68374-8

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No. 68374-8-I

COURT OF APPEALS
STATE OF WASHINGTON
DIVISION I

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

Plaintiff/Petitioner,

vs.

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

Defendants/Respondents.

EVERETT CHEVROLET'S RESPONSE BRIEF

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COUNTER-STATEMENT OF ISSUES[1]

1. Did the trial court properly deny GMAC's motion for summary judgment based on disputed facts in the record that preclude a finding that the Wholesale Security Agreement ("WSA") is a simple demand note?

2. Did the trial court properly find that GMAC's reliance on the "upon demand" clause in the WSA was neither factually nor legally supported, given the compelling evidence that GMAC called a default based solely on the "faithfully and promptly" payment terms of WSA and Everett Chevrolet's alleged breach thereof?

3. Did the trial court properly find that it is premature to dismiss the bad faith breach of contract claims, as a matter of law, before the finder of fact determines whether GMAC was entitled under the WSA to require payment in full "upon demand" in the absence of a default?

COUNTER-STATEMENT OF THE CASE

This appeal is premised on GMAC's assumption that the standard Wholesale Security Agreement, which underpins the operations of virtually every GM dealer that obtains floor plan financing through

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[1] References herein to "R. App.__" are to Respondents' Appendix; references to "RP Vol. __" are to the Verbatim Report of Proceedings Conducted in March-April 2009 (the Replevin Hearing); and references to "R. Ex.__" are to Replevin Hearing Exhibits. References to "App. __" are to documents in the Appellant's Appendix.

GMAC, is payable in full on demand at any time, for any reason or for no reason at all — even though no court has reached that conclusion in this or any other case where the issue has been considered. Having repeatedly made and lost the "demand note" argument in courts across the country, GMAC now asks this Court to *assume* the WSA is, in fact, a demand note, even though this assumption requires the Court to negate the operative payment and default terms of the contract, and ignore the fact that GMAC never treated the WSA as a demand note in its course of dealings.

GMAC conspicuously fails to bring to this Court's attention the fact that it has consistently lost this "demand note" argument in other dealer cases involving virtually identical Wholesale Security Agreements, including a case decided by the United States Court of Appeals for the Third Circuit. *Mente Chevrolet Oldsmobile, Inc. v. GMAC Inc. (now known as Ally Financial Inc.)*, 451 F. App'x 214 (3d Cir. 2011).[2] Research shows that no court has accepted GMAC's tortured reading of the WSA, or found that the WSA is payable on demand irrespective of the existence of a bone fide default.

To the contrary, every court that has addressed the issue has found that there are inherent ambiguities in the WSA that require a finder of fact to determine under what conditions GMAC may demand immediate

[2] *See* discussion at Section III. B below, describing the other dealer cases where GMAC made and lost the same "demand note" arguments it rehashes here.

payment. (*See* Pt. III. B below.) Can GMAC accelerate all outstanding indebtedness and demand payment in full any time, for any reason or for no reason at all? If so, then GMAC could terminate dealers across the country with abandon under identical provision of the WSA, and they would have no legal recourse. Alternatively, is GMAC permitted to take this drastic action only when there is a bone fide default based on the dealer's breach of the obligation to "faithfully and promptly" remit payment upon the sale of a floor planned vehicle?

Until that determination is made by the finder of fact, it is premature to grant summary judgment dismissing the dealer's bad faith claims. If it is ultimately determined that the WSA is not a simple "demand note" then even GMAC concedes that the obligation of good faith and fair dealing attaches to its performance under the terms of the WSA. (GMAC's Brief at 17.) Until then, disputed issues of fact preclude summary dismissal of the dealer's bad faith claims.

COUNTER-STATEMENT OF THE FACTS

A. Everett Chevrolet

In 1996, John Reggans opened a General Motors ("GM") dealership in Everett, Washington, with a capital investment by Motor Holding, a division of GM. (RP Vol. X at 67-68.) Mr. Reggans is the

President of Everett Chevrolet, Inc. and its sole shareholder. (R. App. B at CP 81.) Dealership performance enabled him to pay off that GM capital investment in full well ahead of schedule, and earned Everett Chevrolet multiple awards for profit performance over the years and recognition as one of the most successful dealerships in the area. (*Id.* at CP 81-82, 85.) By January 2009, when GMAC forced Everett Chevrolet to close, GM was in the process of making yet another substantial investment in this dealership. (*Id.* at CP 195-96, RP XI 56-58, 62.)

B. Everett Chevrolet's Long-Standing Relationship with GMAC under the Operative Financing Agreements Floor Plan Financing and the Wholesale Security Agreement

During Everett Chevrolet's long relationship with GMAC and GM, GMAC provided wholesale inventory financing (known as "floor plan" financing) for the acquisition of new and used vehicles for resale. Floor plan financing is the life blood of any GM dealership, without which it cannot operate. The master agreement that governs the wholesale financing relationship between GMAC and Everett Chevrolet is the WSA. (R. Ex. 3.) Everett Chevrolet entered into the WSA with GMAC on December 10, 1996. (R. Ex. 3.) (*See also* R. App. B at CP 82 ¶¶3-4.)

The structure of the relationship was such that (1) GM would sell vehicles to Everett Chevrolet, (2) GMAC would advance funds to Everett Chevrolet and take a security interest in the floor planned vehicles and the

proceeds thereof, and (3) GM would be paid upon shipment of the vehicles to the dealership. (R. Ex. 3.) Everett Chevrolet was required to repay GMAC "faithfully and promptly" after each vehicle was sold to a retail customer. (R. Ex. 3.) When vehicles were sold, Everett Chevrolet would continue to purchase new vehicles from GM, financed through GMAC.[3]

Everett Chevrolet also had a revolving line of credit with GMAC, dated October 16, 2000. (R. Ex. 8.) In 2007, GMAC increased that line from $500,000 to $800,000, to be used for Everett Chevrolet's working capital needs, with interest only payments at the rate set forth in the contract. (R. Ex. 8, RP Vol. I at 18:24-25, 19:21-25, 58.) The Revolving Line of Credit Agreement ("RCLA") permitted GMAC to terminate its lending obligations only upon the occurrence of an enumerated contingency, or 30 days after receipt of written notice of termination. (R. Ex. 8.)

