

63331-7

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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

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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

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.

financing 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-

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".

37:5; VR 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 Vol. 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

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.

closing date. 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

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.

October 31, 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.

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.

Reggans did not know 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, Vol. VI 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-

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.

123:5; VR 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; VR 15:6-8.¹⁶

GMAC demanded a new inventory reduction charge¹⁷ in the amount 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 in 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

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. .

severely 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. GMAC 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 that occurred in December, 2008.¹⁹ However, GMAC’s rendition of 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

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.

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.

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

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

sale fails 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. Modrzjewski) 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. Modrzjewski 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.(4) Webb; GMAC audit of September 23, 2008; GMAC sales date September 20, 2008; sales contract approved by bank September 22, 2008. RV Vol. XIII 21:22-24:17. (5) Smith; GMAC audit of September 23, 2008; GMAC sales date September 20, 2008; sales contract approved by bank September 25, 2008. RV 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

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.

Vol. II 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 working capital needed to reach the stated target and/or goals set for him by GMAC.” VR 18:23-19:3.

Pedram Davoudpour’s testimony confirmed that the requirements in the July letter were false targets and were designed to create the basis for EC’s default. VR 11:23-12:1. The hidden agenda was a working capital assault on ECI, designed to manufacture a default. VR 12:2-4. Mr. Davoudpour admitted that the restrictions that he implemented against EC were based upon the “red flag” identified as the July 31, 2008 letter. (R. Ex. 1), which had been placed in the file by Ms. Smith. RP Vol. VI 103:5-104:7; RP Vol. VI 104:8-105:8; VR 11:13-19. Mr. Davoudpour did not use events occurring in November or December to impose restrictions; he was relying on the July letter. VR 11:19-23.

L. Injunctions Shutting Down EC’s Business

On December 31, 2008, plaintiff GMAC, a Delaware corporation, commenced an action against EC and the Reggans by filing a Petition and Motion for Show Cause (CP 382-385)²⁴ The Petition requested replevin to repossess EC’s vehicles and an injunction to shut down the dealership.

²⁴ Both restraining orders were obtained in the name of a non-existent entity: GMAC, a Delaware corporation. The requisite injunction bond was issued to GMAC, LLC. (See Section III above).

On December 31, 2009, plaintiff obtained an *ex parte* Temporary Restraining Order which prevented the dealership from conducting any aspect of the dealership's business for two weeks. R. Ex. 18; VR 16:14-16. (CP 351). 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

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.

arising for breach of contract by wrongful acceleration, breach of good faith duties, tortious interference with EC's business expectancies (CP 65).

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 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 has 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 lead to believe his past good relationship with GMAC still existed all the while secret action 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 manufacturer 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 denied the January 14, 2009 restraining 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 a 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

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.

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 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 prevented the dealer's performance and trigger default. *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

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 (Section 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."

contractual expectations 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

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.

pressuring EC 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 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), Vol. 4, Ch. 30-2, p. 10. 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*

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.

S.S. *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.

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.

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 *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.

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

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)

on the part of 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 (3) the promise or order must not state any undertaking or

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

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. The agreement does not state a fixed amount to be paid by EC. 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

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.

commercially unreasonable terms.⁴⁰ GMAC cannot assert that the payments are 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

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

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.

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 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.

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.

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 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

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).

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.

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

⁴⁶ Citing *Fulton* decision, *Centerre* held that UCC §1-203 did not apply because a good faith defense to the call for the 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 either call the note in order to place the debtor in default. Thus, *Centerre* applied an unjustifiably restrictive construction of UCC §1-203.

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.

In determining whether GMAC wrongfully terminated the financing contract, the Court of Appeals held

The existence of explicit conditions of default in the acceleration clause, as well as the related security agreements, shows a clear intention that the note be payable on demand only in the event [the borrower] failed to meet the installment obligations or the obligations imposed by the security agreements.

Id. at 1377 (citing *Bank One, Tex. v. Taylor*, 970 F.2d 16 (5th Cir. 1992)).

The *Coffee* court relied upon common law rules of contract interpretation where a court should interpret a contract in a way, if possible, that gives effect to all of the contract's provisions and a court should avoid a construction that renders any portion of the contract meaningless. Applying these rules, the *Coffee* court held that GMAC could only terminate the agreement if one of the default contingencies was met. *Id.* at 1378-79.

The same basic rules of contract interpretation are applied by Washington courts. A court should interpret a contract in a way, if possible, that gives effect to all of the contract's provisions and a court should avoid a construction that renders any portion of the contract meaningless. *Seattle-First Nat. Bank v. Westlake Park Associates*, 42 Wn.App. 269, 711 P.2d 361 (1985). The Wholesale Security Agreement includes demand language and default contingencies that apply to the repossession remedy that GMAC pursued.⁴⁷ 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

⁴⁷ The Revolving Line of Credit Agreement also specifies default events that must occur prior to repossession. R. Ex. 8, paragraph 4.

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 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

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.

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 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.

It is undeniable that the rights of GMAC and EC under the UCC are subject to rules of equity. This is especially true in secured transactions, where acceleration is a matter of equity and courts have been careful to evaluate the fairness of the acceleration under the particular facts of the case. *Brown v Avemco* 603 F.2d at 1367 (acceleration is a harsh remedy with draconian consequences for the debtor). *Bowen v Danna*, 276 Ark. 528, 637 S.W.2d 560 (1982) (court may exercise equitable powers to relieve debtor of hardships of acceleration upon finding fraud or inequitable conduct of

creditor). In *Brown v Avemco*, the Ninth Circuit Court of Appeals held that a creditor's bad faith or inequitable conduct prevents acceleration.⁴⁹

The rights of a secured creditor under a security agreement may be lost by waiver or estoppel. *Central Soya*, 137 Ga. App. 63; 222 S.E.2d 852, 222 S.E.2d 852 (1975); *Urdang v. Muse*, 114 N.J. Super. 372, 276 A.2d 397 (1971); *National Bank of Northern New York v. Shaad*, 60 A.D.2d 774, 400 N.Y.S.2d 965 (1977) (citing 1 Anderson, UCC 2d. Ed. Section 1-103:3). Some courts have applied principles of waiver and estoppel in holding that bad faith and tortuous conduct may affect the secured party's position or priority. *General Ins. Co. of America v. Lowry*, 570 F.2d 120, 10 Ohio Op. 3d 138 (6th Cir. 1978); *Shallcross v. Community State Bank and Trust Co.*, 180 N.J. Super. 273, 434 A.2d 671 (1981).⁵⁰ Additionally, economic duress may be asserted as a defense where the lender committed a wrongful act of such a nature as to actually overwhelm the will of a borrower. *Freedlander, Inc., v. NCNB Nat'l Bank*, 706 F. Supp. 1211, 1211-12 (E.D. Va. 1988).

These "invalidating causes" provide grounds for defeating the rights of a secured creditor under the RCW 62A.9-101. *See also: Knox v. Phoenix*

⁴⁹ The decision in *Brown v Avemco* is consistent with Washington foreclosure cases requiring consideration of the creditor's unconscionable or inequitable conduct. *Jacobson v McClanahan*, 43 Wn.2d 751, 264 P.2d 253 (1953)

⁵⁰ Equitable subordination has been applied to change rights or priorities of secured creditors in cases of "[f]raud, unfairness, or breach of the rules of 'fair play.'" *Nerox Power Systems, Inc. v. M-B Contracting*, 54 P.3d 791, 795 (Alaska 2002). *Key Bank v. Alaskan Harvester*, 738 F.Supp. 398, 401 (W.D. Wash. 1989),

Leasing Inc. 29 Cal. App. 4th 1357, 35 Cal. Rptr. 2d 141 (1994) (bad faith conduct provides equitable grounds for displacement of secured creditor's favored position). GMAC's egregious conduct, including intentional misrepresentations and coercion, require consideration of equitable doctrines. GMAC manufactured default and used acceleration and as a means of abuse, thereby jeopardizing its rights as a secured creditor. *See Lane v. John Deere Co.*, 767 S.W.2d 138 (Tenn. 1989).) .

G. The Trial Court Dissolved the Injunction Because GMAC's Bad Faith Conduct Bars Equitable Relief

Based upon extensive findings of bad faith conduct by GMAC, the trial court dissolved the January 14, 2009 injunction that impaired the dealership's business for months. The trial court's decision is supported by substantial 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

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.

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 any money for out of trust sales. GMAC cannot complain that the restraining orders were violated if they were wrongfully issued.

After the injunction was dissolved, EC attempted to stay in business and mitigate its damages. The dealership lost millions of dollars, lost employees, and GMAC took actions that interfered with financing options with other banks. For two weeks the dealership was completely shut down and could not sell vehicles or parts. EC continued to pay down the floor

planned obligations but, not surprisingly, it could not as rapidly due to the damages caused by GMAC.⁵²

GMAC points to an isolated statement by counsel at the replevin hearing, but fails to mention its continued efforts to shut the dealership after the injunction was lifted. GMAC filed two emergency motions for injunctive relief that were denied by the Court of Appeals, and another motion for an injunction that the trial court denied on May 27, 2009. Meanwhile, GMAC withheld titles to both encumbered and unencumbered vehicles that it obtained as a result of the January 14, 2009 restraining order.

The trial court's rulings regarding GMAC's bad faith required the dissolution of the January 14, 2009 injunction. GMAC's unclean hands preclude any claim for equitable relief. EC, which acted reasonably to mitigate 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

⁵²Under the mitigation of damages doctrine, a non-breaching party must use reasonable means to minimize damages. *Bernson v Big Bend Elec. Co-Op, Inc.* 68 Wn.App. 427, 842 P.2d 1047, 1051 (1993); *Max L. Wells Trust by Horning v Grand Cent. Sauna & Hot Tub Co.* 62 Wn.App 593, 815 P.2d 284 (1991).

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 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

Vol. I 46:9-18; 47:3-5. 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 Vol. I 46:9-18; 47:3-5. GMAC did not prevail on the merits. 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.

I. 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. A trial court's decision regarding a motion to amend will not be disturbed on appeal except for an manifest abuse of

discretion. *Caruso v. Union Local No. 690*, 100 Wn. 2d.343, 350, 670 P.2d 240 (1983). A trial court's decision regarding a motion to amend will not be disturbed on appeal except for an 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. (Dkt. 133).⁵³

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

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.

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

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 of Lacked Merit.

In considering whether to grant a motion for leave to amend under CR 15(a) should be granted, 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 19th day of January, 2009.

LAW OFFICE OF RICHARD A. BERSIN


Richard A. Bersin, WSBA # 7178
Attorney for Respondents

APPENDIX A

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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF SNOHOMISH

GMAC, A DELAWARE CORPORATION,)
Plaintiff,) Cause No. 08-2-10683-5
vs.)
EVERETT CHEVROLET, INC., A)
DELAWARE CORPORATION,)
Et al.)
Defendants.)

VERBATIM REPORT OF PROCEEDINGS

BE IT REMEMBERED that on 11th day of April, 2009,
the above-entitled and numbered cause came on for
Hearing before JUDGE ERIC Z. LUCAS, Snohomish County
Superior Court, Everett, Washington.

A P P E A R A N C E S

For the Plaintiff JOHN GLOWNEY
For the Defendant WILLIAM WHEELER and
KARL HAUSMANN

REPORTED BY:
DIANA NISHIMOTO, OFFICIAL COURT REPORTER
SNOHOMISH COUNTY COURTHOUSE
3000 EVERETT, WA 98201
PHONE (425)388-3281
CSR. 3222

1 THE COURT: All right. We are back on the record
2 in the matter of GMAC versus Everett Chevrolet. And
3 this morning's hearing was scheduled to talk about the
4 motion to amend the complaint. I've sort of changed
5 this agenda. I'm going to give you my ruling. So
6 here we go.

7 This matter has come before the Court for hearing
8 from March 17th, 2009 to April 10th, 2009. The Court
9 has heard and reviewed trial testimony, all exhibits,
10 the memorandum of counsel, the records and the files
11 herein. It is therefore ordered, adjudged and
12 decreed as follows:

13 And these are my Findings of Fact.

14 Owner, John Reggans, has been operating Everett
15 Chevrolet Inc. (Henceforth ECI) successfully in the
16 City of Everett since 1996. He started in this
17 business with an 80 percent investment from Motor's
18 Holding, a division of General Motors Company and a
19 twenty percent match of his own.

20 The program he engaged in with Motor's Holding
21 enabled the junior investor to buy out the larger
22 company interest in a certain amount of time.

23 The pro forma plan for Mr. Reggans was to
24 accomplish this task in 3.5 years. His actual
25 performance was better. He acquired one hundred

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1 percent ownership in 1999, after only two years and
2 nine months. This acquisition was achieved solely
3 through dealer profits.

4 ECI, under Mr. Reggans, has been profitable every
5 year from 1996 to 2006. The Dunn and Bradstreet
6 report filed as exhibit number 92 indicates that his
7 high year sales were approximately 40 million dollars.

8 During the late 90's Mr. Reggans testified that he
9 averaged new car sales of 70 a month from 1996 to
10 1999. In 1999, a new Chevy dealership, Speedway
11 Chevrolet, opened up as a direct competitor. After
12 this, his new car sales dropped, but he still managed
13 to average about 40 to 60 new cars sold a month.

14 In 1999, he received a working capital loan from
15 GMAC in the amount of \$500,000, and repaid it in full
16 in five years. He has had revolving line of credit
17 with GMAC since 1999, with payment terms of interest
18 only. This continued until July 2008, when GMAC
19 unilaterally demanded principal reduction payments of
20 \$10,000 a month in addition to interest.

21 Mr. Reggans testified that in 2006 ECI earned
22 \$700,000 in net profit. However, after 2006, the car
23 industry began to decline. His 2007 net profit was
24 only about \$28,000.

25 In September of 2007, Mr. Jerry Vick became GMAC

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1 branch manager for the Pacific Northwest. When Mr.
2 Vick was asked on direct examination if there were any
3 credit issues in 2007, he indicated, yes, that ECI
4 needed to expand its revolving line of credit from
5 \$500,000 to \$800,000.

6 The request was made directly between Mr. Reggans
7 and Mr. Vick. There was no problem granting this
8 request at that time. At the end of 2007, Mr.
9 Reggans also requested of Mr. Vick that GMAC help
10 finance the purchase of real estate the firm was
11 leasing. Mr. Reggans saw this as critical to the
12 profitability of his business because he was facing a
13 dramatic increase in lease payments and this was a
14 proactive action on his part.

15 The purchase of the property would avoid an
16 escalation in lease payments of nearly fifty percent.
17 Mr. Reggans made clear that this deal had to close by
18 December 31st, 2007. GMAC did not respond until May
19 of 2008. The response was a decline and was verbally
20 delivered by Mr. Vick. GMAC did not respond to this
21 request in writing.

22 On direct examination, Mr. Vick indicated that the
23 reason for the decline was no positive cash flow.
24 However, the April financial statement loss was the
25 first quarter loss of the year. Plus GMAC had just

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1 increased the revolving line of credit.

2 Lastly, the collateral is extremely valuable real
3 estate on Highway 99, Evergreen Way in Everett. The
4 property was appraised. The unrebutted testimony is
5 that the sales price was one million dollars under the
6 appraisal, as such, the Court does not find Mr. Vick's
7 answer at trial to be credible.

8 From a business standpoint, GMAC's position is not
9 reasonable. From the facts presented, GMAC appears
10 to have been dragging its feet. This delay, rather
11 than swift rejection, denies the dealer the
12 opportunity to pursue other options in a timely
13 manner. As an isolated occurrence, this fact is not
14 important. But it is important if it is a pattern of
15 behavior.

16 The April ECI financial statement showed a year to
17 date loss of \$163,042. This led to a meeting between
18 Mr. Vick and Mr. Reggans on June 10th. Mr. Vick
19 testified that the meeting basically covered all the
20 items later memorialized in his letter of July 31st,
21 2008, which is exhibit number 1. Mr. Reggans disputed
22 this vehemently in his testimony, indicating that the
23 meeting was dominated by a request for his personal
24 guarantee and that virtually none of the other topics
25 in Mr. Vick's subsequent letter were communicated in

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1 this meeting. This raises a very serious issue of
2 credibility.

3 In his court testimony, Mr. Vick indicated that he
4 could not recall Mr. Reggans' response to raising
5 these very serious issues, particularly to the request
6 for the \$800,000 cash injection. The Court finds that
7 Mr. Vick's testimony is simply not credible.

8 In the letter, Mr. Vick indicates that because of
9 the losses, ECI will need a cash injection of
10 \$800,000, Mr. Reggans's personal guarantee and
11 continue to pay promptly and faithfully. A deadline
12 was set at October 31st, 2008 to achieve these goals
13 and if that they were not achieved, GMAC promised to
14 "suspend or terminate" the dealer's wholesale credit
15 lines. After these conditions were set, a few more
16 were added.

