercise its discretion to award attorney's fees to EC as a result of the wrongful injunctions?

12. Did the trial court properly exercise its discretion by denying GMAC's untimely motion to amend the complaint?

IV. ARGUMENT

A. Summary of Argument

The trial court's April 10, 2009 Order denying replevin, dissolving the injunction, and denying the amendment of GMAC's complaint should be affirmed. The trial court's findings of bad faith conduct on the part of GMAC are supported by substantial evidence and applicable law.

This appeal must be resolved in the context of the claims actually decided by the trial court and the entire contract. The trial court denied the remedy of replevin and dissolved the injunction due to GMAC's breach of contract and bad faith conduct in violation of the UCC and common law.

Attempting to avoid the consequences of extreme bad faith, GMAC has painted an incomplete and inaccurate picture regarding the underlying facts and the specific claims decided by the trial court. GMAC treats this complex bad faith case as a simple demand note case by focusing attention only on part of the contract instead of reading together all of its provisions, including default contingencies specifically applicable to repossession by replevin. The Wholesale Security Agreement is not a demand note or a negotiable instrument under Article 3 of the UCC.

Under Washington law and the UCC, GMAC has a duty to act in good faith in performing or enforcing a contract. GMAC went beyond making a simple demand for payment. GMAC manipulated information, acted dishonestly, assaulted the dealer's working capital, and manufactured default to shut down EC's business.

GMAC cannot circumvent its duty of good faith by relying upon demand note cases like *Allied*, where its bad faith conduct was designed to prevent the dealer's performance and trigger default. Moreover, *Badgett* cannot be expanded to negate GMAC's good faith duties in this setting.

GMAC's claims for replevin and injunctive relief are barred under equitable principles of estoppel, fraud, duress, and coercion.

GMAC's acts of bad faith and concealment caused EC to sustain major financial damages that were compounded by wrongful injunctions.

The trial court properly exercised its discretion to award attorney's fees as a result of the wrongful injunctions. Nor did the trial court abuse its discretion denying GMAC's untimely motion to amend to interject new claims at the end of the replevin hearing.

B. GMAC Breached its Duty of Good Faith Under the Uniform Commercial Code and Common Law

The cornerstone of this case is GMAC's duty to act in good faith in the performance and enforcement of the financing agreements between the parties. Under common law and the UCC, the duty of good faith permeates every aspect of the contractual relationship.

1. Good Faith Duties Apply to the Performance and Enforcement of the Contract Between GMAC and EC

There is in every contract an implied duty of good faith and fair dealing, which obligates the parties to cooperate with each other so that each may obtain the full benefit of performance. *Metropolitan Park Dist. of Tacoma v. Griffith*, 106 Wn.2d 425, 437, 723 P.2d 1093 (1986); *Lonsdale v. Chesterfield*, 99 Wn.2d 353, 357, 662 P.2d 385 (1983); *Miller v. Othello Packers, Inc.*, 67 Wn.2d 842, 844, 410 P.2d 33 (1966).

The Uniform Commercial Code imposes an obligation of good faith in the performance or enforcement of every contract or duty. RCW 62A.1-203.²⁷ Good faith is defined as "honesty in fact in the conduct of the transaction concerned." RCW 62A.1-201(19).²⁸ The Washington Supreme Court declared that the requirement of good faith is the single most important concept intertwined throughout the UCC. *Schroeder v. Fageol Motors, Inc.*, 86 Wn.2d 256, 262, 544 P.2d 20 (1975).

Good faith is a basic obligation that is required in the performance and enforcement of all agreements or duties under the Uniform Commercial Code.²⁹ The good faith obligation arises by law and may not be disclaimed even by express agreement of the parties. RCW 62A.1-102(3). The principle of good faith functions to protect the contractual expectations

²⁷ RCW 62A.1-203 states: "Every contract or duty within this Title imposes an obligation of good faith in its performance or enforcement."

²⁸ Under Articles 3 and 9 of the UCC, "good faith" also means honesty in fact and the observance of reasonable commercial standards of fair dealing. *See* RCW 62A.3-103(a)(4); RCW 62A.9A-102(a)(43).

²⁹ *See* RCW 62A.1-203 comment (1994): "This section sets forth a basic principle running throughout this Act...that in commercial transactions good faith is required in the performance and enforcement of all agreements or duties. Particular applications of this general principle appear in specific provisions of the Act such as the option to accelerate at will (§1-208)...The concept, however, is broader than any of these illustrations and applies generally, as stated in this section, to the performance or enforcement of every contract or duty."

of the parties to a contract when one of them exercises discretion in the performance of its obligations.³⁰

The trial court based its ruling on the totality of the circumstances that constituted bad faith, including GMAC actions intended to mislead EC and force the dealership out of business, VR 20:16-25. GMAC's bad faith conduct interfered with the dealership's ability to perform contractual obligations. The trial court correctly ruled that GMAC was required to exercise good faith and act in a commercially reasonable manner, citing RCW 62A.9-102(43). VR 20:3-7.³¹

The trial court held that under *Liebergesell v. Evans*, 93 Wn.2d 881, 613 P.2d 1170 (1980), GMAC was required to disclose relevant facts to EC within its general obligation to deal in good faith. VR 18:11-16. GMAC's failure to disclose material facts constituted a breach of the implied duty of good faith and fair dealing. VR 18:17-VR 19:11. GMAC withheld information concerning its true targets, while at the same time pressuring EC

³⁰ See Burton, *Good Faith Performance of a Contract Within Article 2 of the Uniform Commercial Code*, 67 Iowa L. Rev. 1, 20-21 (1981).