In consideration of the future extension or continuation of credit from GMAC, GMAC and Everett Chevrolet entered into a Security

[3] The WSA was amended simultaneously and as part of the same transaction, by the Amendment to the Wholesale Security Agreement, which extended GMAC's obligation to provide floor plan for Everett Chevrolet's purchase of new and used vehicles at auction and other sources, in addition to inventory purchases directly from GM. (R. Ex. 6.) At the same time, the WSA was further amended, as part of the same transaction, by the Amendment to the Wholesale Security Agreement, Conditionally Authorizing the Sale of New Plan Vehicles on a Delayed Payment Privilege Basis ("DPP Agreement"), which applied to sales to fleet customers (i.e., rental companies), who then paid GMAC directly on terms agreed to by that fleet customer and GMAC. (R. Ex. 7.)

Agreement, dated June 15, 1999 ("Security Agreement"), which granted GMAC a security interest in its fixed assets, including its machinery, shop equipment, tools and furniture, to further secure credit extended under the WSA and the RCLA. (R. Ex. 2.)

All of these GMAC financing agreements were form contracts drafted solely by GMAC. (R. Ex. 2-3, 6-8.)

Everett Chevrolet entered into these agreements and continually increased its overall indebtedness to GMAC with the understanding that the Dealerships were only obligated to make payment to GMAC within a reasonable time after the sale of a vehicle to allow time for Everett Chevrolet to process paperwork and collect the sales proceeds from the retail customer or its bank retail financing source. (RP Vol. XI at 107-109, Vol. XV at 18-20.) This arrangement was consistent with the parties' ongoing course of performance. (*Id.*)

Indeed, there was no specified period of time within which to make payment for the sums advanced under the WSA other than the requirement that those payments be made "faithfully and promptly" after each vehicle sale. (R. Ex. 3.) During the many years in which the parties conducted themselves in this manner, GMAC never called a default or terminated financing on the basis of a purported late payment after a vehicle was sold.

C. The Wholesale Security Agreement

The WSA is a one-page form agreement, drafted by GMAC. (R. Ex. 3.) The operative language of the WSA provided that "as each vehicles is sold, or leased, we [the dealership] will, faithfully and promptly remit to you [GMAC] the amount you advance or have become obligated to advance on our behalf to the manufacturer, distributor or seller, with interest at the designated rate per annum then in effect under the GMAC Wholesale Plan." (R. Ex. 3.) The WSA does not define "sale" or "faithfully and promptly."[4]

The WSA also provides for actions that may be taken by GMAC in the event of a default. "In the event of a default in payment under and according to this agreement" or other enumerated contingencies, GMAC may repossess the floor planned vehicles. (R. Ex. 3) The term "event of default" is not defined in the WSA.

The WSA also states that the dealer shall "upon demand" pay to GMAC the amounts owed under the WSA. (R. Ex. 3.) The WSA is silent

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[4] When a dealer fails to remit proceeds of a vehicle sales to GMAC within a reasonable period of time following sale or lease of that vehicle, it is considered "out of trust." (RP Vol. I at 44:7-14.) There is no uniform period of time within which a dealer must remit proceeds under the WSA, nor is there a uniform definition of "out of trust." GMAC's own witnesses could not agree on what constituted the "sale date." According to Mr. Davoudpour, a GMAC Portfolio Manager, the "sale date" is deemed to occur on a date agreed upon in consultation with the dealer (RP Vol. VI at 88: 1-22). According, to Mr. Modrezjewski, a GMAC auditor, the "sale date" occurs upon approval of third party retail financing for the transaction (RP Vol. IV (3/23/09) at 73: 2-11.) According to Ms. Smith, a GMAC Operations Manager, the "sale date" occurs even if the third party retail financing is never approved and the deal is being unwound. (RP Vol. VIII at 112: 6-19).

as to the conditions upon which GMAC may exercise the right to demand payment or how this relates to the "faithfully and promptly" and "event of default" provisions.

The Security Agreement provides collateral security for Everett Chevrolet's inventory financing obligations under the WSA. (R. Ex. 2) GMAC could only take possession of the collateral covered by the Security Agreement upon the occurrence of an "event of default" or one of the enumerated contingencies. (R. Ex. 2) The term "event of default" is not defined in the Security Agreement.

Under these operative inventory financing agreements: (i) the dealer is required to "faithfully and promptly" remit proceeds to GMAC reasonably promptly after the "sale or lease" of a vehicle; (ii) the dealer's failure to "faithfully and promptly" pay within the meaning of the WSA constitutes a breach of the WSA; and (iii) unless cured, GMAC may give Notice of Default, "demand payment" and, repossess its collateral under the WSA and Security Agreement.[5]

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[5] This is precisely the manner in which GMAC interpreted the WSA, when it gave Notice of Default and Demand for Payment on December 19, 2008, alleging a purported breach of the "faithfully and promptly" requirement as the predicate for calling a default and demanding payment. (R. Ex. 83.)

D. GMAC Gives Notice of Default

On December 19, 2008, GMAC gave Notice of Default and Demand for Payment to Everett Chevrolet, alleging that it was in breach of the WSA because of a supposed failure on the part of Everett Chevrolet to pay for certain vehicles "upon their sale or lease" as of that date.

> You are hereby notified that Everett Chevrolet, Inc. ("Dealership") is in **default under its wholesale financing agreements** with GMAC for failure to pay GMAC $206,806.18 for vehicles upon their sale or lease.
>
> **As a result, GMAC hereby demands** that the Dealership immediately remit payment of all amounts owed to GMAC under it s wholesale credit line....