17 One was a charge of \$500 per audit.

18 And number two was the change in the revolving line
19 of credit setting a principal reduction payment of
20 \$10,000 a month.

21 This letter is copied to Michelle Smith and her
22 only. The Court also finds it incredible that a
23 letter of this magnitude would be sent almost fifty
24 days after the meeting.

25 In the world of finance, sixty days is a lifetime.

1 A concerned dealer would certainly want these fifty
2 days in order to meet the conditions set. Here, GMAC
3 deprived the Dealer of his time to adjust, another
4 indication of delay.

5 By his own testimony, Mr. Vick did not mention the
6 deadline in his meeting, only in the letter. The
7 entire scenario, as reported by Mr. Vick, lacks
8 credibility.

9 This letter has been construed in many different
10 ways, but in business this is known as a drop dead
11 letter. The author is communicating to the reader
12 that the relationship is over and it is just a matter
13 of time before the end. However, this letter
14 attempts to mask this intent by justifying GMAC's
15 actions based on credit trends and performance. But
16 at this point in the year, there were no trends as
17 yet. All high overhead businesses show losses at the
18 beginning of the year until they reached their break
19 even point in sales later in the year. This is
20 common knowledge. If this had been the subject of
21 oral conversation over lunch, there is no question, in
22 this Court's view, given Mr. Reggans' wide ranging
23 contacts, that he would have had a different posture.

24 But GMAC deprived him of the opportunity to make
25 the maximum use of his time by misleading him, by

2 on a reservation of its rights. This fifty days
3 becomes a critical point later in the year.

4 what Mr. Reggans did not know is that GMAC was
5 undertaking a very sophisticated financial analysis on
6 his firm. He did not know that a metric was being
7 applied to him. Ms. Smith testified that he needed
8 to show a debt to equity ratio of three to one, yet
9 this was never told to him, even though GMAC knew they
10 had analyzed his April debt to equity ratio at over
11 9.73 to 1. There was no proof by GMAC that the cash
12 injection of \$800,000 was based on achieving this
13 three to one debt to equity ratio.

14 And in fact, Ms. Smith testified that she knew he
15 could not make this target in July because he had
16 continued to lose money. When Mr. Reggans did inject
17 \$500,000 into his business in October hoping this
18 would convince GMAC to lift the personal guarantee
19 condition, he still could only achieve a debt to
20 equity ratio of 18 to 1.

21 On questioning by the Court, Ms. Smith admitted
22 that the target cash injection of \$800,000 was no
23 longer valid in July when it was requested in writing.
24 And they did not tell him it was no longer valid. She
25 calculated that a total cash injection of \$800,000 by

1 the October deadline, given the increased losses,
2 would only get him to a debt to equity ratio of 10.73

3 to 1, when the metric is 3 to 1. She knew that ECI
4 could not meet GMAC goals.

5 According to GMAC, both Mr. Vick and Ms. Smith
6 engaged in detailed financial discussions with Mr.
7 Reggans about the performance of his business, yet not
8 once did they share the financial analysis with him.
9 Targets were set without any justification.
10 Deadlines were set without any notice or
11 justification. When he inquired why he was asked for
12 his personal guarantee after 12 years of doing
13 business with GMAC, he was told vaguely that it was
14 not uncommon. That was a quote, not uncommon, and
15 that "not every dealer" had to do it.

16 Ms. Smith was also not a credible witness. By her
17 own testimony she has 25 years in the business and a
18 Masters in business administration. Yet she could
19 not derive the formulas from simply reviewing the
20 financial information on instruments she has
21 purportedly used for years. She could not glean the
22 formulas without a formula handbook or a cheat sheet
23 and she could not give the Court ECI's breakeven point
24 in total sales, only in units per month. For a high
25 level unit manager, this is simply not credible.

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1 However, it is credible if her primary job is
2 collections and shutting down companies. This does
3 not require a high level financial analysis. And she

4 testified that she was just "promoted" to high risk
5 manager. This is a credit collection term. In other
6 businesses it's called special credits. This is a
7 division of a firm that a client goes to when all
8 credit is about to be cancelled and all debts called
9 due.

10 Proof of this collection attitude is her response
11 to Mr. Reggans when he asked her why he needed to have
12 a personal guarantee. She said he has to have some
13 "skin in the game." This Court found this comment to
14 be highly insulting. It is not only insulting to a
15 person who has earned his ownership via hard work and
16 profit over a 12 year period, it is insulting based on
17 her explanation that a "personal guarantee shows level
18 of commitment." That's a quote. In the credit world
19 this is a false statement. Every single business
20 person in the world knows what a personal guarantee
21 means. It means the lowest credit rating for a
22 business. It means the business has no value. This
23 is why the personal guarantee is required, so that the
24 lender can take your house if the business fails to
25 pay its debts. In this case, it is not true that the

1 business had no value. Motor's Holding, after its
2 own due diligence, was prepared to invest 2.5 million
3 dollars in this business. This casts doubt on the
4 requirement for a personal guarantee.

5 Most small business people start with a personal
6 guarantee and struggle to escape this risk by building
7 the net worth of their business. For her to say this
8 in court under oath shows her lack of respect for the
9 Court, and her total lack of credibility. But it does
10 reveal her motivation. Clearly, this explanation to
11 the Court and to Mr. Reggans is the first real proof
12 of a GMAC hidden agenda.

13 Surprisingly, Mr. Pedram Davoudpour did testify
14 credibly. When the Court asked him why these actions
15 were taking place, he candidly indicated that there
16 were "red flags in the file."

17 When I asked him to identify what he read in the
18 file that was a red flag, he indicated that the letter
19 of July 31st, 2008 was the red flag. Mr. Davoudpour
20 was not using the occurrences of November or December
21 or August to impose the restrictions on ECI that he
22 was responsible for implementing, he was relying on
23 the July letter. Mr. Davoudpour's testimony affirms
24 for the Court that the requirements in the July letter
25 were false targets and were designed to create the

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1 basis for ECI's default.

2 The hidden agenda that is taking place here is a
3 working capital assault on ECI designed to manufacture
4 a default.

5 First, a target for cash injection is set that can

6 either not be reached, or if it is reached, will not
7 bring ECI into compliance with the policy metric of a
8 3 to 1 debt equity ratio.

9 Next is a communication to ECI that the break even
10 is units and that he needs to sell more units to meet
11 GMAC's goals. ECI is also told that they need to
12 reduce inventory. When the Court asked Ms. Smith what
13 this meant, she said, "sell more cars."

14 Next is the \$500 audit charge.

15 Then there is the \$10,000 monthly principal
16 reduction charge.

17 Then the revolving line of credit is suspended,
18 exhibit 69, while at the same time the interest rate
19 is increased from Libor plus 300 basis points to Libor
20 plus 600, an increase of one hundred percent.

21 Ms. Smith testified that all past credit decisions
22 were purportedly based on ECI's performance, but this
23 one in her letter is thinly based "market condition",
24 without indicating what metric in the market is being
25 used, without any stated relation to a specific market

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1 condition or contract term. This seems to be just an
2 arbitrary action, which is not commercially
3 reasonable.

4 Next is the inventory reduction charged billed at
5 over \$170,000. This pre payment has no basis in the
6 contract. See exhibit number 3 where it says "As

7 each vehicle is sold or leased, we will faithfully and
8 promptly remit." It comes directly out of working
9 capital without being earned. The calculation of the
10 sum has no metric and appears totally arbitrary. It
11 appears to assume depreciation of a vehicle that is
12 not being used when all depreciation rules are based
13 on use. It is even generally known that you value a
14 car based on mileage used, so this charge appears
15 arbitrary and as such is not commercially reasonable.

16 Then there is the November refusal to floor
17 unencumbered new and used vehicles at the Dealer's
18 request when it would have had maximum positive effect
19 on the Dealer in response to the Dealer's efforts to
20 be proactive and anticipate his problems.

21 Followed by that decision is the one in December to
22 allow flooring after audits found ECI to be Out of
23 Trust. This action violated GMAC's own rule as
24 testified by Ms. Smith that no flooring would be done
25 once the floorplan was suspended.

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1 But in the December case, the flooring helps GMAC
2 by obtaining more of ECI's assets, and harms the
3 Dealer because only his earlier proactive approach
4 would have enabled him to avoid the Out of Trust
5 position.

6 The three day business day remit rule in this
7 context is used to assault working capital. when the

8 business most needs flexibility, the rule is strictly,
9 if not arbitrarily, enforced. This rule is not a
10 contract term, and it is not uniform among dealers.
11 Some have a five business day remit rule. And there
12 was no testimony in the record concerning how it was
13 applied or who got three and who got five.

14 If it's not based on contract or a clearly
15 articulated policy, it is arbitrary and not
16 commercially reasonable.

17 The sales date determined by GMAC is arbitrary.
18 Pedram Davoudpour testified that when there was a
19 dispute about sales dates then they would negotiate it
20 with the Dealer. However, it was clear from the
21 testimony that there would be no negotiating with Mr.
22 Vick or Mr. Ted Modrzejwski. The date is applied in
23 an arbitrary manner because cars are considered sold
24 before the deal closes and is funded. Even known
25 unwinds are included in the audits as due and payable.

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1 This is a working capital assault, because it then
2 requires the Dealer to fund the GMAC floorplan payment
3 out of his working capital rather than out of the
4 sale. A Dealer with a five day remit will have a
5 distinct advantage here over one who has a three day
6 remit. And this is not commercially reasonable
7 because it's not based in any contract term and not on
8 any clearly articulated policy.

9 Audits taking place on a daily basis also assault
10 working capital. All the employees who testified
11 indicated that the daily audits interfered with their
12 performance. They testified that it reduced sales.
13 Inefficient performance diminishes working capital
14 because employees must be paid who are not achieving
15 peak performance. Mr. Jaffee testified that GMAC was
16 on site interfering with the business operation from
17 November 14th, 2008 until he left on January 28th,
18 2009. He testified that during this time, "there was
19 not one day when they were not physically on the
20 premises." This is not commercially reasonable
21 behavior. He testified that customers overheard their
22 conversations when they would come into his office and
23 demand information. This testimony is contrary to
24 GMAC witnesses who said they were polite and asked
25 employees to step out. This creates a credibility

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1 question that this Court resolves against GMAC.

2 On December 4th, exhibit 56, demand on the open
3 account was made severely impacting not only working
4 capital, but the Dealer's cash position by diverting
5 and freezing these critical funds.

6 On December 15th GMAC demanded payment on all
7 credit lines with a deadline of March 13th.

8 And then surprisingly, on December 19th, just four
9 days later, GMAC demanded immediate payment of all

10 credit lines referenced in the letter December 15th,
11 2008. These two actions coming within days of each
12 other do not make sense unless they are intended to
13 stop his investment from Motor's Holding.

14 On December 30th GMAC acquired a Temporary
15 Restraining Order that shut the business down for two
16 weeks.

17 Demand notices went to financing institutions and
18 this assault stopped all financing of sales until
19 relief was granted by the Court January 15, 2009.

20 It is unrebutted that Mr. Reggans had a
21 pre-investment contract, exhibit number 109, in place
22 that would have provided an equity cash injection into
23 his business by Motor's Holding in the amount of 2.5
24 million dollars and which was due to close on January
25 9th, 2009. It is unrebutted that Mr. Vick and Ms.

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1 Smith of GMAC, and others, knew this contract was
2 pending. With this deal, Mr. Reggans would again be a
3 junior investor in his business. However, it is also
4 undisputed that an equity investment of 2.5 million
5 dollars, just days away, would have solved all of
6 ECI's credit problems with GMAC. Motor's Holding, in
7 its refusal to close, cited this lawsuit as a basis
8 for denial.

9 Okay. So here is my analysis, and this is a
10 quote.

11 "The law has not yet acknowledged a general
12 requirement of full disclosure of all relevant facts
13 in all business relationships but the duty to disclose
14 relevant information to contractual party can arise as
15 a result of transaction itself within the partie's
16 general obligation to deal in good faith."

17 This is from Liebergesell vs. Evans 93 Wash.2d 881.
18 And the quote is from 893. It's a 1980 case.

19 By failing to disclose the debt to equity ratio and
20 other aspects of GMAC's sophisticated financial
21 analysis, GMAC was able to create a false target for
22 the Dealer and mislead ECI about its future actions.

23 GMAC withheld information on its true targets and
24 metrics, while at the same time pushing the Dealer to
25 achieve the stated targets by trying to increase

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1 sales, while at the same time deliberately depriving
2 the Dealer of the working capital needed to reach the
3 stated targets and/or goals set for him by GMAC. By
4 so doing, GMAC leads the Dealer to behave in a way
5 that is beneficial to GMAC but detrimental to the
6 Dealer. These facts were never disclosed. These
7 facts were at all times relevant to their relationship
8 and this Court finds that GMAC had a duty to disclose
9 them. As such, failure to disclose these facts
10 constitutes a breach of the implied covenant of good
11 faith and fair dealing.

12 In a slow market there are two ways to break-even
13 and reach a favorable debt to equity ratio. One is to
14 increase sales but the other is to reduce overhead,
15 which will reduce the firm's ability to sell.
16 Revealing the debt to equity ratio and other parts of
17 the financial analysis could make this determination
18 to reduce possible. To discuss break even analysis
19 only in units and only in increasing unit sales hides
20 this fact. Lower sales in the current climate was not
21 good for GMAC. GMAC pushed the Dealer to perform when
22 he could have reduced his efforts to obtain
23 profitability, but this would have increased his
24 inventory. Ms. Smith testified that he needed to
25 "sell more cars" to succeed. Clearly, in the current

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1 market, with all of his competitors, hers is a
2 specious conclusion.

3 The U.C.C. defines good faith in RCW 62A.9A-102(43)
4 as follows:

5 "Good faith means honesty in fact and the
6 observance of a reasonable commercial standards of
7 fair dealing."

8 In the instant case, GMAC did not conduct itself
9 honestly. There was a hidden agenda throughout the
10 time from when Mr. Vick took control until the
11 catastrophic demands in December. The goal of the
12 team from GMAC in this case was to shut down the

13 Dealer. The mechanism was to set a false target that
14 could not be achieved and by so doing manufacture a
15 default.

16 Given the totality of GMAC's actions, this is the
17 only conclusion this Court can come to. This was a
18 hidden agenda. GMAC does not have a contractual right
19 to shut down the Dealer and put him out of business.
20 GMAC may withdraw their financing, but they must do so
21 in a commercially reasonable manner. This was not
22 done in this case. The actions taken by GMAC to
23 assault the Dealer's working capital were designed to
24 put him out of business, not merely to protect
25 collateral. If GMAC had disclosed that it did not

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1 want to do business with ECI in the future openly and
2 honestly, then he would have had recourse to
3 alternatives. But instead the Dealer was led to
4 believe his past good relationship with GMAC still
5 existed all the while secret actions were taking
6 place, which damaged his ability to perform, and these
7 actions escalated during 2008. In fact, the actions
8 of December 15th and 19th seemed designed to block his
9 financing from Motor's Holding, which closing date was
10 less than thirty days away.

11 If he had the fifty days from June 10th to July
12 31st, he may have been able to close that deal despite
13 the efforts of GMAC. Here, GMAC aligned all forces in

14 order to make the Dealer fail. Such actions are not
15 commercially necessary or reasonable. This case is
16 the perennial problem of a false target, otherwise
17 known as "hiding the ball". If ECI had known that it
18 could never achieve the goals GMAC had set, then it
19 would have been free to pursue other options.

20 Now, GMAC quoted the case of Badgett. I am not
21 going to give the cite. But Badgett is not on point
22 because it deals with an affirmative expansion of a
23 duty of good faith by requiring cooperation. Here no
24 such expansion is contemplated or required. ECI and
25 this Court does not require GMAC to cooperate in any

21

1 venture. The law only requires GMAC to be honest with
2 regard to its intentions and not attempt to
3 manufacture defaults, put pressure on a business to
4 fail, or block other contract opportunities. All
5 these things were done in this case, and all are acts
6 of bad faith.

7 The Dealer in this case has a right to know how he
8 is being evaluated. Failure to disclose this amounts
9 to having to take a test without knowing what the
10 problems are to be solved. He was constantly given
11 partial financial information and encouraged to turn
12 his inventory when doing just the opposite would have
13 made him profitable.

14 ECI sold 19 million dollars by October of 2008.

15 With these sales, that if he had cut back his sales
16 efforts and lowered his break-even point, he could
17 have made a profit, but GMAC was pushing him to do
18 just the opposite in order to engineer default. This
19 constitutes bad faith.

20 So the conclusions of law are that this Court has
21 jurisdiction in this matter.

22 GMAC breached the contract by violating the
23 Covenant of Good Faith and Fair Dealing.

24 The request for replevin is denied.

25 And I think consistent with that, the motion to

22

1 amend the complaint is also denied.