³¹ Professor Summers identifies several categories of bad faith in contract performance, including evasion of the spirit of the deal, abuse of a power to specify terms, abuse of a power to determine compliance, and interference with or failure to cooperate in the other party's performance. See: Summers, "Good Faith" in *General Contract Law and the Sales Provisions of the Uniform Commercial Code*, 54 Va. L. Rev. 195, 232-43 (1968). GMAC evaded the spirit of the financing agreement by providing false targets and manufacturing a default by the dealer. GMAC imposed financing requirements that were not contained in the contract, arbitrarily determined compliance, and interfered with EC's business.

to achieve stated targets by increasing sales, but depriving EC of the working capital needed to reach the targets. VR 18:23-VR 19:3; 22:10-13; 15-19.

The trial court's reliance on *Liebergesell*, although not exclusive, related to GMAC's bad faith conduct as a whole and not limited to any single act. VR 20:16-17. GMAC did not conduct itself honestly, had a hidden agenda with a goal to shut down the dealership, and manufactured a default. VR 20:8-19. GMAC did not have a contractual right to shut down the dealership and put EC out of business. VR 20:18-19; SC Dkt. 251.

Thus, the trial court's decision is not based solely on GMAC's judgment in calling a loan or making a demand. Acceleration of EC's floor plan obligation was only part of the conduct constituting bad faith. In any event, default accelerations are subject to good faith duties under RCW 62A.1-208; *Brown v Avemco*, 603 F.2d 1367 (9th Cir. 1979)³² An 'at will' acceleration clause can only be exercised based on a good faith belief of payment or performance being impaired. RCW 62A.1-208.³³

³² In *Brown v Avemco*, the Ninth Circuit Court of Appeals held that the UCC imposes a good faith requirement on the exercise of default provisions, such as due-on-sale clauses. The option to foreclose or accelerate following a specific default may be exercised only if the lender has a good faith belief that the loan is insecure. *Brown v Avemco*, 603 F.2d at 1375.

³³ RCW 62A.1-203 also limits opportunities to accelerate following breach of the default provision to circumstances in which the secured creditor honestly believes that default impairs the prospects for payment or performance by the debtor.

2. Good Faith Duties Apply to GMAC's Collection and Repossession Actions Under Article 9 of the UCC

The financing agreement between GMAC and EC falls within the scope of Article 9. UCC §9-109 emphasizes that all security interests, “regardless of form,” are included in the basic scope of Article 9. *See White and Summers*, Uniform Commercial Code, Practitioner Treatise Series (5th and 6th Ed. 2000) The enforcement of security interests and default remedies are governed by Article 9.³⁴

GMAC asserted a security interest in EC's assets and attempted to repossess vehicles by replevin. GMAC argues, however, its actions to force a default, enforce the security interest, and repossess vehicles are not governed by Article 9 because the contract is a demand note. GMAC disregards the nature of the replevin claim and the default contingencies that are applicable to repossession in the contract. GMAC's disclaimer of any duty to exercise good faith directly conflicts with the good faith duties governing secured creditors under Article 9 and UCC §1-203.

Principles of good faith underlie the entire Uniform Commercial Code, including the provisions of Article 9. *Central Soya Company, Inc. v S.S.*

³⁴ *White and Summers* observes that canvassing lender liability cases (including the seminal *KMC* case) is beyond the scope of their work, stating that an attorney handling a default and repossession cases under Article 9 and §1-208 may profit from the analyses in lender liability cases that invoke contract or common law principles outside of Article 9 and §1-208. *Id.* at Vol. 4, Ch. 34-4, p. 411.

Bundric, 137 Ga.App. 63, 222 S.E. 852 (1975). A secured creditor's lack of good faith can alter the rights or priorities which would otherwise be determined by Article 9 provisions. *Thompson v United States*, 408 F.2d 1075 (8th Cir. 1969); *Lane v. John Deere Co.*, 767 S.W.2d 138 (Tenn. 1989) (good faith limitation under UCC § 1-208 bars a creditor from using acceleration as a means of abuse).

Bad faith conduct can prevent a secured creditor from exercising collection rights under Article 9 or render the creditor liable for damages. *Limor Diamonds, Inc., v. D'Oro by Christopher Michael, Inc.*, 558 F.Supp. 709 (S.D.N.Y. 1983) (interest of secured creditor acting in bad faith in seizing collateral would be subordinated to seller's unperfected interest); *Mitchell v. Ford Motor Credit Company*, 688 P.2d 42 (Okla. 1984) (creditor's gross negligence accompanied by bad faith supported a conversion claim for wrongful repossession of collateral).

It is undeniable that GMAC's rights and remedies as a secured creditor, including repossession of vehicles, are subject to good faith duties under Article 9. GMAC violated its duty of good faith by manipulating EC and setting up a default to trigger collection and enforcement actions.