(R. Ex. 83)[6] (emphasis supplied). On the basis of that alleged default, GMAC demanded payment in full of all outstanding obligations, and in short order put Everett Chevrolet out of business. (R. Ex. 83)

The question of whether Everett Chevrolet was in breach of the "faithfully and promptly" payment terms of the WSA when GMAC called a default on that basis is hotly disputed. Everett Chevrolet contends that it was not. Everett Chevrolet asserts a claim for breach of contract and breach of implied covenant of good faith and fair dealing against GMAC

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[6] It is established that the alleged payment delay was due to the local bank closing early because of a massive blizzard on December 18, 2008, before funds could be transferred before the close of business that day. (R. Ex. 105, RP Vol. X at 161-66) The next day, without an opportunity to cure, GMAC gave Notice of Default, accelerated the entire outstanding amount of all floorplan financing for sold and unsold vehicles, and demanded payment by the close of business. (R. Ex. 83.)

for wrongfully calling a default under the "faithfully and promptly" terms of the WSA, and/or taking actions in bad faith to manufacture a default where none existed. (App. H.)

A three-week hearing was held on precisely this issue. (This hearing took place in the context of GMAC's request for replevin made at the outset of this case.) Throughout that hearing, the dominant issue was whether Everett Chevrolet was "out of trust," i.e., whether it had failed to pay GMAC for vehicles sold when payment was due.[7]

GMAC claimed the term "faithfully and promptly" required Everett Chevrolet to pay GMAC immediately upon the sale of a vehicle but GMAC granted a three-day "release period" following the sale in which to pay. (RP Vol. I at 39:1-18.) GMAC admitted that it never included the three-day payment requirement as a contract term in the WSA (RP Vol. XV at 56-57.) The evidence further showed that the "release period" varied from dealer to dealer, that the date of "sale" was negotiable, and that dealers regularly had periodic delays in payment where GMAC did not call a default under the WSA or terminate financing. (Vol. I at 52: 1-11, 127-132, 146:1-8; Vol. II at 63: 3-17; Vol.

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[7] *See* conflicting testimony of Melvin Vick, Theodore Modrzejewski, David Hoopes, Pedram Davoudpour, Michelle Smith, and John Reggans on the disputed issue of whether Everett Chevrolet was "out of trust" or on the dates alleged. (RP Vol. I at 39-156, Vol. II at 155-197, Vol. III at 32-82, Vol. IV (3/20/09) at 7-62, Vol. IV (3/23/09) at 4-158, Vol. VI at 4-105, Vol. VII at 7-73, Vol. VIII at 71-155, Vol. XII at 70-102, Vol. XIII at 7-60, Vol. XIV at 80-101.)

VI at 77-78, 86, 88, 96-98.) The GMAC witnesses who conducted the December 18 audit could not confirm that the $206,806.18 for vehicle sales as of December 18 was actually due and owing when Notice of Default was given.[8] (RP Vol. IV (3/23/09) at 99-100, 108-109, 114-116.)

In addition to these admissions from GMAC's witnesses, Everett Chevrolet presented fact testimony that, for the entirety of its relationship with GMAC, it was the regular practice of Everett Chevrolet to receive payment from the vehicle's buyer or a third-party lender providing financing for the vehicle before remitting payment to GMAC.[9]

GMAC knew how long it took for Everett Chevrolet to receive third-party funds with which to pay GMAC because GMAC, for many years, regularly conducted floor plan audits which included a review of when Everett Chevrolet received payment for the vehicles sold. (RP Vol. XI at 23:18-21) At the end of an audit, GMAC would provide Everett Chevrolet a list of vehicles and associated dollar amounts that were due to

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[8] The GMAC employee performing the December 18 audit, upon which the December 19 default was premised, admitted that he did not verify the amounts alleged owed, did not confirm the sale dates, did not confirm whether there were the alleged delays, could not supply that information to Mr. Reggans, and had not even reconciled the audit results that day. (RP Vol. IV (3/23/09) at 96-100, 108-109, 114-116.)

[9] Mr. Reggans testified that, under applicable law in the State of Washington (the Bushing Law), any dealer contract for the purchase of a vehicle can be automatically unwound within four days of execution unless bank financing for the deal is approved. "[U]ntil we have a cashable contract it's not a sale." (RP Vol. XII at 108:13-14.) He explained that, in the State of Washington, a vehicle can be off the lot for up to 72 hours, without the customer having the obligation to purchase. (*Id.* at 109:407.) "A sale is when we have a contract that we can cash and consummate the deal." (*Id.*, at 109:12-13.) Until the deal is consummated, the obligation to remit proceeds does not arise.

be paid by the dealership. (Ex. 91) No specific deadline was given. (*Id.*) When the number of delays in any audit exceeded the threshold that GMAC deemed satisfactory, GMAC would caution that increased interest charges could result. (*Id.*)

The GMAC witnesses confirmed that GMAC gave Notice of Default and Demand for Payment based on an alleged *default* under the WSA arising from Everett Chevrolet alleged breach of its obligation to "faithfully and promptly" remit the amount owed for each vehicle upon its sale or lease. (RP Vol. XIII at 7:5-25, 8:1.) None of the GMAC witnesses identified even a single instance when GMAC demanded payment in full under the WSA in the absence of an alleged default. In fact, Michelle Smith, the GMAC Operations Manager in charge of the Everett Chevrolet account, testified that GMAC's "***discretion***" to limit or terminate the dealer's floor plan financing is "***tied to the dealership's compliance with the agreements***." (RP Vol. VIII at 63:19-25 (emphasis added)).[10]

E. GMAC's After-the-Fact Theory

After GMAC gave Notice of Default based on an alleged breach of the "faithfully and promptly" provision, and ***after*** evidence of GMAC's bad faith conduct in manufacturing an alleged default was adduced at the

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[10] Ms. Smith further testified, "***Suspending or modifying the line of credit would be specific to the dealership's compliance to the agreements***." (RP Vol. VIII at 64:20-25 (emphasis added.)

hearing, GMAC claimed that it was irrelevant whether Everett Chevrolet was actually "out of trust" or in default. In closing argument, GMAC's counsel attempted to mend the defects in GMAC's Notice of Default by arguing the GMAC did not need to prove an actual default under the WSA, and might have relied upon the general "on demand" language in the WSA had it wanted to. (RP Vol. XV at 48:20-25) But GMAC could not explain why it gave Notice of Default based on a purported breach of the "faithfully and promptly" provision of the WSA, if that specific term was wholly irrelevant.