2 I don't think we need to talk about it.

3 Anybody have anything else they want to say?

4 MR. GLOWNEY: What is the Court going to do with
5 the TRO?

6 THE COURT: Well, I think that means it's over.

7 Mr. Hausmann?

8 MR. HAUSMANN: I agree, I think it was just in
9 place between the time of the inception of the case
10 and this ruling on replevin, so I think it's
11 distinguished by definition.

12 MR. WHEELER: Your Honor --

13 MR. GLOWNEY: Is the Court treating this as the
14 final ruling in this case?

15 THE COURT: The Court is treating this as the
Page 21

16 final ruling in this case.

17 MR. WHEELER: Your Honor, taking that into
18 consideration, we would request that there be a hold
19 on the bond so that we could pursue monetary damages
20 against GMAC on that bond.

21 THE COURT: I will grant that.

22 MR. GLOWNEY: Is that going to be in this case or
23 some different case?

24 THE COURT: I am not sure.

25 MR. GLOWNEY: I'm just trying to understand, if you

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1 are saying that this case is finished, then where is
2 he pursuing this claim?

3 THE COURT: well, I thought about this to a
4 certain extent, because I know that this matter is
5 going to continue in some form. I am not quite sure
6 how. What I'm going to do is I'm going to retain
7 jurisdiction in this case for any post hearing motions
8 that relate to this replevin action.

9 And if you think that the bond relates to that, go
10 ahead and make your motion.

11 MR. HAUSMANN: Your Honor, I think just to -- for
12 interest of full explanation we do have a counterclaim
13 pending, and it has a claim for damages.

14 And I just don't -- I am not -- I'm still
15 processing your decision, I am not sure how we should
16 approach that issue through here.

17 THE COURT: The rest of the trial?

18 MR. HAUSMANN: Yes, well you just mentioned this
19 was a final decision.

20 THE COURT: On the replevin motion.

21 MR. WHEELER: So should we file a motion for -- as
22 for readiness to proceed against the bond for the
23 monetary damages on the counterclaim?

24 THE COURT: I am not quite sure I understand that
25 either.

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1 MR. WHEELER: We have a counterclaim against GMAC
2 for monetary damages. The bond was submitted by GMAC
3 so that in the event the replevin action was decided
4 against GMAC --

5 THE COURT: Oh, is it a replevin bond?

6 MR. HAUSMANN: It is a replevin bond.

7 MR. GLOWNEY: It is.

8 MR. WHEELER: It is. So in the event that that
9 decision was rendered against GMAC and the Dealer
10 could prove damages, the Dealer could pursue a claim
11 against that bond.

12 THE COURT: I'm just doing this off the top of my
13 head, I hadn't thought about this part. I would
14 expect that would be the second step of this action,
15 the proceeding against the bond.

16 MR. GLOWNEY: Wouldn't it be a trial on monetary
17 damages? I don't quite understand what proceeding

18 against the bond is --

19 THE COURT: Well, the bond is replevin bond and
20 the decision on the replevin has been made.

21 MR. HAUSMANN: Just to confuse things a little bit
22 more. The first action was an injunction. What GMAC
23 filed was a replevin bond before Judge Allendoerfer.
24 We argued that was not the right type of bond. Judge
25 Allendoerfer said it's a bond, it's sufficient. I

25

1 don't want to paraphrase what he said, but arguably he
2 said that was a bond to insure from damages that
3 flowed from the injunction, which I think might be a
4 different species of damages or species of claim, than
5 a replevin bond and the damages related to the
6 replevin.

7 THE COURT: Okay. what I contemplated was that
8 there was this replevin show cause action and then
9 once the decision was made here, then the other issue
10 would proceed to trial.

11 MR. HAUSMANN: Okay.

12 THE COURT: That's what I contemplated.

13 MR. HAUSMANN: Right.

14 THE COURT: But there might be some -- what I was
15 thinking about last night, is there may be need in
16 going from that step to the trial, there may be some
17 need for other types of motions, depending on the
18 ruling of this hearing, to facilitate a smooth

19 transition. And off on the top of my head, I couldn't
20 think of anything, but that might have been because it
21 was 3:30 in the morning and I couldn't process all
22 that well then.

23 But I think that there are probably some things
24 that probably need to be done, so I will retain
25 jurisdiction for the post hearing motions. I will not

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1 retain jurisdiction for the trial, that has to go back
2 to presiding to be assigned out for trial. And that
3 trial will be on damages.

4 MR. GLOWNEY: So the injunction is lifted?

5 THE COURT: The injunction is lifted.

6 MR. GLOWNEY: So when they sell cars what do they
7 do?

8 MR. HAUSMANN: They are still contractually bound.

9 MR. WHEELER: We will pay the floorplan amount.

10 MR. GLOWNEY: Then we have \$700,000 in
11 delinquencies.

12 MR. WHEELER: The delinquencies were caused as a
13 result of your action.

14 MR. GLOWNEY: And the 130 under the TRO, we don't
15 need to debate that here, but that's a question.

16 THE COURT: I understand that is not a neat and
17 tidy situation, okay. But I can't resolve all the
18 problems at this point.

19 MR. GLOWNEY: I just want to be clear, the

20 injunction is lifted or not.
21 THE COURT: It is lifted.
22 MR. HAUSMANN: Thank you, your Honor.
23 MR. WHEELER: Thank you, your Honor.
24 THE COURT: So I'm not quite sure what you all
25 want to do in terms of an order, but in an hour I'm

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1 going to be heading over to juvenile court.
2 Mr. Hausmann, you know where juvenile court is.
3 MR. HAUSMANN: Yes.
4 THE COURT: If you need me to sign something today,
5 I will be available over there.
6 MR. WHEELER: Yes, we do.
7 THE COURT: You just need to go over there and
8 speak with the court coordinator.
9 MR. HAUSMANN: That's down at Denny.
10 THE COURT: Have you been there lately? Just go
11 in the main front entrance, once you go through the
12 metal detector and all that, there is a little booth.
13 MR. HAUSMANN: Kiosk.
14 THE COURT: Yes, kiosk, and just ask them. I will
15 either be in courtroom one after three o'clock, or I
16 will be upstairs in staffing.
17 MR. GLOWNEY: Are you going to prepare an order or
18 do you want me to --
19 MR. HAUSMANN: We will work together.
20 MR. GLOWNEY: We need to get it entered today.

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THE COURT: Anything else?

22

MR. GLOWNEY: I don't think so.

23

THE COURT: Thank you. Court will be in recess.

24

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APPENDIX B

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF SNOHOMISH

GMAC, A DELAWARE CORPORATION,)	
)	
Plaintiff,)	Cause No. 08-2-10683-5
)	COA. 63331-7-I
vs.)	
)	
EVERETT CHEVROLET, INC., A DELAWARE CORPORATION,)	
Et al.)	
)	
Defendants.)	

VERBATIM REPORT OF PROCEEDINGS
VOLUME I

BE IT REMEMBERED that on 28th day of July, 2009,
the above-entitled and numbered cause came on for
Hearing before JUDGE ERIC Z. LUCAS, Snohomish County
Superior Court, Everett, Washington.

A P P E A R A N C E S

For the Plaintiff	JOHN E. GLOWNEY
For the Defendant	WILLIAM WHEELER and KARL BERSIN

REPORTED BY:
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THE COURT: All right. So let's go on the record.

All right. We are here in the matter of GMAC versus Everett Chevrolet.

And for the record, this is on cause number 08-2-01683-5. This is on for Everett Chevrolet's motion for attorney's fees.

And just for the record, why doesn't everybody go ahead and introduce themselves, starting with plaintiff.

MR. GLOWNEY: Thank you, your Honor. John Glowney with Stoel Rives on behalf of GMAC.

MR. WHEELER: Good afternoon. William Wheeler on behalf of Everett Chevrolet, John Reggans, and as noted in the complaint, Jane Doe Reggans. Well, that's who I'm representing.

THE COURT: Well, see, I was looking at her face when you said that.

MR. WHEELER: That's what the complaint says.

Your Honor, I'm accompanied today by Richard Bersin, he is co-counsel.

MR. BERSIN: Good afternoon.

MR. WHEELER: Who is presently serving as local counsel.

1 As you know, I have been appearing pro hac vice.
2 And for the record, Mr. Reggans is present and Mrs.
3 Reggans is present.

4 And also for the record, Mr. Vick is present.

5 THE COURT: All right. So this is your motion.

6 MR. WHEELER: Yes.

7 Your Honor, the motion is replete with case law
8 that says it is discretionary on the part of the Court
9 to grant attorney's fees for a defendant who
10 successfully defeats a -- an injunctive matter, an
11 injunction, and that is exactly what we did.

12 On December 30th of 2008, GMAC filed a replevin
13 complaint, asserting various claims that the
14 dealership had breached the floor plan agreement, the
15 wholesale floor plan agreement, and it also contained
16 the demand for an injunction barring sales from the
17 dealership.

18 That injunction, that ex parte injunctive order was
19 granted on December 31st of '08.

20 After a hearing on January 14th, Judge Allendoerfer
21 conducted a -- I wouldn't say extensive hearing, but a
22 hearing into prima facie, I guess, determinations on
23 whether the injunction should be granted.

24 He modified that injunction. The initial order
25 barred the dealership from operating, to any extent.

1 They couldn't sell any cars, any parts, couldn't sell
2 any new cars, used cars, service, could not operate.

3 After that two week time period Judge Allendoerfer
4 modified that injunction, and that modified
5 injunction, of course, is an exhibit in my motion.

6 As you well know, from March 17th of '08 until
7 April 10th, we had a hearing which, of 2009, a hearing
8 that was in effect tantamount to a trial, on the
9 merits of whether a replevin order should be granted
10 and whether that injunction should continue.

11 At the conclusion of that replevin hearing, it was
12 determined that GMAC had breached their wholesale
13 floor plan agreement, and that the injunction that --
14 the modified injunctive order and the initial ex parte
15 injunctive order was dissolved, and the motion to
16 modify -- a motion to amend the complaint was denied.

17 Now, in regards to the attorney's fees, you have
18 before you an affidavit from my client indicating that
19 he contacted a number of attorneys in the State of
20 Washington, and outside of the State of Washington, in
21 an attempt to find an attorney who he felt was
22 competent to handle the practical factual issues
23 involved in this case, and the complicated legal
24 issues that are involved in this case.

25 As a matter of fact, on many occasions I recall

1 your Honor making the statement to opposing counsel,
2 not present opposing counsel, but previous opposing
3 counsel, indicating -- and present opposing counsel,
4 that this is a complicated case, that this is a
5 complex case.

6 So therefore, we expedited discovery, and I'm going
7 through the various standards for the judge coming to
8 a determination as to whether or not the Load Star
9 method of an adjustment upward should be applied.

10 We expedited discovery. There were complicated
11 issues with that, as well as we had discovery during
12 the course of this hearing, as the Court may recall.

13 We dealt with the issue involving the right to a
14 substantial amount, meaning the inventory, the
15 inventory -- it was valued at 6.5 million dollars, or
16 thereabouts. It varied from time to time. But it
17 varied to 6.2 million to 6.5 million.

18 One of the Load Star methods is a determination as
19 to how much money is at stake.

20 I had a fee agreement with the client, of course.
21 That fee agreement provided for compensation to be
22 paid to me in the amount of \$225 per hour for in court
23 time and \$175 per hour out of court time.

24 I have a affidavit from my local counsel indicating
25 that he's been in practice for a substantial number of

1 years, and in regards to those amounts, he's come to
2 the determination that those are fair and reasonable
3 amounts to be charged.

4 And I submit to your Honor that the time that was
5 expended was accurate, that the time that was expended
6 was reasonable.

7 My client had to retain local counsel. He retained
8 local counsel in the form of Carl Haussman as you
9 recall, and Carl Haussman sat with me while we tried
10 this case for almost a month. And he engaged in other
11 activities relating to this case, performed various
12 duties underneath my supervision. I served as lead
13 counsel and he submitted various work to me for
14 review.

15 His bill totaled 70 -- I don't have the exact
16 figure in front of me, but I can dig it out. I think
17 it's \$76,000 --

18 THE COURT: \$76,512.58.

19 MR. WHEELER: So I was \$512.50 off.

20 My fee -- and mind you the time period for the fees
21 involved, meaning Carl Haussman and myself, followed
22 the case law.

23 The case law says that you can only recover
24 attorney's fees from the time that that injunction,
25 injunctive matter is filed until the time that the

1 injunctive matter is dissolved.

2 And so we are just requesting attorney's fees from
3 December 31st, when that TRO was entered ex parte.
4 TRO was entered until April 10th of '07, I mean, of
5 '09, excuse me .

6 THE COURT: You keep jumping around.

7 MR. WHEELER: April 10th of '09.

8 THE COURT: All right.

9 MR. WHEELER: My fee, I don't have the specific
10 number at the top of my tongue, but I believe it's 92
11 thousand some odd dollars.

12 THE COURT: \$92,620. It's on page 5 of your
13 brief.

14 MR. WHEELER: Thank you.

15 If you apply the Load Star method, which permits an
16 upward adjustment, up to 1.5 percent of what the bill
17 is, that fifty percent increase is 80 something
18 thousanddollars. I have the figure on my proposed
19 order.

20 And so the entire amount that we are asking for,
21 respectfully asking for is \$253,739.29.

22 Now, what I did not include in this -- in these
23 calculations, these calculations are very modest
24 calculations. There was air flight, there was hotel
25 bills, there was food bills, there was transportation,

1 taxi, et cetera. There was a substantial amount of
2 additional bills.

3 But I did not include that, because I saw in the
4 case law -- I -- put it this way, I did not see in the
5 case law where those kinds of costs could be
6 submitted. So the figures that have been submitted to
7 your Honor are very modest figures.

8 Now, in regards to the injunction, the case law
9 says that an injunction is categorized as a wrongful
10 injunction if it can be proven that if the Court knew
11 the true facts and all of the facts of the case, at
12 the time these injunctions were issued, they wouldn't
13 have been issued.

14 And the true facts should have been disclosed by
15 GMAC from the beginning, meaning that one of the basis
16 for GMAC pursuing this injunction was a claim that
17 \$206,000 on December 18th was just wrongfully not
18 paid.

19 Well the Court heard testimony from March 17th of
20 '09 until April the 10th of '09, where that -- this
21 December 18th was a snow day, that Mr. Hobbs, I
22 believe his name, a representative from GMAC, came to
23 the dealership, made a demand of \$206,000, with no
24 documentation to support what this \$206,000 was for.

25 Mr. Hobbs even admitted he thought that that was a

1 wrongful demand. The banks were closed due to a snow
2 day. The dealership couldn't have paid it even if
3 they wanted to, the banks were closed.

4 There was testimony that Mr. Modrzejwski used a car
5 that was not out of trust, and took those -- the
6 cumulative funds that that car represented to try to
7 make it appear as though the dealership was out of
8 trust. And this is the kind of hi jinks that
9 occurred. We are talking about the time period of
10 December 7th, December 8th, of 2008.

11 Before this injunction was filed, I recall
12 testimony and evidence that the dealership in November
13 had the unencumbered cars, that they could have placed
14 on floor plan to pay any outstanding indebtedness, and
15 yet GMAC refused to permit the cash, because those
16 cars represented cash, to be placed on floor plan and
17 to payoff any indebtedness.

18 However, December 8th, December 9th, 2008, GMAC did
19 what they refused to do just a few weeks ago in
20 November, they took the cars that represented
21 unencumbered cash and put them on floor plan and paid
22 the indebtedness. This was termed by your Honor as
23 manufacturing an out of trust situation.

24 Looking at my memorandum of law, your Honor, I do
25 not want to belabor the point, I know that you have a

1 lot of things on your mind, but I just want to read a
2 couple passages --

3 THE COURT: You should have been here this
4 morning.

5 MR. WHEELER: -- from my memorandum of law, which
6 contained your findings.

7 Number 9, on page 3, it says, "In the instant case,
8 GMAC did not conduct itself honestly. There was a
9 hidden agenda throughout the time from when Mr. Vick
10 took control until the catastrophic demands of
11 December.

12 The goal of the team from GMAC in this case was to
13 shut down the dealership, the mechanism was to set a
14 false target that could not be achieved and by so
15 doing manufacture a default."

16 Your Honor, I won't read it to you, I will just
17 direct your attention to the next page, number 10, 11,
18 and 14, which are the most glaring, bottom line is
19 that GMAC was found to have breached their obligations
20 of good faith and fair dealing, and therefore their
21 motion for replevin was denied, and the injunctive
22 remedy that they were requesting was denied, and the
23 injunction that was in place was denied.

24 And if GMAC had been honest and had come to the
25 commission of who first heard this case back in

1 December 31st, of 2008 and said, look, we held a
2 dealer out of trust, but this car that put him out of
3 trust, it really wasn't out of trust.

4 If we had told the true facts of this case, that we
5 manufactured an out of trust, that we manipulated this
6 dealer into a weak financial position, that we used
7 bad faith, would the Commissioner have granted an
8 injunction? Would Judge Allendoerfer have modified
9 and kept that injunction in place?