3. The KMC and Reid Cases Are Persuasive Authority Supporting a Duty of Good Faith Under the UCC and Common Law

While treating this case as a simple demand note collection, GMAC has ignored well reasoned cases supporting the trial court's conclusion that GMAC is obligated to act in good faith in dealings with EC.

In *K.M.C. Co., Inc. v Irving Trust Co.*, 757 F.2d 752 (6th Cir 1985), the Sixth Circuit Court of Appeals held that, despite a demand provision in the loan agreement, Irving Trust had a good faith obligation to notify KMC before it discontinued funding a line of credit. *Id.* at 759. The court rejected Irving Trust's argument that a good faith notice requirement was inconsistent with its rights to repayment on demand. Citing the Ninth Circuit case of *Brown v. Avemco*, KMC held that a demand provision, like a general insecurity or specific default clause, is subject to a good faith standard of reasonableness and fairness. *Id.* at 759.

A similar decision was reached by the First Circuit Court of Appeals in *Reid v Key Bank of Southern Maine, Inc.*, 831 F.2d 9 (1st Cir. 1987), where a credit line was terminated without an attempt to negotiate with the borrower. The District Court affirmed the jury's finding that the lender had not acted in good faith. The Court of Appeals upheld an award of compensatory damages to the borrower due to the lender's violation of the

credit agreement, discrimination, and failure to comply with Article 9 of the UCC.

The *Reid* court held that even though the note contained a demand provision and the security agreement contained default provisions, the agreement could not be terminated “at the whim of the parties”. *Id.* at 14. Rather, the right of termination or acceleration was subject to the duty of good faith under UCC §1-203. *Id.* at 14-15. The loan documents defeated neither the legal obligation nor the reasonable expectation that the contract be performed in good faith. *Id.* at 14.

In trial court proceedings, GMAC relied heavily upon *Solar Motors, Inc. v First National Bank of Chadron*, 545 N.W. 714 (Neb. 1996), a rarely cited Nebraska case where the court ignored the acceleration clause and just assumed that the floor plan note was a demand note.³⁵ In view of the court’s misinterpretation of the contract in, the statement in *Solar Motors* that *KMC* and *Reid* represent a minority view is flawed. More importantly, GMAC went much further than making a demand for payment by engaging in the pattern of chicanery found by the trial court.

³⁵Most courts would find that the floor plan note in *Solar Motors*, while providing for payment on demand, was not a pure demand note but was a demandable note. See Nation, *Solar Motors, Inc. v. First Nat’l Bank of Chadron: Some Important Lessons For Lenders Regarding Demand Notes*, 113 *Banking Law Journal*, Vol. 113, No. 8, 815. This was clear from the instrument itself and the conduct of the parties reported in the decision.

KMC and *Reid* stand for the proposition that good faith duties apply to a lender's termination of financing, despite the existence of demand provisions in loan documents. GMAC was required to act in good faith in the performance and enforcement of financing agreements with EC. Instead, GMAC's coercive actions interfered with the dealer's ability to conduct business and meet its contractual obligations. GMAC has submitted no authority for using a demand provision to eliminate a duty of good faith, where the lender's bad faith conduct is intended to create default and force the dealer out of business.

C. GMAC's Bad Faith Conduct and Attempted Repossession of Vehicles Extend Far Beyond Making a Simple Demand

This case arose not only from GMAC's accelerated demand for payment, but also from GMAC's concerted efforts to contrive default, shut down EC's business and repossess vehicles. Demands for payment were just one aspect of GMAC's pattern of bad faith conduct.

1. The Wholesale Security Agreement is Not a Demand Note

GMAC's erroneously contends that the Wholesale Security Agreement is a demand note. Under RCW 62A.3-108, a promise is "payable on demand" if it states that it is payable on demand or at sight (or otherwise indicates that it is payable at the will of the holder), or (2) does not state any time of payment.

A "demand note" is payable immediately on the date of its execution; that is, it is due upon delivery thereof. *Allied Sheet Metal*

Fabricators v. Peoples Nat'l Bank, 10 Wn.App. 530, 537, 518 P.2d 734, 738 (1974). An instrument is payable immediately if no time is fixed and no contingency specified upon which payment is to be made. *Id.*

Although the Wholesale Security Agreement contains demand language, it is not a demand note as is defined in either RCW 62A.3-108 or the *Allied* case. The agreement requires the dealership's repayment of sums advanced by GMAC for floor plan financing. A payment obligation did not exist at the time of execution or delivery of the instrument. Due to the nature of floor plan financing, the contract does not state the amount owed or interest rate. The parties amended the "payable on demand" provision when the Wholesale Security Agreement was executed on December 10, 1996, as GMAC had not advanced funds

The Delayed Payment Amendment conditionally authorized payments for the sale of new floor planned vehicles on a delayed payment privilege basis. R. Ex. 7. Until December, 2008, GMAC required payment within three business days after sale. The three business day payment term was not contained in either the Wholesale Security Agreement or the Delayed Payment Amendment. Pursuant to the Delayed Payment Amendment, and under the three-business day remit rule imposed by GMAC, EC was not required to pay floor plan amounts on demand. Therefore, GMAC is estopped from asserting that the agreement is a demand

note due to its prior inconsistent statements and actions in implementing the delayed payment privilege.³⁶

The demand language itself (“upon demand pay”) indicates that the obligation to pay floor plan advances is only “demandable”. *See Banking Law Journal*, Vol. 113, No. 8, 815. In demandable notes, an actual demand for payment is required prior to maturity. Because a demandable note requires the holder to make an actual demand for payment, there is an act to which the obligation of good faith under UCC §1-203 applies. In making the actual demand and setting the repayment date, the holder exercises significant discretion regarding performance of a material contract term.