At the conclusion of the hearing, GMAC urged the court to deem the WSA a "demand note" irrespective of the fact that GMAC had given Notice of Default, as the predicate for accelerating all outstanding indebtedness and demanding payment in full. (RP Vol. XV at 36-41, 48:20-25, 49:1, 51:6-13, 55:13-25, 56-57, 96-100.)

In so doing, GMAC asked the trial court to ignore the specific terms governing payment and default. (RP Vol. XV 55:13-25, 56-57.) GMAC also asked the court to ignore the three weeks of testimony and all evidence of GMAC bad faith efforts to manufacture a default, claiming that it never needed a default in the first place.[11]

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[11] On July 31, 2008, GMAC abruptly demanded that Mr. Reggans put $800,000 into the dealership as additional working capital, and personally guaranty all outstanding GMAC financing, by October 31, 2008, threatening to call a default if he failed to do so.

(R. Ex. 1.) GMAC unilaterally demanded that Everett Chevrolet commence making $10,000 monthly principal payments on the outstanding RCLA, and imposed a new $500 audit charge, for unlimited GMAC audits. GMAC acknowledged that the WSA remained in full force and effect and requested Everett Chevrolet to continue "faithfully and promptly" remitting sales proceeds to GMAC in accordance with the terms thereof. (R. Ex. 1) Everett Chevrolet was not in default on any of its obligations at the time GMAC imposed these draconian conditions, none of which were permitted by the WSA or the RCLA.

Mr. Reggans then made a $500,000 working capital contribution to Everett Chevrolet. (RP Vol. X at 125) However, the $500,000 was promptly swept out of the dealership to pay GMAC's extra-contractual demands, rather than used to meet its operating needs. On October 16, 2008, GMAC cut off Everett Chevrolet's access to working capital by abruptly terminating the RCLA, and increased the interest rate on the full outstanding amount well above the contract rate. (R. Ex. 16.) GMAC also abruptly required curtailments, accelerating principal payments on certain floor planned vehicles, and demanding Everett Chevrolet pay for them *before* they were sold. (RP Vol. X at 147-149, R. Ex. 67-68, 74.) This "inventory reduction charge" amounted to another $170,000 monthly charge not supported by the agreements. From and after November, 2008, GMAC began conducting *daily* audits, and interfering with Everett Chevrolet's ability to conduct business. (RP Vol. II at 93-102.) On November 25, 2008, GMAC demanded that Mr. Reggans personally guaranty all outstanding dealership obligations and contribute another $300,000 by a drop dead date of November 30. (R. Ex. 9.) Each of these GMAC demands was an abrupt departure from the terms of the WSA and/or the RLCA and the historic practice of the parties.

At the same time, GMAC insisted that it be paid in full for any new vehicle sold to retail customers within *three*-days of sale, even though the WSA contains no such term. (R. Ex. 3.) GMAC had historically accepted payments from Everett Chevrolet well beyond three-days of sale, and GMAC had never called a default on that basis over the tenure of the lending relationship.

None of GMAC's unilateral demands was supported by the actual terms of the WSA or the RCLA. GMAC imposed these demands despite the fact that Everett Chevrolet was not in default.

On December 4, 2008, GMAC froze and diverted the dealership's Open GM Account (through which GM remitted payments to the dealership), in derogation of GMAC's official policies, which specifically require a dealer executed Assignment of Open Account before such action is taken. (R. Ex. 56, RP Vol. IX at 19-25.) Everett Chevrolet never signed such an Assignment. (RP Vol. IX at 20:20-22, Vol. X at 160:12-15.) After freezing these critical funds, on December 8, 2008, without notice, suspended Everett Chevrolet's floor plan financing. (R. Ex. 76.) From and after December 8, GMAC demanded payment in full, by certified funds, even though GMAC's witness recognized that it would place an enormous financial burden on the dealership. (RP Vol. I at 127:3-15.)

Everett Chevrolet urged the trial court to consider *all* the terms of the WSA, the interplay of the "faithfully and promptly" and "default" provisions of the contract, as well as the evidence that GMAC gave Notice of Default based expressly on an alleged breach of the "faithfully and promptly" payment terms of the contract. (RP Vol. XV at 69-71.) Everett Chevrolet argued that GMAC had breached the WSA by wrongfully alleging a default of the "faithfully and promptly" requirement, and giving Notice of Default thereunder, when no such default existed.

Given the weight of the evidence, the trial court found that GMAC did not simply call a "demand" note—GMAC had relied on an alleged default under the WSA as the predicate for demanding payment in full, and that the alleged default had been "manufactured" by GMAC in an apparent effort to put Everett Chevrolet out of business. (App. J at 12:2-4.) On this basis, the trial court found that GMAC had breached its obligations under the WSA, and violated its obligations of good faith and fair dealing, and denied GMAC's motion for replevin. (*Id.* at 21.)

F. Appeal from the Replevin Decision

On appeal, this Court held it was error for the trial court to consider the ultimate merits of Everett Chevrolet's breach of contract

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Then, on December 18, 2008, GMAC requested payment in full, by certified check for all vehicles sold as of that day—even though there was a raging blizzard and the dealership's bank had closed early as a result. (RP Vol. X at 161-66, R. App. B, CP 83 ¶¶9-12.)

claims against GMAC in the context of a replevin hearing. This Court reversed the trial court's order denying GMAC replevin and remanded the matter back to the trial court for further proceedings on the underlying merits of Everett Chevrolet's claims. *GMAC v. Everett Chevrolet, Inc.*, No. 63331-7-I, 2010 WL 4010113, at *1 (Wn. App. Oct. 11, 2010) (unpublished).) This Court expressly noted that it did not reach the underlying issue of whether the WSA was a "demand" note or whether the duty of good faith and fair dealing attached. *Id.* at *5n.1. Those issues were specifically left for further determination by the trial court.