10 I submit to you, your Honor, that he would not
11 have.

12 And had all of these other find -- that would
13 probably have taken no more than 15 minutes to
14 articulate to either one of those judges, if they had
15 been disclosed by GMAC, this dealership would not have
16 been damaged. The reason why we have bonds on
17 injunctions is to protect the injured, the potentially
18 injured party, and so that the plaintiff doesn't rush
19 and obtain an injunction wrongfully.

20 Now, I read Mr. Glowney's brief and he seems to
21 quibble with whether or not the bond that was filed is
22 an affective injunctive bond.

23 Well, all I can say is that was the directive for
24 him to get, for his client to get an affective
25 injunctive bond.

1 I look at the injunctive order that was issued
2 December 31st of '08, which is an exhibit in my
3 package.

4 And on the third page --

5 THE COURT: Just -- I don't mean to interrupt, but
6 which pack is it in? The first one?

7 MR. WHEELER: It should be in the first one, the
8 thickest one. And it should be exhibit A. Are there
9 tabs to it?

10 THE COURT: Okay, I got it.

11 MR. WHEELER: Okay. And on the third page, at
12 least the order was, the directive from the Court,
13 number 4, this order is conditioned upon GMAC first
14 posting, giving is crossed out, posting is written in
15 -- posting of bond of 2 million dollars. All right.
16 That was the first order.

17 Let's look at the second order, exhibit C, the
18 second page.

19 The directive from the Court was furthermore GMAC
20 has already posted a bond with the court in the amount
21 of 2 million dollars.

22 Now, if that was not true, why was it signed by
23 counsel for the plaintiff?

24 Additionally, paragraph 5, the next page 3, it
25 says, "GMAC shall post the bond..."

1 Let me -- let me, I guess, explain exhibit number
2 5.

3 After we went before Judge Allendoerfer, or as we
4 were going to Judge Allendoerfer and arguing this case
5 on January 14th of '09, Judge Allendoerfer said, well,
6 he thought the 2 million dollars might be too much of
7 a bond for GMAC to post, so he reduced it.

8 So paragraph 5 is reflective of the reduction, it
9 says, "GMAC shall post a bond with the court in the
10 amount of \$857,000."

11 Now, it's not just for fun, it says, "specifically
12 for the payment of costs and damages, which may be
13 incurred by any party found to be wrongfully
14 restrained by this order."

15 Any party wrongfully restrained by this order would
16 be Mr. Reggans, the party, Mrs. Reggans, and the
17 dealership.

18 And lastly, your order of April 10th of '09, which
19 is exhibit D, and in essence it says bond shall remain
20 in place in the amount of 2 million dollars.

21 Now I submitted to your Honor my affidavit in the
22 first packet fully listing my background and
23 experience. My client couldn't find an attorney with
24 comparable experience, so ultimately he retained me.

25 Very briefly, I worked for the Attorney General's

1 Office in Pennsylvania with the State Board of Vehicle
2 Manufacturers and Salesman, dealt with issues of
3 franchise termination and franchise relocation back in
4 1975. Also served as a hearing examiner for them, was
5 a hearing examiner for the first case that tested the
6 statute in Pennsylvania dealing with franchise
7 relocation. It was entitled Doug Cooper Ford, went up
8 to the Supreme Court -- Doug Cooper Ford versus Ford
9 Motor Company, went up to the Supreme Court of
10 Pennsylvania, and was upheld.

11 I have been in the private practice of law
12 representing dealers ever since January of 1980.
13 Also had my own dealership and went through Chrysler
14 dealership training program and those credentials
15 aided me in understanding the documents GMAC had in
16 their position and possession, and that the dealership
17 had in their possession.

18 And ultimately we prevailed. Contrary to what Mr.
19 Glowney's brief would seem to indicate, the
20 defendant's prevailed in this case.

21 Yes, he filed a motion for discretionary review,
22 which is still pending. What a Commissioner said in
23 the Court of Appeals -- I don't show any disrespect to
24 his findings in his order but he only had a very small
25 modicum of what this case is all about sitting before

1 him when he came to his ruling.

2 So if the Court of Appeals wanted a Commissioner to
3 reverse a superior court judge of Snohomish County it
4 would have been in the statute, but it's not. And
5 that authority is not cited by Mr. Glowney. The
6 defendants prevailed and they still prevail until
7 otherwise.

8 Now, Mr. Glowney's brief indicates that this
9 hearing that we had from March 17th of '09 until April
10 the 10th of '09 was not a trial, was not definitive,
11 and carries very little weight.

12 I submit to your Honor respectfully, that there was
13 a reason for a three and a half week trial on this
14 case. And that reason was upheld in your order of
15 April 10th of '09, exhibit D. That was the reason for
16 that hearing. There wasn't just the intellectual
17 exercise.

18 And as it relates to the bond, if you refer to
19 page, I think it is 30, of Judge Allendoerfer's
20 hearing of January 14th of '09, Dehkoda-Steele, who
21 was representing GMAC at the time, made the comment to
22 the Court, the statement to the Court, the
23 representation to the Court, that on the issue of the
24 bond, your Honor, we would be more than happy to
25 change the title of the bond to whatever the Court

1 believes to be reasonable and sufficient to cover the
2 situation.

3 So just because the bond has -- is denoted as a
4 replevin bond, that's a red herring.

5 GMAC made the representation to the Court that if
6 the Court felt that the denotation was inappropriate,
7 they would change it to any -- anything that the Court
8 wanted, as long as it was an injunctive bond.

9 And there was colloquy back and forth with the
10 Court on, I believe it was page 15, regarding this
11 bond. And interestingly enough, the colloquy was
12 between me and the Court.

13 And on page 15 and 16 I'm discussing the replevin
14 bond. And I make the statement on page 15, line 14,
15 questioning whether this was an injunctive bond. And
16 on page 16 the Court, on line 10, in reference to the
17 title of the bond, said that's just semantics, where
18 you have at the top of the page, where it says
19 replevin or injunctive bond, that's just semantics.
20 This is a bond to cover damage to the injured parties.

21 Now, the case law says that part of the damage is
22 attorney's fees that the defendant is eligible to
23 recover.

24 And your Honor, I respectfully submit that our
25 request to you is justified, is meritorious. We did

1 prevail. There was hardship associated with
2 prevailing. All the Load Star standards were met.

3 This wrongful injunction could have been avoided if
4 GMAC had just been honest with the Commissioner and
5 honest with Judge Allendoerfer.

6 And so therefore I humbly request an order in the
7 amount of two hundred and fifty-three and some odd
8 thousand dollars.

9 Thank you, your Honor.

10 THE COURT: Mr. Glowney?

11 MR. GLOWNEY: Before I start the argument, I just
12 want to lay in an objection to the timeliness of the
13 briefing.

14 I received a response brief, or my secretary
15 received one by e-mail about 8:00 o'clock last night.
16 I don't really object to that, I saw it this morning,
17 it was five pages, I looked at it and I was prepared
18 to deal it. But yet I walked in here and received yet
19 another brief this morning.

20 THE COURT: Which one was the one --

21 MR. GLOWNEY: Reply in support of defendant's
22 motion for attorney's fees.

23 THE COURT: Is that the one from co-counsel?

24 MR. GLOWNEY: Mr. Bersin, yes. Yes, it's awfully
25 late, it's five pages, I dealt with it at the time. I

1 understand busy schedules, so I don't seriously object
2 to that one.

3 I do have a problem though getting a second brief
4 handed to me ten minutes before this hearing starts,
5 which is what I received here from Mr. Wheeler.

6 So with that, I just want to make that objection on
7 the record.

8 THE COURT: All right. So noted.

9 MR. GLOWNEY: There are two primary reasons why
10 this motion should be denied at this time.

11 First, it is premature. The state of the record in
12 this case is that we have sought discretionary review,
13 which is a very difficult standard to reach. The
14 court Commissioner has granted that. And in so doing
15 has said it believes that this Court's ruling were
16 probable error.

17 In addition, the Court instituted an injunction,
18 which requires Everett Chevrolet to deposit all the
19 proceeds of all sales into the court registry.

20 Now, the case law that I submitted says, if the
21 injunction is found wrongful after a full hearing.
22 Well, now you have a question of what the settled law
23 is on the very issues that their motion goes to.

24 In other words, this Court believes that there was
25 bad faith. Court Commissioner says, no, I think

1 that's probable error. That's not correct.

2 So what is the law? Well, we don't know. We
3 will find out when there is a ruling on discretionary
4 review.

5 But it seems to me to be premature to say that you
6 can have a full hearing when in fact the state of the
7 law is in such flux, as it particularly applies to
8 this case.

9 THE COURT: What do you mean by the state of the
10 law and being in flux?

11 MR. GLOWNEY: Well, if the Court upholds our
12 discretionary review, there would be no basis for this
13 Court's ruling and replevin should have been granted,
14 the injunction should not be dissolved, and we would
15 prevail. They would be entitled under no theory, if
16 the Court upholds this Court's theory after review,
17 then there is a different potential outcome.

18 We are not operating in a vacuum here, we know that
19 the Court of Appeals has granted discretionary review
20 and disagrees with this Court's theory of the law.

21 So I don't think you can have a full hearing when
22 the very question of what law applies, and how it
23 applies is in that kind of substantial question.

24 This is not like a -- this is not like a motion --
25 I'm sorry. This is not like an appeal after the end

1 of the case. When you appeal at the end of the case,
2 you appeal as of right. And you have no idea whether
3 the Court of Appeals has any view as to whether you
4 are correct as the appealing party, whether they think
5 you are right or whether they think you are wrong.

6 But when you seek discretionary review you indeed
7 have some notion that the Court has looked, at least
8 prima facie, has taken an initial look at what you've
9 said, and they agree, in part, at least enough to say,
10 we are not sure the trial court did this correctly.

11 THE COURT: Okay. One thing I found disturbing
12 about that conclusion was that the Commissioner
13 totally ignored a major factor in the record and that
14 was the Motors Holding contract for 2.5 million
15 dollars. And I just want to put that on the record.

16 And I am not quite sure how you can overlook that
17 fact, which I found is a fact in this case. I am not
18 sure how you can ignore that and proceed.

19 But go ahead.

20 MR. GLOWNEY: My only point is not to be
21 disrespectful to this Court.

22 THE COURT: No, I have to make that observation,
23 since I have the opportunity at this point.

24 MR. GLOWNEY: Sure. But my point is that the
25 point of this rule is, look if you have an injunction

1 and it's proven ultimately to be wrongful, then you
2 may have a right to claim some attorney's fees, but
3 you really, in this case, haven't gotten to that
4 point. Because the State of the law as to this
5 Court's ruling is questioned. And it's questioned in
6 a way that the Court really can't ignore.

7 THE COURT: So are you saying -- I am not sure --
8 I read this, and I have been pondering it for a while.
9 Are you saying that this is -- is this the finality
10 argument, is that what you are saying?

11 MR. GLOWNEY: No. I'm simply saying that, for
12 example, in the All Star case that we submitted, I put
13 a footnote in my brief, in which there was a summary
14 judgment, an award of attorney's fees, it went up to
15 the Court of Appeals, and it was reversed. And the
16 Court of Appeals said, well, okay, we have to reverse
17 attorney's fees, because it's a little premature now,
18 you need to go to trial and get a final resolution.

19 In the same way, it's premature to make any
20 decision here, because we know that the Court of
21 Appeals thinks that this Court's basis for its ruling
22 is probable error. Now that may or may not prove out,
23 we will go argue the case and they may agree with me
24 or they may agree with you.

25 But sitting right here today, this Court doesn't

1 know its rulings are going to be correct, because it
2 already knows that the Commissioner has granted
3 discretionary review. Discretionary review is hard to
4 get, your Honor. They don't grant it very often. So
5 to get there you really have to meet a fairly steep
6 standard on both the legal side and on the affects
7 side.

8 And since we've met that I submit to the Court it
9 simply isn't right for determining because the very
10 basis upon which they are asking you to rule is
11 questionable. It's not settled.

12 And so, you really don't have a full hearing on
13 something, if you don't know what the law is. And we
14 sit here today and we know that there is a question as
15 to whether your theory of bad faith works, or my
16 theory, I guess, to put it that way, but GMAC's
17 theory. And we already know that Court of Appeals has
18 some questions about your theory and we will go argue
19 those off.

20 But you don't know, as a judge sitting here, I
21 don't know whether or not that law applies. If you
22 don't know what that law is, you really can't reach a
23 conclusion whether the injunction was rightful or
24 wrongful, because it turns in a large part on their
25 theory on whether you are correct or I'm correct.

1 So knowing that there is no basis for the Court to
2 sort of say, well, here is the law, it's clear that
3 the injunction is correct, because we now know that
4 the Court of Appeals disagrees.

5 So that makes it premature. You can't have a full
6 hearing when you don't know what the settled law is,
7 and we know sitting here that the law is unsettled
8 now, just because of the posture of the case as we
9 stand here today.

10 Now, in terms of the injunctive relief, the TRO was
11 to prevent conversion by Everett Chevrolet and Mr.
12 Reggans. After GMAC made demand, they were owed some
13 six million dollars, and Everett Chevrolet and Mr.
14 Reggans sold off about 33 cars and didn't pay any
15 proceeds.

16 That was upheld by Judge Allendoerfer. It was
17 modified to say, well, you can sell some cars but you
18 need to pay those proceeds, under the formula he set
19 up, to GMAC.

20 This Court dissolved it. We then go to the Court
21 of Appeals and they come back and say, well, no, we
22 are not going to let you convert those proceeds, we
23 are going to tell you to put them into the registry of
24 the court and wait for further hearing.

25 So on that record --

1 THE COURT: Well, I understand that point, Mr.
2 Glowney, but I think, aren't you distorting it just a
3 little bit, because they gave me the power to
4 distribute that money, so I can just give it right
5 back, if I wanted to. So it's said by good cause, if
6 I find good cause I can --

7 MR. GLOWNEY: If you find good cause. My view is
8 that again, it's a little unsettled and a little
9 premature to say that the Court of Appeals thinks that
10 the injunction should have just been fully dissolved
11 and left there. That's not what they said. They
12 said, no, no, put the money in the registry, and now
13 another motion can be brought for good cause, and if
14 that happens, we will address it.

15 THE COURT: Well, they also could have just
16 reinstated the injunction that I dissolved one hundred
17 percent, correct?

18 MR. GLOWNEY: They could have and they didn't. I
19 don't disagree with that, your Honor. My only point
20 is we have three courts, we have the TRO Commissioner,
21 we have Judge Allendoerfer and we have the Court of
22 Appeals, all who have felt some kind of injunctive
23 relief was appropriate here.

24 Now, that ties in a little bit to the other point,
25 which is that, what the rule says is that you get your

1 attorney's fees if the whole point of the full hearing
2 was solely on the injunctive relief, when the trial
3 on the merits has for its sole purpose the
4 determination of whether or not the injunction should
5 be dissolved.

6 Well, clearly that was not the purpose of the
7 hearing on the replevin. The point of the replevin
8 motion is not a full trial, and its purpose was to
9 determine whether or not replevin should be granted.

10 Their defense -- I don't recall, and the Court can
11 correct me, there was no motion by them to dissolve
12 the injunction. The motion pending before you was our
13 motion under a statute which has a limited relief.
14 You either grant us immediate possession or you deny
15 it. That's what was before the Court.

16 But the sole purpose of this lawsuit was to get
17 replevin. I mean, that wasn't the sole purpose. But
18 it was not the sole purpose of this lawsuit to get the
19 injunction. The injunction was ancillary to the
20 replevin. It was to prevent Everett Chevrolet and Mr.
21 Reggans from converting proceeds.

22 THE COURT: Well, I have a question about that
23 too.

24 And the first question is, let's say there was
25 something between these parties, which was solely an

1 injunction action. What would it look like?

2 MR. GLOWNEY: What would a --

3 THE COURT: Yes. You are arguing, well, this was
4 defective, because the sole purpose wasn't to dissolve
5 the injunction. Well, let's say there was something
6 like that, what would it look like in this context?

7 MR. GLOWNEY: I don't know. I don't think I'm
8 arguing that it's defective, your Honor. I'm simply
9 arguing that the standard is different. The rule is
10 that it has to be the sole purpose.

11 THE COURT: Well, okay. However, the relief that
12 GMAC asked for from the beginning was not just
13 replevin, it was replevin and injunction, so aren't
14 these irrevocably intertwined?

15 MR. GLOWNEY: Well, they were both in the case,
16 your Honor, but they both have different purposes.

17 THE COURT: You didn't answer my question.
18 Aren't they irrevocably intertwined?

19 MR. GLOWNEY: I guess I have to understand what you
20 mean by irrevocably. I would say no, not irrevocably.

21 THE COURT: You will have to show me how you can
22 unwind it all.

23 MR. GLOWNEY: Well, you could simply say -- I will
24 hypothesize. If we had just sought replevin, then
25 they would have sold off cars, we wouldn't have tried

1 to stop them, and we would have replevin whatever cars
2 are left when we are finished.