Furthermore, the Wholesale Security Agreement contains default contingencies. The contract states that GMAC may repossess vehicles upon the occurrence of enumerated events of default: (1) default in payment; (2) default in performance or compliance with other terms and conditions; (3) bankruptcy insolvency or receivership; or (4) insecurity on the part of

³⁶The requisites of an equitable estoppel include: (a) an admission, statement, or act inconsistent with the claim afterward asserted (e.g., GMAC’s requiring payment within three business days); (b) action by the other party on the faith of such admission, statement, or act (e.g., GMAC alleging the agreement is a demand note); and (c) injury to such other party from allowing the first party to contradict such admission, statement, or act (e.g., requiring cashier’s check on sale date changes payment terms and causes financial hardship on EC. *Bignold v. King County*, 65 Wn.2d 817, 399 P.2d 611 (1965).

GMAC. R. Ex. 3. As in the *Coffee* case³⁷, the demand and default provisions are contained in the same wholesale security agreement. The contract is a hybrid with payment, performance, security and enforcement terms.

Unlike several cases cited by GMAC, the Wholesale Security Agreement cannot be construed as a demand note because the agreement (1) requires loan advances, (2) does not state a fixed amount, (3) was not immediately due upon execution, (3) was amended to grant a delayed payment privilege for a remit period that is not included in any contract; (4) requires a call for acceleration of payment; and (5) contains demand language that conflicts with GMAC's three-business day remit rule.

2. The Wholesale Security Agreement is Not a "Negotiable Instrument" Under RCW 62A.3-104

The Wholesale Security Agreement does not meet the requirements of a "negotiable instrument" under Article 3 of the UCC. A negotiable instrument requires an unconditional promise or order to pay a fixed amount of money (with or without interest or other charges described in the promise or order), which: (1) is payable to bearer or to order at the time it is issued or first comes into possession of a holder; (2) is payable on demand or at a definite time; and

³⁷*Coffee v. GMAC*, 5 F.Supp.2d 1365 (S.D. Ga. 1998) (See Section D).

(3) the promise or order must not state any undertaking or instruction by the issuer to do any act in addition to the payment of money. RCW 62A.3-104(a).

The Wholesale Security Agreement fails the “unconditional promise” test under RCW 62A.3-106(a)(i)³⁸. The contract does not contain an unconditional promise to pay a fixed amount of money because it contains this express condition to EC’s payment obligation: “GMAC’s payment of the amounts of all advances and obligations to advance.” GMAC’s right to demand payment from EC is contingent upon its payment of advances in compliance with floor plan financing obligations.

The Wholesale Security Agreement does not contain a fixed amount to be paid or state the applicable interest rate. Rights and obligations with respect to the promise to pay are stated in other writings, including the Delayed Payment Amendment.³⁹ GMAC imposed financing conditions and charges that are not contained in any written contract, including several arbitrary and commercially unreasonable terms.⁴⁰ GMAC cannot assert that the payments are

³⁸ RCW 62A.3-106(a)(i) provides that a promise or order is “unconditional” unless it states (i) an express condition to payment, (ii) that the promise or order is subject to or governed by another writing, or (iii) that rights or obligations with respect to the promise or order are stated in another writing. RCW 62A.3-106.

³⁹ The Wholesale Security Agreement also refers to GMAC Wholesale Plan is referenced in but has not been introduced in the litigation.

⁴⁰ GMAC’s arbitrary and commercially unreasonable terms include, without limitation, its increased interest rate due to undefined “market conditions” and inventory reduction charges.

definite and fixed in the Wholesale Security Agreement, but also demand payment for charges that are not even included in the contract.

The Wholesale Security Agreement is not a negotiable instrument. Nor did the parties agree that the determination of rights and obligations under the writing would be governed by Article 3. *See* RCW 62A.3-104, Comment 2, paragraph 4; RCW 62A.1-102(2)(b). In any event, Article 3 incorporates the same definition of good faith that applies generally to contract performance under RCW 62A.1-203. *See* RCW 62A.1-103(a)(4) (“Good faith” means honesty in fact and the observance of reasonable commercial standards of fair dealing). If, as GMAC alleges, the Wholesale Security Agreement is a negotiable instrument under Article 3, and the agreement falls under Article 9, then both parties are required to perform and enforce their contractual obligations in good faith.⁴¹

3. GMAC’s Reliance Upon *Allied* and Other Demand Note Cases to Excuse Bad Faith Conduct is Misplaced

GMAC relies heavily on the *Allied* case to repudiating a duty to act in good faith. Yet *Allied* is factually distinguishable and underscores the differences between the GMAC agreement and a typical demand note. The loans in *Allied* were made under demand promissory notes. The demand notes

⁴¹ Article 9 governs if there is a conflict between Article 3 and Article 9. *See* RCW 62A.3-102(b). Thus, GMAC cannot escape good faith duties under by calling the contract a negotiable instrument under Article 3.

did not contain default or repossession provisions. *Allied*, 10 Wn.App. at 535.