G. GMAC's Motion for Summary Judgment

By motion dated November 11, 2011, GMAC moved for summary judgment dismissal of Everett Chevrolet's bad faith claims on the grounds that there were no disputed facts as to whether the WSA was a "demand note," arguing that, on that basis, GMAC had no duty of good faith and fair dealing in performance of the contract. (App. D.) In support of its Motion for Summary Judgment, GMAC submitted the entire Verbatim Report of Proceedings from the earlier three week hearing. (App. D.)

The voluminous record of that hearing contains conflicting testimony and other evidence as to the import of the WSA and related agreements, the meaning of their terms, and the historical practices of the parties. (RP Vol. I-XV) Based on that record, GMAC asked the trial

court to find there were no disputed facts on the issue of whether the WSA should be deemed a "demand note" irrespective of substantial evidence to the contrary. GMAC offered nothing new, other than the earlier replevin decision of this Court which expressly reserved these issues for determination by the trial court.

At GMAC's request, the trial court reviewed and relied upon that extensive record of trial testimony and disputed facts in rendering its decision. Among other things, the record of that hearing shows that GMAC took the position that the "relevant contract terms" are found in the related financing agreements, taken as a whole: the WSA, the amendments thereto (including the DPP amendment), the Security Agreement and the Revolving Credit Agreement. (RP Vol. XV at 36:8-11, 37:2-25.) GMAC suggested to the trial court that it should rely exclusively on the "upon demand" language in the WSA and ignore the "faithfully and promptly," "default" and "event of default" provisions of the related agreements. (*Id.* at 38-41, 56-57.) GMAC essentially asked the trial court to cherry pick the terms of the relevant contracts in determining whether the WSA was payable on demand or upon default. (*Id.* at 37-41.)

GMAC dealt in a similar fashion with the undisputed evidence that GMAC had specifically relied on an alleged *default* on December 19,

2008 when it gave Notice of Default and, on that basis, demanded payment in full. According to GMAC, it was irrelevant that GMAC demanded payment based on an alleged default, because it supposedly could have done so for any reason or no reason at all. GMAC asked the trial court to consider ***not*** what GMAC actually did, but what it ***might have*** done. (RP Vol. XV at 48:21-25, 49:1, 51:6-13, 96:12-25 through 101:1-12.)

GMAC's contentions were disputed by Everett Chevrolet, and contradicted by the weight of documentary evidence and, in some cases, by GMAC's own witnesses. (RP Vol. XV at 68:25 through 89.)

The trial court found there were disputed facts as to the meaning of the contractual terms of the WSA and related agreements, and rejected GMAC's contention that it should nullify all operative terms of those contracts other than the "upon demand" clause.

> In the instant case, there are no demand notes. The only thing that exists in this relationship is the various security agreements, where you identified the wholesale security agreements with all of its various amendments or revolving line of credit agreement. The security agreements are contracts with demand provisions, not notes.

(App. B, Ex. 1 at 49:21-25, 50:1-2.) The trial court also rejected GMAC's contention that it should ignore what GMAC actually did (demand

payment based on a specific alleged default) and speculate as to what GMAC might have done in the absence of a default.

> These inferences in favor of ECI show that GMAC injected itself into the day-to-day management of ECI and then managed it into a default position, then GMAC made its demand.

(*Id.* at 56:4-7.) Viewed in a light most favorable to the non-moving party, the trial court found there were disputed facts as to the proper interpretation of the financing agreements that precluded a judicial finding that the WSA was a simple "demand note" and, in fact, the evidence weighed heavily in favor of finding that GMAC had manipulated a technical default so that it would have a basis for demanding payment in full. (*Id.* 56:8-16.)

ARGUMENT

I. STANDARD OF REVIEW

This Court reviews "the denial of summary judgment de novo. *Wilson v. Steinbach,* 98 Wn.2d 434, 437, 656 P.2d 1030 (1982). Summary judgment is proper if pleadings, depositions, affidavits, prior trial testimony, and admissions, viewed in a light most favorable to the nonmoving party, show that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Pulcino v. Fed. Express Corp.*, 141 Wn.2d 629, 639, 9 P.3d 787 (2000), *overruled on other grounds by McClarty v. Totem Elec.*, 157 Wn.2d 214, 137 P.3d 844

(2006)." *Harrell v. Washington State ex rel. Dept. of Social Health Services*, 170 Wn. App. 386, 397, 285 P.3d 159 (2012). GMAC cannot satisfy this standard.

II. AS AN INITIAL MATTER, GMAC PUTS UNDUE WEIGHT ON THIS COURT'S ORDER GRANTING DISCRETIONARY REVIEW.

Throughout its Brief, GMAC relies heavily on various statements made by this Court in its order granting discretionary review. (*See, e.g.*, GMAC's Brief at 11-12.) This Court has previously held, however, that an order granting discretionary review does not have precedential value and is not a decision on the merits. *Fluor Enters., Inc. v. Walter Constr., Ltd.*, 141 Wn. App. 761, 771, 172 P.3d 368 (2007). Accordingly, this Court should apply the governing standard of review set forth above without giving undue weight to the order granting discretionary review.

III. THE TRIAL COURT'S DENIAL OF SUMMARY JUDGMENT DOES NOT CONTRAVENE THIS COURT'S DECISION IN *ALLIED.*

On page 15 of its Brief, with no factual finding to support it, GMAC improperly claims that it was not subject to a duty of good faith because it enjoyed and in fact exercised a purported "right to demand repayment by EC at any time for any reason" (GMAC's Brief at 15). GMAC then relies on *Allied Sheet Metal Fabricators, Inc. v. Peoples National Bank of Washington*, 10 Wn. App. 530, 518 P.2d 734 (1974), to

argue that, therefore, the trial court erred in denying GMAC's motion for summary judgment on Everett Chevrolet's bad faith claims. (GMAC's Brief at 15-17.) GMAC's argument is unavailing.