3 If we sought just injunctive relief, we would have
4 stopped them, we wouldn't have sought any replevin.
5 We would have simply said, you keep on selling cars
6 forever, we won't ever try to collect them, we won't
7 ask you to give them to us, and we will just require
8 you to pay our share of the proceeds under some profit
9 formula as Judge Allendoerfer did. So there is no
10 necessary requirement that they be together.

11 THE COURT: That's not the question, but given the
12 way it proceeded isn't it irrevocably intertwined,
13 because you could have separated them, that's what you
14 just said.

15 MR. GLOWNEY: We got a TRO and then we got
16 preliminary injunction, we then sought replevin. They
17 didn't move -- and if you look through one of the
18 cases I cited, there was a case that says actually you
19 got to move to either dissolve the injunction or you
20 have to battle on the merits of the injunction. They
21 didn't do that. They battled on the merits of the
22 replevin. Replevin asked to give me the collateral,
23 give me the cars.

24 The injunction said, well, you can go sell the
25 cars, but you give us the proceeds and stop converting

1 the proceeds.

2 So there are different forms of relief, and yes,
3 they were side by side in this case. I don't know
4 irrevocably or entwined, I would disagree respectfully
5 with the Court irrevocably intertwined, but they were
6 both in the case. But under that, even if they are
7 both in the case, then that simply goes to this rule
8 and the cases I cited which says you get all your fees
9 only if the sole purpose of the hearing is to dissolve
10 the injunction. And we know right now that's not
11 true. That was a replevin hearing.

12 THE COURT: Well, okay. I hear what you are
13 saying. But they can't ever make that choice. They
14 can't split it apart after you as plaintiff joined it
15 together. After you entwined them, they can't untwine
16 them for purposes of litigation.

17 MR. GLOWNEY: Oh, no, I would disagree. In fact --

18 THE COURT: Okay. Tell me how.

19 MR. GLOWNEY: Because -- and they did so, in fact.
20 Because when we got to the end of that replevin
21 hearing and this Court ruled, what did they tell you?
22 We still have to pay to GMAC the floor plan amount.

23 So could they untwine them? Absolutely. Pay us
24 the floor plan amount as you agreed. Even at the very
25 end of that extended hearing, they still took the

1 position in this Court that they had an obligation to
2 pay the floor plan amount.

3 So you don't want an injunction, then don't take
4 the proceeds and keep them, do what you tell this
5 Court, do what you stated on the record by your
6 lawyers. Do it. Pay the money over.

7 So I think they could have untwined them, but they
8 didn't.

9 THE COURT: All right. Go ahead.

10 MR. GLOWNEY: So the rule stated, in the cases I've
11 cited, is that it's only if the sole purpose do you
12 get all the fees then. If it's not the sole purpose,
13 you only get those fees related to dissolving the
14 injunction. But if you have to litigate other issues,
15 you don't get your fees for having to litigate those
16 other issues.

17 But what we litigated here was their claims to stop
18 replevin by arguments of bad faith and breach of
19 contract. And they've now claimed because of those
20 breaches of contract, they have now suffered millions
21 of dollars of damages.

22 But if they have to, if they have to -- since they
23 had to respond to those claims, those are not fees
24 associated with making all those claims that solely
25 relate to injunctive relief.

1 In fact I argue they have almost zero fees that
2 relate to injunctive relief. They had to do all that
3 work to respond to the replevin. If we hadn't an
4 injunction, they would have made the exact same
5 claims, raised the same defenses, raised the same
6 breach of contract, because they had to to respond to
7 the replevin action. So therefore under the rule I've
8 stated --

9 THE COURT: Isn't there some -- you know, with all
10 due respect, counsel, isn't there some
11 disingenuousness to that argument. If there is no
12 injunction, then there is no crisis.

13 The whole reason this came down the way it did from
14 the litigation standpoint is because of the
15 injunction, not because of the replevin action.

16 The whole reason that discovery had to be expedited
17 and all this stuff was compressed into a month, and we
18 basically all ran around like chickens with our heads
19 cut off for a while, that was because of the
20 injunction, that was not because of the replevin.

21 MR. GLOWNEY: I would submit that--

22 THE COURT: That's a question.

23 MR. GLOWNEY: Yes, I thought it was, your Honor.

24 I would submit that the only motion before you was
25 a motion for replevin. If it was so -- if it's true,

1 if it was such a problem, then where was the motion to
2 dissolve the injunction? You never had one. You
3 never received a motion to dissolve the injunction.
4 I never saw one.

5 So I would say they thought fighting the whole
6 battle out on the replevin, keeping the cars -- Mr.
7 Reggans wanted to stay in business, so he wanted to
8 keep the cars, so did he. But to him that seemed to
9 be the crucial thing because he spent a lot of time on
10 it and his attorneys never filed a motion to dissolve
11 the injunction.

12 So I would argue that the case law is fairly clear
13 on this. It's a special right to get fees for
14 wrongfully dissolved injunction. It's not like a
15 right, you have to sort of meet these standards.
16 Courts just don't -- it's not a broad standard, it's a
17 fairly narrow one. In fact, that's what the cases
18 say. The Court's then, if you are not just getting a
19 sole injunction, the Court's interpret this very
20 narrowly, and I think that's a cite from the Parson's
21 Supply case, which I cited in my brief.

22 But it said, "However, when a preliminary
23 injunction is not determined to be wrongful until
24 after a trial on the merits..."

25 In other words, this was upheld on a preliminary

1 injunction. "... our courts apply the general rule
2 very narrowly. Attorney's fees for the trial are
3 recoverable as damages only if injunctive relief is
4 the sole purpose of that suit."

5 It clearly wasn't. They wanted to defeat
6 replevin. They wanted to apparently to try and
7 establish some damages, although that was not before
8 the Court, as we determined at the beginning of the
9 hearing. But they were trying to keep all those cars,
10 because Mr. Reggans wanted to stay in business.

11 And they had, in their hands, a way to resolve the
12 injunction by simply paying us, instead of converting
13 the proceeds. And in fact, they came at the very end
14 of that hearing, as I said, and said, yeah, we still
15 have to pay this.

16 So that means to me the replevin hearing was based
17 upon the replevin.

18 So for those two reasons, this is premature. You
19 don't have a settled law, and this was not a hearing
20 on the merits, therefore, settled law before the
21 court. And on the law that requires a segregation of
22 the fees, when you don't have the -- when dissolving
23 the injunction is not the sole purpose of the hearing,
24 they have not segregated their fees. In fact, almost
25 all of those fees were necessary to respond to the

1 replevin hearing.

2 They have failed to segregate fees. I cited in the
3 footnote all the existing Washington case law about
4 requirement to segregate fees. They have made no
5 attempt to do that.

6 There's really no basis -- I didn't address this in
7 my brief, but there is no basis for a Load Star claim
8 here. There were two attorneys on the other side. So
9 to establish some claim for a Load Star --
10 particularly, again, under the state of the record
11 here, Court Commissioner, Court of Appeals disagrees
12 with this Court. So we don't know what the law is
13 going to be. So it's awfully premature to come up
14 with a ruling as if they had prevailed when we already
15 know that.

16 THE COURT: Well, let me ask you this question,
17 there is no showing for the need for Load Star, so are
18 you basically telling me that any general practitioner
19 could take this case and try this case against GMAC,
20 is that what you are telling me?

21 MR. GLOWNEY: I don't think that's the standard for
22 Load Star, your Honor, but no, that's not what I'm
23 telling you.

24 THE COURT: What are you telling me?

25 MR. GLOWNEY: I'm telling you when you have two

1 attorneys on the other side, both very capable --

2 THE COURT: I think he's talking about the
3 difficulty of the case, so that's the general
4 question. Do you think that any general practitioner
5 could take Mr. Reggans as a client and go ahead and
6 litigate this case against GMAC?

7 MR. GLOWNEY: Well, you put me in a difficult
8 position.

9 THE COURT: Well, that's the whole point of the
10 question.

11 MR. GLOWNEY: Well, my point is that they
12 disregarded controlling Washington authority. They
13 didn't cite -- didn't deal with the
14 Allied Sheet Metal case. I don't think they've dealt
15 with the -- it's popping out of my head I said it so
16 many times, the case is on good faith, it will come
17 back to me in a second, your Honor, but the two major
18 Washington cases that deal with the issues that were
19 in this case.

20 So do I think any general practitioner could, I
21 think a general practitioner would have dealt with
22 those cases and they would have addressed them here
23 and they did not.

24 So I am not so sure that they couldn't have done
25 better than that. But

1 Allied Sheet Metal was never addressed and neither was
2 -- and the nature of demand instrument, they never
3 addressed the nature of demand instrument, but yet the
4 UCC law in that is pretty clear on how that operates.
5 So from that point of view, no.

6 But that's not really a Load Star basis to do this.
7 They charge their fees, and when you have two
8 attorneys on the other side, and to then add a Load
9 Star to it, I don't see any basis for that.

10 Now, the last point, let's be clear about the issue
11 over the bond. I don't quite know why there is a
12 replevin bond, I don't get that. I came into this
13 case late, as this Court knows. And I think there
14 should have been an injunction bond and it should have
15 been lowered to the amount that Judge Allendoerfer
16 said on the 14th. That didn't seem to happen. And I
17 do know, as I talked to Mr. Haussman, that there is
18 some discussion that he relayed to me that he had with
19 counsel about not moving it or leaving it at two
20 million, and I am not going to relate -- I don't
21 recall it fully, your Honor. I just remember talking
22 to him about that issue. So I am not going to relate
23 it fully here, because I frankly can't, I can't recall
24 the exact content of the discussion with Mr. Haussman.

25 The problem however is not GMAC's liability. I am

1 not here arguing that GMAC wouldn't be liable for fees
2 if this Court awarded them and ultimately it was
3 upheld. That's not my argument.

4 The problem is is that the bonding company is a
5 party. If you are a bonding company and you authorize
6 a bond for the risk represented by replevin, that's
7 one thing. Replevin things go wrong, okay.

8 If you authorize a bond for injunction, those are
9 different types of risks. And so it doesn't make any
10 difference to GMAC, we are liable in the end. If we
11 are, we stand there. I am not arguing with that.
12 But if you are going to start authorizing some claim
13 against the bond, your problem is that the party who
14 is then at issue, the bonding company, is not before
15 the Court, hasn't been heard and it has put out a
16 replevin bond.

17 Now, I don't think the Court can award injunctive
18 damages, however the Court views all this, against a
19 replevin bond. It's not just semantics to the
20 bonding company. To the bonding company those
21 represents different types of risks that they have
22 assessed and bonded. So this is an injunction issue.
23 I think there should have been an injunction, I agree,
24 I don't disagree with that. But there wasn't, there
25 is not one.

1 THE COURT: Okay. One of the interesting
2 questions that seems to be popping up at this point is
3 if this case isn't properly bonded, does GMAC have any
4 right to any of the remedies that it's seeking?

5 MR. GLOWNEY: At this point -- oh, certainly, we
6 can seek our remedies. But somebody needs to -- given
7 where it is now, if we were pursuing -- had the Court
8 granted replevin, then we would have needed a replevin
9 bond. And right now there is no injunction from this
10 trial court, there is one from the Court of Appeals,
11 but the Court of Appeals didn't order any bond to be
12 placed. So yes, we can pursue our relief at this
13 point.

14 All I'm saying is when you are looking backwards, I
15 don't understand how they -- I personally don't
16 understand how the parties got to where they did. It
17 doesn't make sense to me. It should have been simply
18 an injunction bond, to my mind, it wasn't.

19 So my only point is that if you are ordering,
20 saying to GMAC, hey, I'm ordering you to pay fees,
21 that's fine. I mean I disagree but I wouldn't have an
22 issue with that. But if you go say, the bonding
23 company has to. Well, they are not in front of you
24 and they don't have an injunction bond posted, they
25 have a replevin bond posted.

1 So the parties may have said, oh, we will agree,
2 geez, we agree that's okay. But you needed to have
3 the bonding company part of that conversation, because
4 the bonding company may have a different point of
5 view. Maybe they don't, I don't know, maybe they do.
6 My only point is they are not in front of this Court
7 and we don't know what their view is. And so when
8 that conversation took place in front of Judge
9 Allendoerfer nobody went to the bonding company and
10 said, pull the replevin bond, let's issue an
11 injunction bond and that didn't happen, and that's the
12 problem that I see.

13 So it's not GMAC liability issue, you don't have
14 the bonding company here who you are trying to make
15 rulings against, and they are entitled to due process
16 and have a chance to be heard on this issue at least,
17 before the Court rules.

18 THE COURT: Okay. Are you done?

19 MR. GLOWNEY: Thank you, your Honor, for your
20 attention.

21 THE COURT: Counsel?

22 MR. WHEELER: Your Honor --

23 THE COURT: Hang on just a second.

24 Rebuttal. Can you keep it down to about ten
25 minutes?

1 MR. WHEELER: I will, and I just want to reserve
2 two minutes for my local counsel.

3 In regards to two attorneys. I've read numerous
4 case law on the Load Star method. There was never an
5 exception for a certain number of attorneys
6 representing one party or the other.

7 I recall -- and if this had been briefed by
8 opposing counsel, I would have had a case that
9 articulated that the judge, in its discretion, can
10 apply the Load Star method just to one of the many
11 attorneys that the defendant may have, or he may apply
12 it to both of them. Or if he has more than two
13 attorneys, he could apply it to them too. But I have
14 never heard a defense of a Load Star method stating
15 that just because you have two attorneys it
16 disqualifies.

17 Next thing. In regards to the bond, it was the
18 obligation of GMAC to get an appropriate bond. The
19 issue was raised before Judge Allendoerfer. He felt
20 it was just a matter of semantics, whether it was
21 called a replevin bond or an injunctive bond, it was a
22 bond. That is all he was concerned about. And as
23 far as he was concerned, it was effective.

24 But the obligation in those various orders that I
25 read off, the TRO, ex parte, the restraining order of

1 January 14th, both of those orders required GMAC to
2 get the appropriate bond, not to place that obligation
3 upon anyone else than themselves.

4 And if that bond was not obtained, then all of this
5 action should have never occurred, because the only
6 basis for obtaining an injunction is by the party who
7 obtains it files an appropriate bond.

8 As it relates to the late submission by my
9 supplemental brief, I apologize, but I'm still
10 somewhat mystified, because in my late submission of
11 my supplemental brief that was submitted today, all it
12 did was attach the first pleading in this case, Mr.
13 Glowney's pleading by prior counsel. That's no big
14 surprise. And on the second page of it, line 12, it
15 sets forth what this whole case is about.

16 And they are claiming that \$206,000 was the cause
17 for them filing this replevin and injunctive
18 proceeding.

19 However, when Mr. Glowney filed this motion to
20 modify the denial of injunctive relief before the
21 Court of Appeals, that's a document that he filed, on
22 the second page of that document, which is exhibit 2,
23 he's referring to 18 cars that he's alleging was sold
24 March through April of 2009. So we have 18 cars that
25 he's alleging March, April of 2009. However, the

1 first filing just addresses \$206,000 that was
2 allegedly outstanding by GMAC -- the claim by GMAC, as
3 of December 30th of 2008. We are talking about apples
4 and oranges.

5 We are not talking about the same injunctive
6 relief. And therefore we can not say that since there
7 was a request for an injunction December 30th of 2008,
8 that was the same injunction that was, he says,
9 ultimately granted by the Court of Appeals involving a
10 different time period involving different vehicles,
11 and involving a different amount.

12 And relating to that, if those titles were released
13 that GMAC, in our estimation, wrongfully withholding,
14 we filed two motions for release of titles.

15 And if those titles had been released, even a
16 substantial portion of the vehicles that we are
17 talking about between April, between March of '09 and
18 April of '09, would have been paid for, because those
19 vehicles were unencumbered, used cars owned by the
20 dealership.

21 In regards to bad faith, and how did the dealership
22 get into this mess? It got into it because there was
23 bad faith back in December of 2007, bad faith back in
24 all of 2008. The dealership suffered damages as a
25 result of the bad faith. That's why they are limping

1 along financially.

2 The Allied Sheet Metal case, Mr. Glowney I says,
3 the Allied Sheet Metal case wasn't reviewed by counsel
4 for the defendant. The Allied Sheet Metal case was
5 reviewed by your Honor, and determined that it was not
6 applicable.

7 We shouldn't stall this case. We shouldn't stall
8 Mr. Reggans' claim for attorney's fees, Everett
9 Chevrolet's claim for attorney's fees under some
10 hypothecation that Court of Appeals might do something
11 different. They might not once they receive the true
12 facts and the full story.