The GMAC agreement is surely not a demand promissory note.⁴²

Instead of construing the entirety of the Wholesale Security Agreement, GMAC relies upon *Allied* to assert that the very nature of demand provisions permits call at any time with or without reason. Neither *Allied*, nor the cases GMAC cited for the same proposition⁴³, construe a demand provision within a security agreement with default contingencies. *Allied* and the simple demand note cases addressed disputes over extensions of financing, without a lender's bad faith conduct of the magnitude found by the trial court here. Judge Lucas found that GMAC's bad faith actions, its manipulation of the dealer's financial capacity, and its attempt to remove EC's franchise from the market went far beyond making a simple demand.

GMAC also relies upon *Centerre Bank of Kansas City v. Distributors, Inc.* 705 S.W.2d 42 (Mo. Ct. App. 1985) and *Fulton National Bank v. Willis Denny Ford, Inc.* 154 Ga. App. 846, 269 S.E.2d 916 (1980), two cases seeming to hold that the duty of good faith is reduced to governing only gaps in an agreement. Like *Allied*, *Centerre* and *Fulton* are distinguishable because they involved calls on simple demand notes

⁴² Similar to *Allied*, the *Badgett* case (see Section F) involved a note that contained a demand promise, without default and repossession provisions like those in the Wholesale Security Agreement.

⁴³ See cases cited in Petitioner's Brief. p. 19, footnote 25.

containing no additional conditions, and without the complexities of GMAC's floor plan financing.

The *Fulton* and *Centerre* cases fail to recognize the basic principle that the good faith obligation reaches the “performance and enforcement of all agreements or duties” RCW 62A.1-203 Comment (emphasis added).⁴⁴ The good faith obligations apply under UCC §1-203 are limited to contract “performance and enforcement” in order to preclude its applicability to contract negotiations. *See* RCW 62A.1-203. Therefore, the duty arises by law from a contract within the scope of the UCC and cannot apply to the period before it was formed.⁴⁵ This limitation is explicitly recognized in §1-203 by precluding contract negotiations from the scope of the duty of good faith. As a result, the demand of payment on a note is inseparable from the enforcement of the debtor's performance of the contract (the duty to pay) and is subject to the obligation of good faith⁴⁶.

⁴⁴ Both courts took the position that §1-203 would add a term (a good faith limitation) to the contract that was not expressly included or intended by the parties. *Centerre*, 705 S.W.2d at 48.

⁴⁵ The debtors in *Centerre* did not deny there was a demand note and knew that the lenders could call the note at anytime. *Centerre*, 705 S.W.2d at 48. The obligation of good faith arises by law regardless of the parties' intent. *See* RCW 62A.1-203(3).

⁴⁶ Citing *Fulton*, *Centerre* held that UCC §1-203 did not apply because a good faith defense to the call for payment of a demand note “transcends the performance or enforcement of a contract...” *Centerre*, 705 S.W.2d at 48. However, *Centerre* fails to explain why calling a demand note does not relate to the performance or enforcement of the contract and overlooks the fact that the lender must call the note in order to place

D. The *Coffee* Case Strongly Supports the Application of Good Faith Duties to GMAC's Performance and Enforcement Actions

Contrary to GMAC's position, the U.S District Court's decision in *Coffee v. GMAC*, 5 F.Supp.2d 1365 (S.D. Ga. 1998), provides compelling support for the conclusion that GMAC's contract performance and enforcement actions are subject to a duty of good faith. The *Coffee* case is also on point because the court properly interpreted a GMAC wholesale security agreement containing both demand language and default contingencies.

In *Coffee*, an automobile dealership sued GMAC alleging that the lender improperly administered and wrongfully terminated the dealership's line of credit. The GMAC wholesale security agreement included a demand provision, as well as granting GMAC the right to terminate the agreement in upon the occurrence of certain default contingencies. *Coffee*, 5 F.Supp.2d at 1372. GMAC argued that the contract was a demand note, precluding the dealer's assertion of wrongful termination claims. On motions for summary judgment, the District Court ruled that the lender was contractually obligated to advance funds up to the stated amount and could not terminate the line of credit at will. Whether one of the contractually specified contingencies allowing termination had occurred was a fact issue that precluded summary judgment.

the debtor in default. Thus, *Centerre* applied an unjustifiably restrictive construction of UCC §1-203.

Viewed in the context of GMAC's claims, and reading the contract as a whole, the agreement cannot be construed as a simple demand note. GMAC's actions in manufacturing a default before it terminated financing and pursued repossession contradict the demand note arguments raised by GMAC in this appeal. GMAC acted like a default was necessary.