A. GMAC's Argument Is Based on the False Premise That, as a Matter of Fact, It Had a Demand Note.

By way of background, in *Allied*, the plaintiff, Allied Sheet Metal Fabricators, Inc. ("Allied") sought damages from the defendant lender, Peoples National Bank ("Peoples"), arising out of Peoples' termination of its credit relationship with Allied, specifically, (1) Peoples' calling the entire balance of Allied's indebtedness without declaring a default and (2) Peoples' calling a demand without notice. 10 Wn. App. at 532. The trial court granted summary judgment of dismissal in favor of Peoples, on the ground that there was no factual dispute that the contracts at issue were "demand notes." *Allied*, 10 Wn. App. at 534. On appeal, this Court affirmed the trial court's finding that Allied's payment obligations were governed by demand notes. *Id.* at 534-35. The Court further highlighted the following:

> Allied failed to set forth any facts which indicate a commitment by Peoples for continued financing or extension of credit and therefore the demand notes, which indicate the contrary, are controlling. Further, it is apparent that Allied's affidavits create no issue of fact, for they only show that Allied was a borrower from Peoples and that its loans were evidenced by demand promissory notes.

Id. Stated another way, the Court agreed that, as a factual matter, there was no demonstrated factual dispute that Peoples had called a demand under a simple demand note. *Id.* at 535. The Court also held that a duty of good faith does not inhere in a simple demand note. *Id.* at 536 n.5.

Here, GMAC attempts to take shelter under this *Allied* ruling, despite the fact that it did not (1) merely call a demand (2) under a simple demand note. The fatal flaw in GMAC's reliance on *Allied* is that it rests exclusively on the false premise that GMAC had a simple demand note pursuant to which it could call a demand "at any time for any reason," as it claims in its Brief. (GMAC's Brief at 15.) This is a false premise because there has ***never*** been a finding by a trier of fact that the payment obligations of Everett Chevrolet were those found in a simple demand note.[12] To the contrary, applying the correct summary judgment standard and considering the facts and reasonable inferences from the facts in favor of Everett Chevrolet, as the non-moving party, the trial court properly

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[12] GMAC's reliance on this Court's statements — in an earlier appeal in this same litigation — that the Wholesale Security Agreement and Revolving Line of Credit Agreement contain "on demand" language is misplaced and misleading. (GMAC's Brief at 15 n.45 (citing *GMAC v. Everett Chevrolet, Inc.*, No. 63331-7-I, 2010 WL 4010113, at *1 (Wn. App. Oct. 11, 2010) (unpublished)).) *First*, in that earlier appeal, this Court expressly stated that it was not deciding the merits of the parties' underlying dispute, including GMAC's arguments regarding the implications of the "on demand" language GMAC relies on here. *Id.* at *5 n.1. *Second*, the inclusion of "on demand" language is not dispositive. (R. App. A, *Bob Smith Automotive Group, Inc. v. Ally Financial, Inc.*, No. 20-C-11-007570, 4/30/2012 Memorandum Opinion and Order at 9 n.16 (Circuit Court, Talbot County, Maryland)).

found that the lending relationship between Everett Chevrolet and GMAC was ***not*** governed by a simple demand note.[13] (App. B 49:21-50:5.)

It is fantasy to argue, as GMAC does, that there is only one interpretation of Everett Chevrolet's payment obligation under the WSA agreement, that the only reasonable interpretation is the one GMAC advances, and that GMAC is entitled to summary judgment as a result. While GMAC focuses exclusively on the "on demand" clauses of the WSA and RLCA, Everett Chevrolet's position (which is the one supported by the parties' years-long lending relationship) is that its obligation to repay GMAC was *not* on demand, at any time, for any reason, but rather "faithfully and promptly" following the sale of a vehicle, as is expressly stated in the WSA as follows:

> [A]s each vehicle is sold, or leased, we [Everett Chevrolet] will, ***faithfully and promptly*** remit to you [GMAC] the amount you advanced or have become obligated to advance on our behalf to the manufacturer, distributor or seller . . . .

(R. Ex. 3 (emphasis added).) At best, "faithfully and promptly" is ambiguous, as is the interplay between that phrase and the "on demand"

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[13] This Court stated in *Allied* that "[i]t is elementary that a demand note is payable immediately on the date of its execution. The general rule is well stated in 11 Am. Jur. 2d, Bills & Notes § 286 (1963): 'An instrument is payable immediately if no time is fixed and no contingency specified upon which payment is to be made.'" *Allied*, 10 Wn. App. at 536. Here, there were contingencies upon which payment was to be made (i.e., the sale of vehicle followed by the corresponding payment to be made in a "faithful and prompt" manner). On the date of execution of the WSA, no amounts were immediately due because no funds had been advanced, no vehicles had yet been floor planned, and no vehicles had yet been sold.

clauses — both of which raise factual questions to be resolved by the trier of fact, a conclusion reached by other courts considering the *identical* contract language at issue here, as discussed below.

Thus, because GMAC was not merely calling a demand under a simple demand note, GMAC cannot prevail in its attempt to escape liability as a matter of law under *Allied* based on the false premise that it had a demand note as a matter of undisputed fact. At best, this is a factual question to be determined by the ultimate trier of fact.

B. Other Courts Have Consistently Denied GMAC's Attempts to Obtain Summary Judgment Based on the Same Argument It Rehashes Here.

In a number of jurisdictions, in similar litigation involving *identical* contractual language (i.e., contained in GMAC form agreements), courts have consistently rejected GMAC's argument that it is entitled to summary judgment on the respective dealers' contract and tort claims because it had an unfettered right to demand repayment from the dealers at any time for any reason (i.e., in the absence of an enumerated default and without any duty of good faith).[14] These decisions, discussed below, are conspicuously absent from GMAC's Brief.

First, in *Mente Chevrolet Oldsmobile, Inc. v. GMAC Inc. (now known as Ally Financial Inc.)*, 451 F. App'x 214 (3d Cir. 2011), the Third

[14] As a matter of reality, GMAC argues that it had an unfettered right to shut down the dealerships on its floorplan.