13 I turn my remaining time over to my local counsel.
14 Thank you.

15 MR. BERSIN: Your Honor, I was responsible for
16 getting the reply brief to you somewhat late. And the
17 reason why I submitted it yesterday was that
18 co-counsel was flying from Philadelphia, had the
19 primary responsibility for this motion. But I
20 noticed that there was no mention in any of the papers
21 of the Court of Appeals rule that is applicable in
22 these situations.

23 Court of Appeals, the Rap provision 7.2(i)
24 specifically addresses this type of situation. There
25 are matters that are left within the trial court's

1 authority and jurisdiction while an appeal is pending.
2 And one of those is ruling on attorney's fees.

3 And obviously the rule is set up so that we won't
4 be bounced back and forth between the trial court and
5 Court of Appeals, just because there has been an
6 acceptance of discretionary review. This is a matter
7 that's directly related to an order that's been issued
8 by this Court, if in fact Court of Appeals retains
9 jurisdiction on discretionary review and reviews the
10 whole situation.

11 The rule is set up so you can rule on attorney's
12 fees, and if attorney's fees are to be considered on
13 the appellate level, it's not a piecemeal appeal. So
14 it's expressly provided. I'm very surprised I didn't
15 see it in GMAC's material. On the one hand they
16 argued that -- it almost sounds like they won the case
17 here.

18 All the Court of Appeals did is accept
19 discretionary review. In fact, there is a motion to
20 modified pending for a three judge panel, at this
21 point in time, to reconsider a review, that acceptance
22 of discretionary review. But while all of this is
23 pending, the trial court is left with certain areas
24 where it can continue to rule, including
25 reconsiderations, enforcements of rulings, and

1 specifically attorney's fees issues that follow up on
2 orders from the court.

3 So in effect what GMAC is trying to do is to stall
4 this whole thing, move it up to Court of Appeals, and
5 act like they've already won this case, when in fact
6 your Honor has entered an order that is directly
7 contrary to their interests.

8 MR. GLOWNEY: Your Honor, they've raised two issues
9 that they did not raise in their opening argument, I
10 would like to address those, your Honor, if I could.

11 THE COURT: It was in the briefing, counsel. I
12 will give you a couple minutes.

13 MR. GLOWNEY: Thank you, your Honor.

14 The first is, counsel, I'm surprise he would tell
15 you what the petition said, because he is
16 misrepresented. He's tried to suggest that the
17 original petition was just about the \$206,000. Well
18 let me read you the next sentence after that in the
19 petition at page two.

20 "This breach is ongoing and the dealership
21 continues to sell and rent cars without remitting any
22 money to plaintiff. The defendants currently owe the
23 plaintiffs \$6,367,294.89, in terms of the financing
24 agreement.

25 The plaintiff has demanded payment, the defendants

1 have failed to tender payment."

2 So when he tells you it's about the 206, that's not
3 correct.

4 The only other objection is he puts in two pages of
5 our motion to modify, rather than the whole thing.
6 The motion to modify wasn't just about the cars in
7 April and March, it's about all the cars that have
8 been converted and which is ongoing, at least up to
9 the June 5th ruling by the Court of Appeals. So
10 putting in two pages of the brief is simply again
11 misleading.

12 The third point is I didn't raise the issue over
13 the Court's jurisdiction. I raised it before, because
14 it was a different issue. I didn't raise it here,
15 because I don't argue that the Court doesn't have
16 jurisdiction. I think the Court has jurisdiction to
17 hear this motion.

18 But on the rules that govern when and whether the
19 Court should grant fees or not fees under those rules,
20 not under the jurisdiction rule, this Court doesn't
21 have settled law before it, and they are not entitled
22 under the arguments I made before. So I didn't raise
23 it, because I am not making that argument. It's not a
24 question of Court's jurisdiction, it's a question of
25 directly applying the rules that apply to this issue.

1 Thank you, your Honor.

2 THE COURT: All right. Here is what I'm going to
3 do, and as I've indicated earlier in this proceeding I
4 don't like to be making new law, but maybe that's what
5 we are doing in this case.

6 Mr. Glowney has made an argument that I can't award
7 attorney's fees unless it's solely an injunctive
8 action. But I think that this is sort of a new
9 animal. I think that the replevin and the injunction
10 were irrevocably intertwined. And the response I got
11 from counsel didn't convince me any differently. And
12 maybe that's new law on this case.

13 I can't see how, when the plaintiff makes the
14 choice to combine a replevin action and an injunction,
15 especially in this particular case where the scope of
16 the original TRO was way excessive, that was even
17 observed by Judge Allendoerfer after two weeks and he
18 backed that off significantly.

19 I can't see how that would require Everett
20 Chevrolet to somehow make a selection of which cause
21 of action to defend, the replevin or the injunction or
22 somehow split them and try and seriate them. That
23 doesn't make any sense either. You are going to have
24 to do the best you can with what you are faced with.

25 That's addressing the argument that you made about

1 this isn't applicable, unless you are solely resisting
2 an injunction.

3 I think they are irrevocably intertwined. I think
4 that's the responsibility of GMAC. And I do not think
5 that defeats the motion for attorney's fees.

6 Given that posture, I do believe that this Court,
7 after a month about, had a full hearing on this, on
8 those issues. And I would remind everyone here that
9 the standard for an injunction is that you are likely
10 to prevail on the merits. So even from that
11 standard, the injunction and the replevin are
12 intertwined.

13 And in what happened in the hearing is that GMAC
14 didn't prevail on the merits. And I've already made
15 extensive findings on that, as to the reason why I
16 think that GMAC breached its covenant, it's implied
17 covenant of good faith and fair dealing.

18 And I agree with Mr. Wheeler on this one, GMAC lost
19 that. Given the sort of simple logic that flows from
20 that, then he has a right to move for attorney's fees,
21 I'm going to grant the motion for attorney's fees.

22 The problem that I see, however, in terms of the
23 Load Star, I actually think that perhaps the Load Star
24 is applicable here.

25 The only problem, and I was kind of quickly looking

1 through this to see if I missed something, but the
2 only problem here is that in order to do a Load Star
3 analysis I have to look at the total hours to see if
4 the total amount of hours expended are reasonable.
5 And then I have to look at the rates to see if the
6 rates are reasonable.

7 There has been an affidavit submitted by both
8 counsel, indicating the rate structure. And I think
9 that the rates that have been applied in this case are
10 reasonable. And probably, I think the observation was
11 made in one of the affidavits that they were actually
12 below market for this area, and I think that's
13 probably right.

14 I think you were charging, you said -- was it \$225
15 or \$275?

16 MR. WHEELER: \$225 in court, \$175 out of court.

17 THE COURT: I'm sure that Mr. Glowney charged more
18 than that.

19 MR. GLOWNEY: I didn't object to his rate, your
20 Honor.

21 THE COURT: I didn't think that you did.

22 I didn't have the opportunity to see the total
23 hours, they weren't totaled anywhere.

24 In looking through --

25 MR. WHEELER: The bills weren't in there?

1 THE COURT: Yes, but you have to total it up too.
2 In terms of looking through the individual bills to
3 see whether the time that was expended on certain
4 action was reasonable, I didn't really have any need
5 to say that it was or wasn't, I didn't see anything
6 that jumped out. So from that standpoint, the Court's
7 review basically says, yes, those hours that were
8 charged per item seem to be fine to me.
9 What I would like to have is a submission that
10 totals those hours, if that's possible. I don't know
11 how you do that.
12 MR. WHEELER: Your Honor, I --
13 THE COURT: And there wasn't any -- well, you put
14 a total figure in your brief, but I didn't see
15 anything that summed up -- well, there is no summary
16 sheet that sums up the hours and the total charges of
17 each one of these invoices, is there? Maybe it's not
18 in my packet.
19 MR. WHEELER: If you --
20 THE COURT: I mean, there should be .
21 MR. WHEELER: Put it this way, there was -- on the
22 motion, I listed the hours, the amount charged per
23 hour.
24 THE COURT: Yeah, but the total hours.
25 MR. WHEELER: And the total hours, yes, the total

1 hours is totaled.

2 THE COURT: What page?

3 MR. WHEELER: I specifically recall that.

4 I have an order, and on the last -- on the second
5 to the last page of the motion, well, there is the
6 total of the amounts on --

7 THE COURT: Well, you have the amounts?

8 MR. WHEELER: Here it is, paragraph 21, that refers
9 to Carl Hausmann's time, and the total hours is 275.5
10 hours. That's paragraph 21.

11 THE COURT: 275.2 for the record.

12 MR. WHEELER: That's paragraph 21 A, and if you
13 look at -- I know I totaled them for me too. Here it
14 is, paragraph 19, 19 A. The total hours was 349.9.

15 THE COURT: All right. So I stand corrected.

16 MR. WHEELER: Let me just correct that, just to
17 this extent.

18 Paragraph 19 A totals the number of hours for in
19 court time at 137.4 hours, and out of court time at
20 349.9 hours at \$175 an hour.

21 So the hours are in there.

22 THE COURT: So to get the total I have to add
23 137.4?

24 MR. WHEELER: Just the two, yes. Want me to add
25 them? I guess.

1 THE COURT: If the answer to that question is yes.

2 MR. WHEELER: All right, 137.4 --

3 THE COURT: 349.9, is that what you are saying?

4 MR. WHEELER: Yeah. That's 487.3.

5 THE COURT: And combine those two rates together,
6 you had a total of 96,220.

7 MR. WHEELER: And that took into consideration
8 flying down to Plano, Texas doing depositions of Mrs.
9 Smith, Mr. Vick, the chief of -- I can't recall his
10 name now, GMAC's chief man who came to the first few
11 -- first week, I think, of hearings, but then he never
12 testified, but he was in charge.

13 We took -- we took depositions here and down there,
14 Plano, Texas.

15 And by the way --

16 THE COURT: Just a second, I'm thinking about
17 something here, so let me think.

18 Just a second, hang on a second, let me do one more
19 thing.

20 All right. So for the record, the request for the
21 attorney fees was \$253,739.25. That was applying the
22 two attorneys' total bill \$92,620 for Mr. Wheeler, and
23 \$76,539.50 for Mr. Haussman, adding those two together
24 and then doing 1.5 multiplier under Load Star. I'm
25 going to find that there was detail there to look at

1 the individual entries for time on the bills. I
2 totally did not see the different numbers and
3 different parts of these sections, and they weren't
4 added all together.

5 But now that they have been added all together, I
6 do think that 487.3 hours for this total effort is a
7 reasonable sum of hours. And I also think, on Mr.
8 Wheeler's part, and I think that 275.2 hours of Mr.
9 Hausmann's part is also reasonable, as local counsel.
10 I've already found that the rate is reasonable.

11 This isn't part of Load Star formula, but just for
12 the record, if you take his total, Mr. Wheeler's total
13 hours and add them into his basic expenditure, I think
14 I did that right, the average hourly rate is \$190.06,
15 which is way below market and you multiply that by 1.5
16 it's still only \$285. And I'm sure that a comparable
17 downtown attorney is at least in the three hundreds,
18 maybe more than that.

19 So I am finding under Load Star that the hours are
20 reasonable and that the rate is reasonable.

21 What I'm going to do though, is I'm only going to
22 apply the multiplier to Mr. Wheeler. From what I saw
23 in this case, I don't think that Mr. Hausman provided
24 the same level of expertise as Mr. Wheeler. Mr.
25 Hausman was basically a person on the ground locally,

1 familiar with the local rules, how the Court operates
2 and how to follow different things. And he had some
3 role in the discovery, but I don't think that went
4 above and beyond to some interstellar level of
5 difficulty.

6 But I do believe with no uncertainty that the
7 average attorney around here could not try this case
8 and go up against GMAC and make any kind of effective
9 case at all, whatsoever.

10 I do believe that even in trying this case from the
11 bench, you have to have a certain amount of experience
12 in business and business transactions and accounting
13 to understand what went on in this case and why it was
14 problematic.

15 So based upon that, I am going to award attorney's.
16 And what I've done is I've taken your rate -- not your
17 rate, but your total expenditure, Mr. Wheeler, of
18 \$92,620, I've multiplied that by 1.5, which I came up
19 with \$138,930. And then I added Mr. Hausmann's bill
20 of \$76,512.50, for a total award of attorney's fees of
21 \$215,442.

22 Okay.

23 MR. WHEELER: Thank you, your Honor.

24 MR. REGGANS: Thank you, your Honor.

25 THE COURT: Anything else?

1 MR. WHEELER: Your Honor, I --

2 THE COURT: Actually, there is something else.

3 Now, on the bond issue, Mr. Glowney argued this as
4 if I am imposing that on the bond. One of the things
5 that has sort of been bothering me about this case
6 since the decision, was that I thought in terms of
7 proceeding, there should have been some intermediary
8 motions with regards to the bond, and how are we going
9 to proceed on the bond. And I think we did discuss
10 that a little bit right after the trial, but then
11 nothing ever happened.

12 You know, I'm loath to do stuff like that on my own
13 motion. The parties have never put that forward. I
14 am not, at this point, imposing that against the bond.
15 That's how it normally works. And I haven't really
16 heard any argument on that, nobody briefed it, except
17 Mr. Glowney.

18 MR. WHEELER: Well --

19 THE COURT: So what do you want to do?

20 Well, let me ask you this question, since I'm
21 looking at your face you seemed somewhat puzzled.

22 Were you planning on proceeding immediately against
23 the bond for the award of attorney's fees?

24 MR. WHEELER: Yes, I was. But if that is barred
25 by your Honor --

1 semantics. You raised the objection, GMAC seemed to
2 agree with that. We have gone through this whole
3 exercise with this document called replevin bond in
4 place. I think that if that is not an injunction
5 bond, then we are in a very precarious situation.

6 And I am not so sure that, Mr. Glowney, that you
7 can just sort of take this laissez faire attitude
8 about it that, well, we will just pay the attorney's
9 fees, we don't really care about the bond. The relief
10 is conditioned on the acquisition of the bond.

11 MR. GLOWNEY: I understand that, your Honor. All
12 I'm saying is --

13 THE COURT: I am not sure how you can go forward
14 without that. That's a jurisdictional issue, isn't
15 it?

16 MR. GLOWNEY: No.

17 MR. WHEELER: That should void out his appeal,
18 everything.

19 THE COURT: Maybe we should do some additional
20 briefing on it, but I am not going to ask for anything
21 right now. You should all think about it.

22 When relief is conditioned on the posting of a bond
23 that, in my view, is jurisdictional. The Court does
24 not have jurisdiction until you follow that.

25 MR. GLOWNEY: I would disagree with the Court, it

1 is not jurisdictional.

2 MR. WHEELER: Your Honor --

3 MR. GLOWNEY: The numbers need to be corrected to
4 what the Court -- and it refers to Mr. Guy being here
5 and Mr. Guy is not here, so that should be crossed
6 out. I'm here.

7 THE COURT: You can cross it out, can't you cross
8 it out? Cross it out.

9 But I stay with my original observation, this is a
10 complicated case. And it seems like it only gets more
11 complicated the more we do.

12 So do you want me to fix the numbers?

13 MR. WHEELER: Yes, I do, your Honor, to remove any
14 debate. We would rather have the order come from
15 you.

16 THE COURT: I apologize for slowly doing this, but
17 they don't give us real calculators.

18 All right. So the numbers are slightly different,
19 so check me.

20 I'm adding \$92,620, as your base fee, Mr. Wheeler,
21 is that right?

22 MR. WHEELER: Yes.

23 THE COURT: And then for Mr. Haussman, \$76,512.50,
24 is that right?

25 MR. WHEELER: Yes.

1 THE COURT: That comes to \$169,132.50, and on your
2 form it says 159.50.

3 MR. WHEELER: Well, I guess I made a \$10,000
4 mistake.

5 THE COURT: Well, it's not ten thousand, it's
6 twenty bucks or something.

7 MR. WHEELER: \$20.

8 THE COURT: So I'm going to strike that, and put in
9 \$169,132.50 and then over here for the Load Star, you
10 have \$84,579.75 and I've only added \$46,310, and then
11 that should add up to \$215,442.50, I believe.

12 Let me do it one more time to make sure.

13 Okay. That's what I got. Anybody check me?

14 MR. WHEELER: We agree.

15 THE COURT: All right. I'm signing that.

16 Thank you all.

17 MR. WHEELER: Your Honor, may I be heard just for a
18 moment further?

19 As it relates to this bond --

20 THE COURT: All right.

21 MR. WHEELER: As of today, we should have been able
22 to go against this bond. And the fact that Mr.
23 Glowney has questioned this bond, can we have an order
24 from the Court directing Mr. Glowney to inquire of
25 this bonding company whether they are going to stand

1 behind this bond and pay it? And if their answer is
2 no, then we should immediately be able to proceed with
3 the contempt action against GMAC for forcing us to go
4 through all of this litigation when they had no right
5 to force it, they had no right to force us to go
6 through all of these machinations.