The court's analysis in *Reid*, which also involved claims for wrongful termination of financing, is equally applicable to GMAC's attempt to repossess vehicles. The *Reid* court declared that "it would be illogical to construe an agreement providing for repayment of or default in the event of certain contingencies, as permitting the creditor, in the absence of the occurrence of those contingencies, to terminate the agreement without any cause whatsoever. *Reid*, 831 F.2d at 14. Under such a construction, the enumerated conditions would be rendered meaningless. *Id.* at 14.⁴⁸

Similarly, the default contingencies in the Wholesale Security Agreement would be rendered meaningless if GMAC is allowed to repossess vehicles without a default. The contract is not a simple demand note or an integrated agreement as to time for payment. Therefore, the duty of good faith applies to contract performance and enforcement by both parties. The trial

⁴⁸ In *Reid*, the Court of Appeals observed that although the note granted the bank the right to repayment on demand, the demand provision should not be considered as an integrated contract as to the time term. Moreover, the fact that the note and security agreement contained default provisions did not mean that the agreement "could simply be terminated at the whim of the parties". Rather, the right of termination or acceleration was subject to the duty of good faith.

court correctly determined that GMAC failed to comply with RCW 62A.9A-102(a)(43), as it did not act in good faith or meet commercially reasonable standards.

E. The *Badgett* Case Does Not Negate GMAC's Good Faith Duties in the Performance and Enforcement of the Contract

GMAC argues that the trial court added a good faith defense to the demand note and that its decision therefore conflicts with *Badgett*. GMAC focuses on the holding in *Badgett* that there is no “free floating duty of good faith”. *Badgett v. Sec. State Bank*, 116 Wn.2d 563, 807 P.2d 356 (1991).

Badgett is not controlling authority because it addressed an implied duty of good faith, without ruling on the statutory duty of good faith under the UCC. See RCW 62A.9A-102(a)(43) (adopted in 2001). The *Badgett* court held that proposals to modify the loan were part of the *negotiation* process and required further meeting of the minds of the parties, unlike in our case where there were existing duties to performance within the contract. See *Badgett*, 116 Wn.2d at 574.

The trial court specifically held that GMAC committed numerous acts of bad faith in violation of the Washington Uniform Commercial Code. (CP 136; Appendix A). Under Article 9, secured creditors are required to exercise “good faith”, which is defined as “honesty in fact and the observance of reasonable commercial standards of fair dealing”. RCW 62A.9A-102(a)(43).

Badgett dealt with an affirmative expansion of a duty of good faith by requiring cooperation. The *Badgett* court stated that this expansion of the existing duty of good faith created obligations in addition to those intended by the parties within the contract, and was like a free-floating duty of good faith which was unattached to the underlying legal document. *Badgett*, 116 Wn.2d at 570. Although the trial court cited GMAC's bad faith conduct with respect to options for improved financing, the court's ruling that GMAC committed bad faith was in no way limited to delays relating to future financing. GMAC was required to act in good faith in the performing and enforcing the financing contracts.

The trial court cited numerous instances of bad faith that interfered with the dealership's business and its ability to perform obligations under the floor plan financing arrangement. Unlike the *Badgett* case, GMAC's bad faith conduct went far beyond violations of the "free floating" duty of good faith, by violating specific statutory duties of honesty in fact and the observance of reasonable commercial standards of fair dealing. GMAC's bad faith was connected to the contract terms, as GMAC interfered with EC's business operations and ability to perform under the contract. Thus, the trial court did not expand GMAC's duties to include affirmative acts of cooperation.

While *Badgett* construed the duty to cooperate with respect to future financing arrangement as a free floating duty of good faith, the decision cannot

be extended to bad faith conduct which hinders the dealership's contract performance. As the trial court ruled, law requires GMAC to be honest with regard to its intentions and not attempt to manufacture defaults, put pressure on a business to fail, or block other contract opportunities. This conduct constituted bad faith and should not be considered business as usual for a lender. GMAC did not follow reasonable commercial standards of fair dealing in performing the contract.

GMAC cannot use *Badgett* to justify actions completely outside the realm of good faith and commit affirmative acts of bad faith. Otherwise, there would be no limitation on a lender's decision to create a default and accelerate, and engage in conduct designed to interfere with the borrower's performance. GMAC has cited no case that vests unlimited discretion in a lender to actively engage in bad faith conduct to impair the borrower's performance and force the closure of the business.

F. GMAC's Claims for Replevin and Injunctive Relief Are Barred Under Equitable Principles of Estoppel, Fraud, Duress and Coercion

In addition to good faith duties, the UCC affirms the application of principles of equity. RCW 62A.1-103 states:

Unless displaced by the particular provisions of this Act, the principles of law and equity, including the law of merchant and the law relative to capacity to contract, principal and agent, estoppel, fraud, misrepresentation, duress, coercion, mistake, bankruptcy, or other validating or invalidating cause shall supplement its provisions.

evidence and applicable law which prevents a party with unclean hands from obtaining equitable relief.

Before obtaining equitable relief such as an injunction, the party must have clean hands. *In re Pacific Northwest Storage, LLC*, 383 BR 764 (2007) A court of equity will not intervene on behalf of a party whose conduct is unconscionable, unjust, or marked by lack of good faith. *Portion Pack, Inc. v. Bond*, 44 Wn.2d 161, 265 P.2d 1045 (1954); *Income Investors v. Shelton*, 3 Wn.2d 599, 101 P.2d 973 (1940).

GMAC obtained the restraining orders before all of the evidence regarding its bad faith conduct could be presented. After hearing testimony at the replevin hearing, the trial court found numerous instances where GMAC's concealed facts in dealings with EC. GMAC acted in bad faith by escalating demands upon EC to change financing terms, demanding a personal guarantee and an \$800,000 cash injection, imposing unreasonable demands based upon false targets, and manufacturing default to terminate wholesale financing and credit lines.