Circuit Court of Appeals affirmed the district court's conclusion that the phrase "faithfully and promptly" in the WSA is ambiguous because the phrase, which is not defined in the WSA, may reasonably be given more than one interpretation. *Id.* at 217. The Court held that, therefore, whether GMAC had breached the WSA by declaring the alleged payment default was properly submitted to the trier of fact. *Id.* The Third Circuit also held that the interaction between the WSA's "on demand" language and the "faithfully and promptly" language (identical to that herein relied on by GMAC and Everett Chevrolet, respectively) is a question of fact that also must be submitted to a trier of fact.[15] *Id.* at 217 n.3.

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[15] Based on the Third Circuit's decision in *Mente*, GMAC should be collaterally estopped from obtaining a different contract construction in this proceeding when it has previously litigated, and lost, the identical issue based on the identical form contract language at issue here.

Under Washington law, "[f]or collateral estoppel to apply, the party seeking application of the doctrine must establish that (1) the issue decided in the earlier proceeding was identical to the issue presented in the later proceeding, (2) the earlier proceeding ended in a judgment on the merits, (3) the party against whom collateral estoppel is asserted was a party to, or in privity with a party, the earlier proceeding, and (4) application of collateral estoppel does not work an injustice on the party against whom it is applied." *Christensen v. Grant County Hospital District No. 1*, 152 Wn. 2d 299, 307, 96 P.3d 957, 961 (2004).

The test for collateral estoppel is easily satisfied here. *First*, the issue of whether GMAC was entitled to judgment as a matter of law based on its "demand" theory was identical in *Mente*. *Second*, the *Mente* trial resulted in a jury verdict in favor of the plaintiff dealerships, which the Third Circuit upheld on the merits. *Third*, GMAC was a party in *Mente*. *And fourth*, GMAC will not suffer prejudice by an application of collateral estoppel here; being required to litigate a claim on the merits does not constitute "prejudice" for collateral estoppel purposes.

Second, in a similar lawsuit pending in Maryland state court, GMAC unsuccessfully moved for summary judgment on the plaintiff dealerships' claims for breach of contract and breach of implied covenant of good faith and fair dealing.[16] (R. App. A, *Bob Smith Automotive Group, Inc. v. Ally Financial, Inc.*, No. 20-C-11-007570, 4/30/2012 Memorandum Opinion and Order at 6-10 (Circuit Court, Talbot County, Maryland) (denying GMAC's motion for summary judgment on dealerships' contract and tort claims, including but not limited to claim for breach of implied covenant of good faith and fair dealing). In *Bob Smith Automotive Group*, as here, GMAC argued that it was entitled to summary judgment because it "made a simple and independent demand . . . and that such a demand was authorized by the contracts between the parties." *Id.* at 3. The court rejected this argument, concluding that: (1) whether GMAC made a simple demand was a question of fact; and (2) the relationship among the "faithfully and promptly," "upon demand," and "default" provisions was ambiguous and that such determination was to be made by the fact-finder. *Id.* at 5 n.3, 9.

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[16] Citation to this Maryland decision is proper. Although GMAC, in the context of seeking discretionary review, previously moved to strike this Maryland decision from Everett Chevrolet's supplement, it did so by improperly representing to this Court that Md. Rule 1-104(a) barred its citation. Maryland Rule 1-104(a) applies, however, only to unpublished decisions of the Maryland Court of Appeals and the Court of Special Appeals, not the Circuit Courts. *See* Md. Rule 1-104(a) ("Not authority. An unreported opinion of the Court of Appeals or Court of Special Appeals is neither precedent within the rule of stare decisis nor persuasive authority.").

Similarly, GMAC's summary judgment efforts have failed in other jurisdictions as well. *See also, e.g.*, *Weed v. Ally Financial Inc.*, No. 2:11-cv-2808, Order, Dkt. #98 ¶ 1 (E.D. Pa. Feb. 4, 2013) (denying GMAC/Ally's Motion for Judgment on the Pleadings (Dkt #60), in which GMAC sought judgment as a matter of law based on, among other things, its alleged right to call a demand at any time for any reason).

To the best of undersigned counsel's knowledge (and GMAC does not cite any authority to the contrary), a reversal of the trial court's denial of GMAC's summary judgment motion in the present case would result in this being the only case where, based on *identical* contract language (drafted by GMAC), a court concluded that GMAC was entitled to summary judgment of dismissal as a matter of law.

In any event, because there has been *no* finding by the trier of fact that GMAC was acting under a "demand note," GMAC's entire argument that the trial court erred in denying its motion for summary judgment fails.

C. In the Alternative, Even If GMAC Had a Demand Note, It Did Not in Fact Call a Simple Demand, But Instead Declared an Alleged Default.

The second false premise of GMAC's litigation position is the notion that it called a mere demand. It did not. The reality is that GMAC never issued a simple demand for repayment, as a lender would under a demand note. Instead, GMAC issued a written notice erroneously

contending that Everett Chevrolet was in default under its Wholesale Security Agreements for an alleged "failure to pay GMAC $206,806.18 for vehicles upon their sale or lease." (R. Ex. 83.) GMAC used that manufactured default as an excuse for demanding immediate payment of $6,367,294.89. (*Id.*) Because GMAC used Everett Chevrolet's purported default as the basis for its so-called "demand," GMAC is estopped from relying upon a new after-the-fact theory to obtain summary judgment on Everett Chevrolet's counterclaims.

Specifically, GMAC is estopped from claiming it had the right to call a demand, at any time for any reason, because on December 19, 2008, GMAC *actually* claimed the following:

> ***You are hereby notified that Everett Chevrolet, Inc. ("Dealership") is in default*** under its wholesale financing agreement with GMAC for failure to pay GMAC $206,806.18 for vehicles upon their sale or lease.
>
> ***As a result, GMAC*** hereby demands that the Dealership immediately remit payment of all amounts owed to GMAC under its wholesale credit line . . . .