7 THE COURT: So, Mr. Glowney, what's your position
8 on that?

9 MR. GLOWNEY: That seems to be a relatively
10 confused position to my mind, because the bond wasn't
11 necessary for the replevin action.

12 THE COURT: All right.

13 MR. GLOWNEY: It related --

14 THE COURT: So go ahead and draft the order. When
15 you come up with something, present it.

16 Court is in recess.

17 (Proceedings concluded.)

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APPENDIX C

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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF SNOHOMISH

GMAC, A DELAWARE CORPORATION,)	
)	
)	Cause No. 08-2-10683-5
Plaintiff,)	
)	
vs.)	
)	
EVERETT CHEVROLET, INC., A DELAWARE CORPORATION,)	
Et al.)	
)	
Defendants.)	

VERBATIM REPORT OF PROCEEDINGS

BE IT REMEMBERED that on 27th day of May, 2009, the above-entitled and numbered cause came on for Hearing before JUDGE ERIC Z. LUCAS, Snohomish County Superior Court, Everett, Washington.

A P P E A R A N C E S

For the Plaintiff	JOHN GLOWNEY
For the Defendant	WILLIAM WHEELER and DAVID NOLD

REPORTED BY:
DIANA NISHIMOTO, OFFICIAL COURT REPORTER
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3000 EVERETT, WA 98201
PHONE (425) 388-3281
CSR. 3222

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THE COURT: The next matter we have is GMAC versus Everett Chevrolet. This was carried over from yesterday on GMAC's motion for injunctive relief to prevent conversion of collateral.

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There has been some additional briefing that's been presented to the Court and another declaration from Mr. Reggans that's entitled second declaration of John Reggans in opposition to Petitioner's motion for injunctive relief and declaration from Margie McDonald, also in opposition to Petitioner's motion for injunctive relief. And I have had a chance to review those.

14

So do you want to begin?

15

MR. WHEELER: Yes.

16

MR. GLOWNEY: Yes, your Honor.

17

THE COURT: Okay. Let's proceed.

18

Mr. Glowney.

19

MR. GLOWNEY: May I approach to argue from the bench?

20

21

THE COURT: Absolutely.

22

MR. GLOWNEY: And if it may please the Court, John Glowney on behalf of GMAC, the moving party.

23

24

What is not responded to in any of the declarations that were submitted here, which I have received this

25

1 morning, is the fact that Everett Chevrolet has sold
2 at least nine floored vehicles since April 10th, when
3 the Court dissolved the injunction and ruled on the
4 replevin motion. They sold at least nine floored
5 vehicles, which would require the payment to GMAC of
6 at least \$150,000, as reflected in Mr. Davoudpour's
7 declaration.

8 THE COURT: Let me stop you there.

9 There is a lot of questions I have, but one of the
10 questions is this, is how is it that they are selling
11 -- they are able to sell floored vehicles, I mean,
12 from the mechanism standpoint?

13 MR. GLOWNEY: How are you they able to do that?

14 THE COURT: Yes, how are they able to -- I thought
15 that -- and this goes to the point that Mr. Wheeler
16 made yesterday in requesting that I order GMAC to
17 release titles, how is it that they are selling
18 floored vehicles? I thought that GMAC was holding all
19 the titles and MSO's.

20 MR. GLOWNEY: I believe we are holding most of the
21 titles and the MSO's. I believe we are holding all of
22 the floored ones. And I can only surmise, your Honor,
23 what I believe is that they are -- they can correct
24 me, because this is only my surmise, is that they are
25 giving temporary licenses and at some point the

1 customer asks for the actual license and at some
2 point -- and the actual title, and they are giving
3 temporary titles, in that they are then either slowing
4 -- doing something with the customer to slow them down
5 to not do it. They have paid for a few vehicles. I
6 can't remember whether they are floored or non
7 floored. I think Mr. Davoudpour's declaration
8 indicated that there were a few payments for sales
9 back in March.

10 So I think there is a little bit of what you might
11 say of robbing Peter to pay Paul, is that when they
12 are finally four, six, or seven, or eight weeks later
13 after the sale to actually provide a title they then
14 scraped some money together, tender enough for that
15 car and then we have released some titles to them when
16 we have received proceeds.

17 So you have this Ponzi Scheme -- would probably not
18 be a fair comment -- but you have them taking sort of
19 sales, you know, that they make now that they used to
20 pay for a car back in March. So they have a number of
21 cars out there that they have sold to customers where
22 they have not provided final titles, but given them
23 temporary titles. And they just simply haven't, until
24 they have enough pressure from somebody, given them
25 the actual full title. That's my surmise.

1 THE COURT: Okay. Go ahead.

2 MR. GLOWNEY: So as they indicated at the end of
3 that hearing, both counsel indicated that they needed
4 to pay for the floored vehicles. And it remains true,
5 regardless of this Court's ruling on the good faith
6 issue, they still owe GMAC approximately five million
7 dollars, and GMAC still has a security interest in the
8 vehicles. And that security interest is property,
9 recognized under the U.S. Constitution and under our
10 State Constitution.

11 So this is really simply -- ultimately they are
12 simply converting our property and taking the proceeds
13 and using it in their business. And that they can not
14 do. They can not convert property.

15 We are at a point in this, procedurally in this
16 case where there has been no trial on damages, so
17 there is no proof of damages, and there has been no
18 judgment entered in favor of Everett Chevrolet. And
19 that's the way you have a, gain a right to execute and
20 obtain someone else's property. You obtain a judgment
21 which allows you to go use the procedures of court to
22 then take someone's property to satisfy a judgment.

23 You are not allowed to do that before you've proven
24 damages and before you obtain a judgment. You can get
25 provisional remedies under our law. But provisional

1 remedies require you to meet those standards and, at
2 best, provisional remedies simply allow you to freeze
3 property. They don't allow you to actually take it
4 and consume the proceeds, as Everett Chevrolet has
5 been doing.

6 So where we stand is that they are converting
7 property. And we are asking the Court to enter an
8 injunction to prevent that.

9 They've alleged bad faith, they've alleged -- or
10 unclean hands. It's not really a question of unclean
11 hands. The equitable power of the court doesn't
12 stretch so far as to prevent conversion of property.

13 THE COURT: Okay. I thought that was an
14 interesting argument. It sort of, unclean hands
15 doctrine, the way I understand it, is that the Court
16 is prevented from exercising its equitable powers if
17 one of the parties has unclean hands.

18 The way you just described it though, you described
19 it as, in other words, it's a negation of power. And
20 you are describing it as a positive authorization
21 through equity.

22 How do you get there, Mr. Glowney?

23 MR. GLOWNEY: I am not arguing unclean hands
24 authorizes the Court to do something. I'm simply
25 saying that unclean hands is not really determinative

1 of the scope of the equitable power.

2 Put unclean hands aside, the Court doesn't have
3 equitable power to assist or authorize conversion of
4 the property. So arguing about --

5 THE COURT: But, okay.

6 MR. GLOWNEY: Sorry.

7 THE COURT: But if the Court does not exercise its
8 equity power and if somebody behaves in a way that one
9 side thinks is illegal, the Court is not authorizing
10 that.

11 MR. GLOWNEY: That may be true. But I don't think
12 -- I would argue to the Court, it's not that I think
13 it's illegal, it is conversion, and I'm asking the
14 Court to rule on it.

15 THE COURT: Let's assume it is.

16 MR. GLOWNEY: Okay.

17 THE COURT: But if the Court, because of the
18 unclean hands doctrine, the Court says, no, the Court
19 is not going to exercise its equitable power and sort
20 of get into this mix. That's not the Court
21 authorizing it, that's just the Court not acting. How
22 is it an authorization?

23 MR. GLOWNEY: Well, then I think -- well, I think
24 it is. I would simply argue it is. The Court is then
25 -- knowing that a party in front of this Court is

1 committing conversion of property, knowing that they
2 have not -- that this case has not yet proved any
3 damages, they have not gone to judgment for damages,
4 and the Court will say I'm going to allow them to
5 convert, I would disagree with the Court.

6 THE COURT: You just said it again, I'm going to
7 allow. It's not an allowance, it's a forbearance. I
8 don't see how that's an authorization of their
9 behavior.

10 And so if you want to give me the line of logic
11 that you are following there, I would be happy to
12 listen to it, but I don't see how forbearance is an
13 authorization.

14 MR. GLOWNEY: I don't have a further argument on
15 that, your Honor. I think forbearance is an
16 authorization when the Court knows they are converting
17 and when the parties are in front of you. That's my
18 argument.

19 THE COURT: Here is the magic question then. Is
20 there any authority that you have for that position?

21 MR. GLOWNEY: I have submitted the authority that I
22 have, your Honor. I don't think the Court can aid in
23 lawless behavior.

24 THE COURT: Which case are you relying on?

25 MR. GLOWNEY: I've submitted the quote from Story,

1 which is in the JL case, I think it's a case they
2 cited, which I quoted.

3 THE COURT: In the second brief?

4 MR. GLOWNEY: In the second brief, your Honor.
5 I've cited on page 2, your Honor, the quote.

6 THE COURT: Okay, you know, I read that language.
7 I will just read it for the record. It says, "Courts
8 are ordained for the enforcement and vindication of
9 the law and legal rights. They never aid anybody in
10 his effort to violate law or give him the benefit of
11 the fruit of his own violation thereof."

12 And again, that's an assertive action being
13 described there, not a forbearance.

14 And the problem that I think you need to solve, and
15 you know, help me if you can, is the argument that you
16 are making, from my perspective, is one sided. You
17 are arguing about your injury, but you are ignoring
18 the injury that the Court found with regard to where
19 they are arguing unclean hands.

20 And the problem there is that in order to provide
21 an equitable remedy or maybe an equitable
22 intervention, maybe that's the right way to say it,
23 doesn't the Court have to make a factual determining
24 for both sides? In other words, don't we need a
25 trial?

1 MR. GLOWNEY: Well, I think that you can make a
2 factual determination that we have a security interest
3 and that's property interest. That's constitutionally
4 protected without a trial. I think the Court can
5 make the determination that they have not been awarded
6 any damages yet, because it hasn't happened
7 procedurally.

8 THE COURT: All right. Here is another question
9 for you, and maybe Mr. Vick can answer this one if you
10 can't.

11 One thing that puzzles me about this is -- well,
12 let me ask you this question first. What other
13 remedies do you have to solve this problem?

14 MR. GLOWNEY: I don't believe we have any that I
15 know of that we can without -- to prevent the sale of
16 the cars without Everett Chevrolet paying us, that I
17 don't have any remedy to keep them from taking the
18 security interest, which is property.

19 THE COURT: Well, aren't they your cars?

20 MR. GLOWNEY: Our cars.

21 THE COURT: Aren't they your cars? Mr. Vick is
22 shaking his head yes.

23 MR. GLOWNEY: From a legal standpoint, we have a
24 property interest, which is a security interest in
25 them.

1 THE COURT: All right. So I am not authorizing
2 this activity, but I think I -- and I have been
3 avoiding this for a while, I'm going to go ahead and
4 ask this question, because I think it flows logically
5 from the prior question.

6 If they are your cars and you are concerned that
7 they are being sold without authorization, why don't
8 you just give a demand, say we are sending a truck for
9 these cars, go out there and get them? Why don't you
10 do that? Isn't that a remedy that's available?

11 MR. GLOWNEY: It is an available remedy, your
12 Honor.

13 THE COURT: Okay. So you just told me there
14 wasn't any other remedy other than the Court
15 intervening with its equitable powers.

16 MR. GLOWNEY: Well, your Honor, I think if we did
17 that, we would have a potential breach of the peace,
18 because I think my opponents here would object. So
19 yes, it's a remedy. We are in front of the Court --
20 maybe we should go out there and do that, I just think
21 that a Court should not -- and I understand the
22 Court's argument about whether it's a forbearance or
23 positive action. But in my view, it's occurring in
24 front of the Court, it's conversion of the property,
25 and that a court should step in and that the notion

1 that unclean hands would bar that in some way, seems
2 to be, in my view, not the correct conclusion that a
3 court should reach. That's what I'm arguing.

4 THE COURT: Okay. Anything else?

5 MR. GLOWNEY: No, your Honor, thank you.

6 THE COURT: Mr. Wheeler?

7 MR. WHEELER: Good morning, your Honor.

8 THE COURT: Good morning.

9 MR. WHEELER: Your Honor, the problem is that
10 opposing counsel totally ignored all of the findings
11 that were made by this Court after a month trial, in
12 which his client was proven to have acted in bad faith
13 and acted in a manner in which they concealed a
14 relevant material facts that clearly my client would
15 have taken into consideration had he known, and at
16 least had the opportunity to act in a contrary manner.

17 In fact, my client relied upon the information, the
18 erroneous and intentional -- intentionally false
19 information that GMAC provided to my client, and as a
20 result my client has lost millions of dollars.

21 This Court made a finding that GMAC acted in bad
22 faith, acted dishonestly, concealed various targets,
23 had my client pursue false targets. GMAC provided
24 information, knowing that it was false in July of 2008
25 to my client, for my client to rely upon to move

1 forward in his business ventures.

2 Now, the law determines -- of Washington,
3 determines that concealment of material facts by a
4 contracting party, where that contracting party is
5 providing financial information or advise or direction
6 to the other contracting party is fraud.

7 GMAC committed fraud through concealment. GMAC
8 damaged my client economically.

9 THE COURT: I found that argument interesting. I
10 am not sure I totally embrace it. I hadn't thought
11 about it. I didn't read any of the cases cited with
12 regard to that. I have dealt with that particular
13 argument in the past, like in the distant past when I
14 was practicing. But what has that got to do with
15 this? I am not quite sure what that argument has to
16 do with what we are doing today?

17 MR. WHEELER: It has to do with their bad faith and
18 their fraudulent concealment has to do with GMAC's
19 unclean hands.

20 THE COURT: Well, I under --

21 MR. WHEELER: They don't have -- in effect, their
22 unclean hands deprives them of the capability. They
23 are incompetent to even pursue an equitable remedy
24 with them having had committed in a bad faith act or
25 fraudulent act, creating a situation where they have

1 unclean hands.

2 THE COURT: Okay. So why do you think that there
3 needs to be an additional argument of fraud via
4 concealment? Why do you think there needs to be that
5 additional argument, because I already found that they
6 acted in bad faith?

7 MR. WHEELER: As an attorney, one would pursue
8 every course of action that one would think you have a
9 right to pursue and I did the research on conversion
10 -- excuse me, on fraud and concealment and I felt that
11 that was appropriate under the circumstances, since
12 there was a concealment of facts.

13 In addition, as it relates to GMAC's assertion that
14 we are -- we have converted property, one of the
15 initial elements of conversion is that one must --
16 there must be a declaration that the property is
17 illegally held.

18 Well, GMAC approved the acquisition of this
19 inventory. The inventory was delivered to the
20 dealership. The dealership didn't acquire the
21 inventory through any illegal means. GMAC, as the
22 Court has concluded, has breached their contract with
23 the dealer, so the dealer has this inventory not
24 illegally. It possesses it legally. GMAC just has
25 a security interest, but a security interest isn't

1 everything as it relates to possession. It's just a
2 security interest.

3 Now, as it relates to the Floor Plan contract.
4 Since GMAC breached the Floor Plan contract, then the
5 three day release privilege that we talked so much
6 about during the course of this case, whereby the
7 dealer sells the car and then he has three days to pay
8 this car off, GMAC breached the Floor Plan agreement,
9 so now we no longer have a three day release privilege
10 and the injunction that was in place has now been
11 dissolved.

12 The only thing that was -- under normal
13 circumstances the dealer would hold the titles to
14 encumbered cars, cars that are on Floor Plan, and cars
15 that are unencumbered, cars that the dealer purchased
16 at an auction or cars that the dealer acquired through
17 trade, the dealer would hold those titles, both of
18 them, the encumbered and unencumbered.

19 The injunction, the modified injunction had a
20 provision that stated that GMAC could hold both
21 titles, both categories of titles, but the injunction
22 was dissolved April 10th.

23 Did GMAC, in good faith, return those titles so
24 that this dealership could operate in a normal
25 operating function? No. GMAC still holds the

1 encumbered titles as well as the unencumbered titles.

2 Now, in GMAC's affidavit they state that 13
3 vehicles were sold in a wholesale fashion to a used
4 car dealer.

5 THE COURT: Stop before you go into that argument.

6 On this holding of titles, you described that as
7 being a -- maybe I should call it a power or authority
8 that was given under the modified injunction, right?

9 MR. WHEELER: Correct.

10 THE COURT: Don't they have that power, don't they
11 have that as a remedy normally under the wholesale
12 Floor Plan and the UCC?

13 MR. WHEELER: I would say no. Under the Floor
14 Plan agreement it doesn't provide for GMAC to hold the
15 titles. As a matter of fact it says that --

16 THE COURT: They can make any sort of demand they
17 want, can they not?

18 MR. WHEELER: Well, not a demand that's devoid of
19 good faith. That's what this case is about.

20 They can not arbitrarily, and in bad faith, make a
21 demand that is contrary to the UCC, and contrary to
22 the Liebergesell case.