GMAC still refuses to acknowledge the effect of its bad faith conduct on a request for injunctive relief. GMAC asserts that the trial court erred in dissolving the injunction because it had a clear legal or equitable right, a well-grounded fear of invasion of that right, and no adequate remedy at law. *See*

Tyler Pipe Industries, Inc. v Department of Revenue, 96 Wn.2d 785, 638 P.2d 1213 (1982).

GMAC does not have any legal or equitable rights because it breached the Wholesale Security Agreement by committing multiple bad faith acts in violation of the UCC and common law. GMAC failed to demonstrate that there is no adequate remedy at law.⁵¹ In weighing the competing harms in a complicated financing relationship, a court has to consider that EC's survival as a business was at stake. There was a great potential for harm if an injunction forced EC out of business. Instead of preserving the status quo, the restraining orders prevented EC from conducting business.

GMAC's allegations regarding out of trust sales in December, 2008 were false and misleading. GMAC alleged out of trust sales based upon inaccurate and manipulated information in an effort to close the dealership. GMAC manipulated sales dates by considering cars sold before the deal was closed and funded. Audits included known unwinds as completed sales. EC was not out of trust at the time the lawsuit was filed. The out of trust transactions of December 5 and December 8 were cured on December 9, 2008. The December 12, 2008 audit showed that the dealership did not owe GMAC

⁵¹ After the Commissioner denied GMAC's emergency motion for an injunction on April 28, 2009, the trial court denied another GMAC motion for an injunction on May 27, 2009. (See Verbatim Report of Proceedings on May 27, 2009 ("VR 3"), attached as Appendix C).

damages and avoid closure of the business, has not engaged in conversion of collateral.

H. The Trial Court Exercised its Discretion to Properly Award Attorney's Fees Due to the Wrongful Injunctions

GMAC has challenged the trial court's decision to award EC attorney's fees of \$215,442.50, asserting that the injunctions were not wrongful and the award is excessive. The standard of review for cases involving an award of attorney's fees is well established:

(W)hile the reasonableness of an award of attorney's fees is subject to appellate review, a trial court's determination will not be reversed absent an abuse of discretion. A trial court does not abuse its discretion unless the exercise of discretion is manifestly unreasonable or based upon untenable grounds or reasons.

Progressive Animal Welfare Soc. v. Univ. of Wash., 114 Wn.2d 677, 688-689, 790 P.2d 604 (1990). *See Boeing Co. v. Sierracin Corp.*, 108 Wn.2d 38, 65, 738 P.2d 665 (1987) (appellate court reviews an award of attorney's fee for abuse of discretion). The trial court's award of attorney's fees was reasonable and warranted by applicable Washington law.

Attorney's fees are recoverable by a party who prevails in dissolving a wrongfully issued injunction or, as here, temporary restraining order. *Ino Ino, Inc. v. City of Bellevue*, 132 Wn.2d 103, 937 P.2d 154, 943 P.2d 1358 (1997); *All Star Gas, Inc. of Washington v. Bechard* 100 Wn.App. 732, 998 P.2d 449 (1979). A party "is found to be wrongfully enjoined" if there is a judicial

determination that such relief was wrongful. *Swiss Baco Skyline Logging Co. v. Haliewicz*, 14 Wn.App. 343, 541 P.2d 1014 (1975). The test is not whether the injunction was erroneous on its face, but whether it is later determined that the restraint was erroneous in the sense that it would not have been ordered had the court been presented all of the facts. *Knappett v. Locke*, 19 Wn.App. 586, 576 P.2d 1327 (1978), *aff'd*, 92 Wn.2d 643, 600 P.2d 1257 (1979); *Nintendo of Am, Inc v Lewis Galoob Toys, Inc.*, 16 F.3d 1031 (9th Cir. 1994).

In this instance, if the trial court at the December 31 and January 14 injunction proceedings knew all of the facts involving the bad faith of GMAC, the restraining orders would not have been issued. After shutting EC down and impairing the dealership's operations with wrongful injunctions, GMAC is responsible for EC's attorney's fees.

GMAC's contention that restraining orders were required to compel EC's performance of contract obligations is contrary to Washington law and defies the realities of the case. GMAC breached the Wholesale Security Agreement by committing numerous acts of bad faith, requiring the dissolution of the injunction.

The amount of the fee awarded was reasonable and consistent with Washington law. All of the litigation before the appeal related to GMAC forced extensive litigation by shutting down the dealership and preventing the sale of vehicles. Addressing GMAC's argument that EC could only

recover fees related solely to the injunction, the court observed that it would not make sense to split the claims or require EC to choose which claim to defend.

The trial court found that replevin and the injunction were intertwined, and that GMAC elected to pursue the claims together. VR 2 46:9-18; 47:3-5 (See Appendix B). The testimony regarding the contractual relationship, the floor plan arrangement, and the dealings between the parties were relevant to both replevin and injunction VR 2 46:9-18; 47:3-5. GMAC did not prevail on the merits. VR 2 47:13-14. The evidence regarding bad faith conduct of GMAC resulted in the denial of replevin and the lifting of the injunction.