23 Now, since there is no release privilege --

24 THE COURT: All right. Go ahead.

25 MR. WHEELER: -- because there was a breach of

1 their contract, they breached the contract, we have
2 these cars legally.

3 Now, we have been paying them off slowly, not as
4 fast as they want us to. But we haven't been paying
5 them off fast under normal circumstances because of
6 the economic damage that GMAC caused the dealership.
7 We've lost millions of dollars.

8 They have run off employees through their guise,
9 through the variety of things that they did. They
10 suffocated or strangled business so that the
11 dealership could not do business to the point where
12 all of the -- at one point, as you know, GMAC had all
13 of the retail banks that were doing business with this
14 dealership --

15 THE COURT: All right. I recall, you don't
16 really have to go into that.

17 MR. WHEELER: So if we can't sell cars for a
18 substantial period of time, and get them financed, if
19 -- for the first two weeks of this injunction the
20 dealership was totally shut down.

21 Now this dealership prior to it being totally shut
22 down was selling millions of dollars of product a
23 month in parts, service. We had a full time service
24 -- I mean, a parts man who was selling a quarter of a
25 million dollars worth of parts a month.

1 We were selling cars new and used in substantial
2 volume.

3 THE COURT: I remember.

4 MR. WHEELER: So that's why there has been a
5 decrease or a slowing up in the payment to GMAC. We
6 haven't -- we haven't denied that they have a security
7 interest, but we are paying them slowly.

8 And hopefully -- I have --

9 THE COURT: Okay. Let's go into the point that
10 you just made about -- you seem to be arguing to me
11 that the three day release provision is now somehow
12 voided.

13 MR. WHEELER: Yes.

14 THE COURT: Mr. Wheeler, how are you coming to
15 that conclusion?

16 MR. WHEELER: Well, first of all, you found, made a
17 finding that the three day release privilege was a,
18 was an arbitrary act, in effect, in bad faith, because
19 it couldn't be justified. In other words, GMAC had a
20 rule for this dealership of a three day release
21 privilege, but they couldn't justify why there was a
22 five day release privilege with other dealers.

23 THE COURT: Okay. So what's --

24 MR. WHEELER: Their argument was that --

25 THE COURT: No, no, I'm following you. Let's

1 work with this, I guess.

2 So I found that the three day was arbitrary in
3 terms of other dealers being given a five day.

4 MR. WHEELER: Yes.

5 THE COURT: But when you are talking about slow
6 pay, aren't we talking about far in excess of five
7 days?

8 MR. WHEELER: Yes, we are talking about far in
9 excess of five days.

10 THE COURT: Now, how is that --

11 MR. WHEELER: If GMAC could give us our five
12 million dollars, we could give them their inventory
13 and be done with it.

14 In other words, they damaged us, they strangled us
15 to death. How could we then just act as though
16 nothing had occurred and just pay them on time as
17 though this was business as usual?

18 THE COURT: Okay. So my question for you, Mr.
19 Wheeler, is what is -- let me back up.

20 What you are describing is what I would call a self
21 help remedy, are you not?

22 MR. WHEELER: If you conclude that that's self
23 help -- I mean, aren't we under the obligation of
24 mitigating our damages, that's what the law of
25 Washington says, that there was a breach of contract.

1 If we don't mitigate our damages, we are creating
2 greater damage. In other words, if we just threw up
3 our hands and gave them back the cars, then our right
4 to recover for the future loss incurred by GMAC's
5 action, we would be losing our right to recover.

6 And I've included cases in there on mitigation of
7 damages.

8 THE COURT: Okay, so good. Is there any
9 particular case that you think factually supports or
10 is analogous to what you are doing here?

11 In other words, is there, in that body of authority
12 that you cited, is there one case that, or a few
13 cases, or a series of cases where there is a
14 similarity in terms of what's happening in terms of
15 the facts on the ground.

16 I see all the general principles and I will grant
17 you that the general principles are there, what I'm
18 talking about are applications of simple facts in this
19 case.

20 MR. WHEELER: The answer to that, since I know your
21 Honor wants direct answers to direct questions.

22 THE COURT: Thank you.

23 MR. WHEELER: The answer to that is no, no, we
24 don't have a case of this unique nature, of this exact
25 fact pattern, but all of the principles that I've

1 articulated in my brief apply. Mitigation of damages
2 and compensatory damages, I mean, they caused this
3 damage. They weakened us to the point where we are
4 in the financial economic hospital.

5 Should we act in our conduct as though nothing
6 happened? It's not an option on our part. We want
7 to pay them, we are just paying them slowly, because
8 they breached their contract, they used bad faith.
9 They disqualified themselves from even coming to this
10 Court and asking for equitable relief through their
11 bad faith.

12 Thank you.

13 THE COURT: All right. You need any rebuttal for
14 that, Mr. Glowney?

15 MR. GLOWNEY: I think the allegations of damages
16 are so extremely exaggerated, I am not going to argue
17 with them, they are just exaggeration. They haven't
18 proven damages yet, we haven't had a trial. It's
19 doubtful that their theory will work when it's
20 actually tested, but you need to have a trial and get
21 the judgment.

22 The only other point I would make is that the
23 mitigation of damages does not stretch so far as to
24 allow you to convert people's property. That's simply
25 conversion.

1 I simply stand on the prior arguments I made. I
2 don't think the Court should watch conversion take
3 place. I don't think the argument, unclean hands
4 work, and I don't think mitigation of unclean hands
5 work, it's not a remedy.

6 Thank you, Your Honor.

7 THE COURT: Okay. Give me about 15, 20 minutes.
8 There is something that came up in this argument that
9 I want to check. So I'm going to do a little checking
10 and I will come back and give you my decision.

11

12

(Recess taken.)

13

14

THE COURT: We are back on the record in the
15 matter of GMAC versus Everett Chevrolet on the motion
16 for injunctive relief.

17

18

19

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21

I took the time to do a little research on the
definition of conversion, because the more I listened
to this the more I started to think that this is a
little bit more complicated than it appears on the
surface.

22

23

24

25

I'm just going to quote -- I'm quoting from a case
called *Martin vs. Sikes*. The citation is 38 Wash.2d
274. It's a 1951 case. It's not exactly factually on
point here, but some of the principles discussed, I

1 think, are relevant.

2 The first thing it says is that "A conversion is
3 the act of willfully interfering with any chattel
4 without lawful justification, whereby any person
5 entitled thereto is deprived of possession of it."

6 But then the writers sort of depart from that a
7 little bit and recognize that conversion is actually a
8 little bit more complicated than that.

9 One of the things that they say is that "It is not
10 necessary to a conversion that there should be a
11 manual taking of a thing in an action by defendant nor
12 that it should be shown that he had applied it to his
13 own use, but the question is, does he exercise a
14 dominion over it to the exclusion of plaintiff's right
15 and if he does so that is a conversion."

16 One of the things that came up in this discussion
17 this morning, which had been bothering me for a while,
18 both on this motion and in the prior hearing, was the
19 possession of the titles and the MSO's by GMAC. And
20 then there was this description of the slow pay, which
21 I described as a self help remedy, which Mr. Wheeler
22 is assigning as part of the mitigation, as part of the
23 dealer's duty to mitigate damages. I am not taking a
24 position on that, but I think I do understand the
25 argument.

1 In the body of this case they talk about a lot of
2 different definitions of conversion and the problems
3 with them. And one of the issues that arises is that
4 it's just very difficult to do.

5 Quoting another part of the case it says "American
6 courts have not defined conversion in terms of
7 possession, but instead, in a possibly futile attempt
8 to cover all conceivable contingencies, have adopted
9 such definitions as that of Judge Cooley, which, it
10 will be seen, employs interference with dominion as
11 the test. Any distinct act of dominion wrongfully
12 exerted over one's property in denial of his right, or
13 inconsistent with it, is a conversion."

14 Further on it says, "Does he exercise a dominion
15 over it in exclusion or defiance of the plaintiff's
16 right? If he does, that in law is a conversion."

17 All right. So why I am explaining those different
18 definitions and offering those for the parties' review
19 is because I think that there is a possible argument
20 that this is not conversion, and from a factual
21 standpoint the basis for that is that GMAC holds the
22 titles and the MSO's. That property can not be
23 finally taken out of the GMAC's dominion or control
24 while they hold the titles. And from a factual
25 standpoint this morning, in terms of the property

1 that's been arguably converted, I haven't seen an
2 analysis of which properties GMAC still holds the
3 title to and which ones it doesn't.

4 And the admitted self help remedy of what you are
5 calling a slow pay does not have the intent to deprive
6 GMAC of its security interest. The intent is not
7 indicated as such. And I think that's another thing I
8 need to take into consideration.

9 But be that as it may, I wanted to point that out,
10 because I thought that from an analytical standpoint
11 I think there are some problems with the fact that
12 this theory of conversion, has some serious problems.
13 But be that as it may, I already found that GMAC acted
14 in bad faith. That part of the argument from Everett
15 Chevrolet I agree with and that prevents GMAC from
16 coming to the Court and asking the Court to exercise
17 its equity jurisdiction.

18 From the standpoint of both parties' positions,
19 each side has arguments about wrong doing of the other
20 side.

21 And, you know, those are issues that have to be
22 settled at trial. And I'm loath, and I think, as you
23 know, I'm loath to sort of give somebody summary
24 judgment which, you know, constitutes a win over the
25 other side given those facts that I've heard.

1 So the motion for injunctive relief on the basis of
2 conversion is denied. I think that the doctrine of
3 unclean hands applies here.

4 GMAC has, I found, already acted in bad faith and I
5 think that prevents them from coming to the Court and
6 asking for injunctive relief, but that is not the only
7 thing that does.

8 There are other remedies available to GMAC. And I
9 think when you come to court to ask the Court to
10 exercise its equity jurisdiction that has to be done
11 under at least an assertion that that is the only
12 remedy that's available.

13 And Mr. Glowney, at first you said that, and then
14 when I pushed you a little bit on that, you kind of
15 had to come off that stance. And that's another major
16 factor for this decision.

17 I started to have a chambers conference with you
18 all this morning, and sort of inquire a little bit
19 about what you are doing to try and settle this.
20 Maybe that's something we should talk about at some
21 point. I decided not to do it this morning. I
22 decided to just go ahead and hear this motion.

23 But from my standpoint, cases like this that are
24 this complex, I think the parties need to be talking
25 to each other in terms of trying to resolve it.

1 This constantly coming into court and sort of
2 picking at the outer edges of it, it's not going to
3 get anywhere. Either you need to talk about it and
4 settle it, or you need to accelerate your trial date
5 and go to trial and get this settled. That's just a
6 little bit of advice on my part.

7 I don't see how motion practice is going to resolve
8 any of the major issues in this case.

9 I am not necessarily in favor of self help remedies
10 from either side. But the problem is, and I've
11 indicated this before, I think this has gone on for
12 too long a time, and just the passage of time is now
13 clearly injuring both sides and there needs to be a
14 speedy resolution of this. I am not quite sure how
15 you all contemplate that occurring, but I think that
16 it needs to happen as quickly as you can get it done.

17 Anyway, the motion is denied. The basis of it is
18 that I think the Court isn't in a position to exercise
19 its equity jurisdiction because of the prior finding
20 of bad faith and I also think, in summary, there are
21 some problems with the theory of conversion here,
22 because GMAC is holding titles and that property is
23 not converted, under your own presentation of the
24 facts, until those titles are given over.

25 And given that modicum of control, I don't see how

1 there is total dominion being exercised over the
2 property by Everett Chevrolet.

3 Anything else?

4 I know you have to catch a plane, because I was
5 going to read some more cases and I thought, oh, wait
6 a minute, he has to catch a plane.

7 MR. GLOWNEY: Two things, your Honor. One, just a
8 point of clarification, the Court referred to other
9 remedies and in our discussion, Court pointed out self
10 help, did the Court have any other remedy other than
11 that in mind when the Court uses the phrase other
12 remedies?

13 MR. WHEELER: Well, your Honor --

14 THE COURT: You mean the example I asked in my
15 question?

16 MR. GLOWNEY: Right. You said you believed we had
17 other remedies and directed us to self help.

18 THE COURT: No, I didn't direct anyone to
19 anything.

20 MR. GLOWNEY: You directed the conversation to self
21 help as a topic.

22 MR. WHEELER: He is asking you for legal advice.

23 MR. GLOWNEY: I'm simply --

24 THE COURT: Let him finish.

25 MR. GLOWNEY: It's up to the Court to tell me

1 whether or not if there was some other remedy that the
2 Court had in mind other than self help.

3 MR. WHEELER: And I would object to an answer,
4 because that in effect would be providing an unfair
5 advantage, in effect a prejudicial response --

6 THE COURT: I've already indicated that I am not
7 in favor of self help remedies by either side. I do
8 not think that that is a resolution of the problem.
9 I think that's only going to make the problem worse.
10 I think that it's already making the problem worse.
11 Okay.

12 And so what I'm trying to say to today is that from
13 my standpoint you either need to litigate this or
14 settle it.

15 And I don't know enough about what was happening,
16 like I said, I was thinking about having a chambers
17 conference and talk to you all about what's going on
18 in terms of that. But I think that this sort of
19 continuing in limbo is injuring both sides. And I
20 think that needs to be resolved. You either -- I
21 think you have the evidence, I mean a four week
22 hearing, I think you have all the evidence discovered.
23 You need to go to trial or you need to settle it.

24 I don't know what Mr. Reggans' options are in terms
25 of floor planning or some of the other things, but you

1 are going to make a motion, aren't you?

2 MR. WHEELER: Yes.

3 THE COURT: About getting titles returned. And it
4 seems to me that when you described the problem, if I
5 was understanding it right, you were talking about
6 getting titles back so that you could Floor Plan those
7 vehicles under a different entity, perhaps?

8 MR. WHEELER: No. These are unencumbered vehicles,
9 vehicles that were not floor planned that GMAC holds
10 the titles on. The dealership wholesaled those
11 vehicles and we want those titles to be able to
12 transfer them to the wholesaler.

13 The GMAC --

14 THE COURT: Oh, are you talking about the 13
15 cars?

16 MR. WHEELER: Correct, the 13 vehicles. We are
17 not just talking about the -- we are talking about the
18 13 vehicles which is at issue right now.

19 THE COURT: All right.

20 MR. WHEELER: All right. And I do want to see if
21 we could settle this case. I have overtures out to
22 opposing counsel. We have not made any meaningful
23 progress in that manner. But in any event, I still
24 want to -- and in interim between now and, I believe
25 it was Friday or Monday, we were going to argue this

1 next motion on the unencumbered titles.

2 THE COURT: It should be Monday.

3 MR. WHEELER: Monday.

4 MR. GLOWNEY: Could I ask it be either Tuesday or
5 Wednesday, because the Court of Appeals has set a
6 briefing schedule for the motion to modify
7 Commissioner Ellis' ruling on the injunction that we
8 asked for. They gave my opponents until Friday to
9 file their brief and given me until June first to file
10 mine.

11 So it would be a little hard for me to respond to
12 this motion and that on Monday. So if we could have
13 it on Tuesday or Wednesday, if the Court would allow
14 me to do that.

15 Mr. Guy is also going to be out of town on Thursday
16 and Friday at a collage reunion, so we are
17 shorthanded.

18 MR. WHEELER: I would prefer Tuesday, if possible.

19 THE COURT: Okay.

20 Ms. Song, go ahead and put it on for Tuesday
21 morning. All right. Tuesday morning.

22 MR. WHEELER: Should we be here at 9:00 o'clock?

23 THE COURT: Yes.

24 MR. GLOWNEY: And I will get a brief at what
25 point, counsel?

1 MR. WHEELER: Today is Wednesday, you should get
2 one by Friday morning.

3 MR. GLOWNEY: Thank you.

4 THE COURT: All right. Anything else?

5 MR. GLOWNEY: I have a form order that simply says
6 the motion is denied, I think I sent it to the Court,
7 but I think all it says is the motion is denied.

8 THE COURT: I don't have a copy of it, I don't
9 think.

10 MR. GLOWNEY: Or we can do it on Tuesday, if the
11 Court wants to.

12 MR. WHEELER: I rather --

13 MR. NOLD: How about if I write into this that the
14 Court's oral rulings are incorporated into this order?

15 MR. GLOWNEY: Yeah, the Court's oral rulings are
16 fine.

17 THE COURT: That's fine.

18 MR. WHEELER: Unclean hands and bad faith.

19 THE COURT: Okay.

20 Let's go off the record.

21

22

(A conversation was held,
but not reported.)

23

24

25

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

CERTIFICATE OF SERVICE

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I certify under penalty of perjury that on January 19, 2010, I delivered a copy of the Respondents' Brief 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 19th day of January, 2010.



Lien Le, Legal Assistant
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