In calculating fees, the trial court used the lodestar method, which is the starting point for determining an award of attorney fees. *Scott Fetzer Co. v. Weeks*, 122 Wn.2d 141, 859 P.2d 1210 (1993). Under the lodestar methodology, a court determines whether counsel expended a reasonable number of hours in securing a successful recovery for the client. *Id.* at 150. The lodestar fee may be adjusted upward or downward in the trial court's discretion. *Fetzer*, 122 Wn.2d at 150. The trial court found that the hours and rates were reasonable and properly applied a 1.5 multiplier to the hourly rate of EC's counsel. VP 2 52-19-20; 53:16-18.

I. The Trial Court Properly Exercised its Discretion to Deny GMAC's Untimely Amendment to Add New Claims

In its April 10, 2009 Order, the trial court exercised its discretion to deny GMAC's untimely motion to amend the complaint and assert conversion claims. (CP 136; App. A). A trial court's decision regarding a motion to amend will not be disturbed on appeal except for a manifest abuse of discretion. *Caruso v. Union Local No. 690*, 100 Wn. 2d.343, 350, 670 P.2d 240 (1983).

1. The Late Amendment Would Have Prejudiced EC.

The most important factor to consider in ruling on a motion to amend under CR 15(a) should be granted or denied is prejudice to the nonmoving party. *Caruso*, 100 Wn. 2d.at 350; *Herron v The Tribune Publishing Co.*, 108 Wn.2d 162, 166, 736 P.2d 249 (1987).

GMAC waited until April 1, 2009 to file the motion to amend and add new claims for damages. (CP 125). Defendants objected on the grounds that the amendment to add new claims after extensive discovery and at the end of a four week replevin trial would unfairly prejudice EC and Reggans. (SC Dkt. 133).⁵³

⁵³ By April 1, 2009, the parties had already participated in several hearings and engaged in extensive discovery, including cross-country trips for depositions and document productions. The court had conducted injunction hearings and heard two weeks of testimony regarding the replevin claim.

The test as to whether the trial court should grant leave to amend is whether the opposing party is prepared to meet the new issue raised in the proposed amendment. *Quackenbush v. State*, 72 Wn.2d 670, 434 P.2d 736 (1967). Until GMAC's proposed amendment, the only allegations and relief requested by GMAC pertained to claims for replevin and injunctive relief, facts. At the eleventh hour, GMAC tried to interject claims for breach of contract, promissory estoppel, unjust enrichment, and conversion. GMAC's amended complaint incorporated allegations of personal liability against John Reggans which had not been previously asserted. If granted, the amendment would have changed the nature of the case and subjected defendants to entirely new claims.

2. GMAC's Late Filing Was the Result of Inexcusable Neglect

A motion to amend should be denied due to inexcusable delay on the part of GMAC, accompanied by the prejudice to defendants. *Del Guzzi Construction Co. v. Global Northwest Ltd.*, 105 Wn. 2d 878, 888, 719 P2d. 120 (1986).

3. The New Claims Lacked Merit.

In considering whether to grant a motion for leave to amend under CR 15(a), it is proper for the court to "consider the probable merit or futility of the amendments requested." *Doyle v Planned Parenthood*, 31 Wn.App.126, 131, 639, P.2d 240 (1982); *MacLean v First Northwest*

Industries of America, Inc., 96 Wn.2d 338, 345, 635, P.2d. 683 (1981).

Based upon the trial court's ruling that GMAC breached the Wholesale Security Agreement by engaging in bad faith, the new claims asserted by GMAC lacked merit.

The trial court did not abuse its discretion in denying an amendment due to the resulting prejudice to EC and inexcusable neglect.

J. Respondents Are Entitled to Recover Their Reasonable Attorney's Fees Under RAP 18.1

Respondents request their attorney fees on appeal under RAP 18.1 and RCW 4.84.330. Respondents were the prevailing parties at the replevin hearing are entitled to recover attorney's fees due to wrongful injunctions. When a party to an appeal was entitled to attorney's fees at the trial level, that party is also entitled to attorney's fees if he prevails on appeal. *Reeves v. McClain*, 56 Wn.App. 301, 783 P.2d 606 (1989).

IV. CONCLUSION

For the reasons stated, the trial court's decisions are supported by substantial evidence and applicable law respondents request that the Court of Appeals affirm the April 10, 2009 Order denying replevin, dissolving the injunction, and denying the amendment of complaint. Respondents also request that Court affirm the award of attorney's fees and award respondents their fees on appeal.

Respectfully submitted this 12th day of April , 2010.

LAW OFFICE OF RICHARD A. BERSIN

A handwritten signature in cursive script, appearing to read "Richard A. Bersin".

Richard A. Bersin, WSBA # 7178
Attorney for Respondents

No. 63331-7-1

**IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I**

GMAC, A Delaware corporation,

Petitioner,

v.

EVERETT CHEVROLET, a Delaware corporation,
JOHN REGGANS, AND JANE DOE REGGANS

Respondents

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I certify under penalty of perjury that on April 12, 2010, I delivered a copy of Respondents' Brief (Corrected) to petitioner's counsel of record, John E. Glowney of Stoel Rives LLP, at 600 University Street, Suite 3600, Seattle, Washington 98101-4109.

Dated this 12th day of April, 2010.



Lien Le, Legal Assistant