(R. Ex. 83 (emphasis added.))

If the funds GMAC advanced under the parties' agreements were payable on demand for no reason at all, as GMAC now contends, then GMAC could have demanded payment without having to manufacture and identify an alleged default in its letter to Everett Chevrolet. It did not. GMAC's own conduct (i.e., hanging its hat on default) is inconsistent with

its argument that it could demand repayment absent default (i.e., for any reason at any time). In sum, principles of estoppel bar GMAC from asserting that it called a simple demand, when, in actuality, it declared an alleged default.[17]

On this very issue, in *Bob Smith Automotive Group*, the Maryland court found that "[a]t best . . . there remains an issue of material fact surrounding whether [GMAC's] letters were notices of default or demands for immediate payment." (R. App. A, Memorandum and Order at 5 n.3.)

At best, the same issue of material fact exists here, requiring the affirmance of the trial court's decision.

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[17] Some courts refer to this application of estoppel as the "mend the hold" doctrine. *See* Robert H. Sitkoff, *"Mend the Hold" and Erie*, 65 U. Chi. L. Rev. 1059, 1062 (1998); *Chevrolet Motor Co. v. Gladding*, 42 F.2d 440, 445 (4th Cir. 1930); *Blunt v. Wentland*, 250 Iowa 607, 615 (1959) ("Having elected to repudiate, the appellant was not entitled afterwards to mend his hold by insisting that, if he had not repudiated the contract, the purchaser would not instantly have been able to produce the required cash payment. That a party who has one ground of objection cannot afterwards mend his hold and select another, which might have been obviated, had it been insisted upon, is well settled."); *Corporation De Mercadeo Agricola v. Mellon Bank Int'l*, 608 F.2d 43, 48-49 (2d Cir. 1979) (holding that, under New York law, "when a bank offers one reason for refusing a draft on a letter of credit, and that reason is later refuted, it cannot at trial point to an entirely different reason for sustaining the refusal"); *Life Care Centers of Am., Inc. v. Charles Town Assocs. L.P.*, 79 F.3d 496, 509 (6th Cir. 1996) (applying Tennessee law) (affirming trial court's ruling precluding defendants from justifying their conduct retroactively on ground different from one proffered at time of decision to terminate underlying contract); *Bank of Taiwan, Ltd. v. Union Nat'l Bank of Philadelphia*, 1 F.2d 65, 66 (3d Cir. 1924) (applying New York and Pennsylvania law) ("By formally placing its refusal to pay on one ground, the defendant must be held to have waived all others. That plaintiff was not a bona fide holder for value was not mentioned in connection with the ground on which defendant refused to pay.").

IV. THE TRIAL COURT'S DECISION DOES NOT RUN AFOUL OF *BADGETT.*

On pages 17-18 of its Brief, GMAC argues that the trial court's denial of summary judgment was improper under *Badgett v. Security State Bank*, 116 Wn.2d 563, 807 P.2d 356 (1991).[18] GMAC's reliance on *Badgett* is also misplaced.

By way of brief background, in *Badgett*, the plaintiffs sought to recover damages from their former lender for its refusal to restructure their agricultural loans. *Id.* at 565. On appeal, the Washington Supreme Court reinstated the trial court's dismissal of the damages claims, reciting black-letter principles governing the duty of good faith and fair dealing, as follows:

> There is in every contract an implied duty of good faith and fair dealing. This duty obligates the parties to cooperate with each other so that each may obtain the full benefit of performance. . . . However, the duty of good faith does not extend to obligate a party to accept a material change in the terms of its contract. . . . Nor does it inject substantive terms into the parties' contract. Rather, it requires only that the parties perform in good faith the obligations imposed by their agreement. . . . Thus, the duty arises only in connection with terms agreed to by the parties.

Id. at 569 (citations and internal quotation marks omitted). The Court went on to conclude that the defendant lender did not have a common law duty of good faith while attempting to restructure its loan agreement with

[18] As was the case below, GMAC does not make clear to which counterclaims and affirmative defenses this argument applies.

the plaintiff borrowers because there was no contract term creating a duty to restructure such agreement. *Id.* at 570.

Here, *Badgett* presents no bar to Everett Chevrolet's claim that GMAC breached the duty of good faith when it manufactured a default on the part of Everett Chevrolet, demanded full repayment based on that alleged default, and otherwise engaged in a campaign designed to strip the dealership of working capital. That is, GMAC's conduct of which Everett Chevrolet complains stems directly from the rights and obligations expressly stated in the WSA and RLCA (i.e., the circumstances under which a default may properly be declared and the circumstances under which a default, left uncured, can lead to a demand). (*See, e.g.*, App. H, Everett Chevrolet's Answer at 10 ¶¶ 24, 26-27.) In other words, unlike the plaintiffs' claims in *Badgett*, Everett Chevrolet's bad faith claims do not attempt to create or otherwise depend on a duty not found in the parties' agreements. Instead, Everett Chevrolet alleges that GMAC engaged in bad faith in *its performance of those agreements. See Badgett*, 116 Wn.2d at 569 (the duty of good faith "requires only that the parties perform in good faith the obligations imposed by their agreement"). Specifically, Everett Chevrolet alleges that GMAC breached the "faithfully and promptly" provisions of the WSA by wrongfully calling a default based on an purported failure to pay "upon sale or lease of the

vehicles" (R. Ex. 83) when, in fact, Everett Chevrolet had been "faithfully and promptly" remitting sales proceeds to GMAC as required by the terms of the contract. GMAC had a duty of good faith to abide by the "faithfully and promptly" payment terms of the WSA, which are an integral part of the WSA and the entire floor plan financing arrangement.

Accordingly, the trial court properly denied GMAC's motion for summary judgment on Everett Chevrolet's bad faith claims.

V. GMAC'S ARGUMENT REGARDING THE TRIAL COURT'S FACTUAL INFERENCES REGARDING ITS INVOLVEMENT IN EVERETT CHEVROLET'S "MANAGEMENT AND OPERATIONS" IS A RED HERRING.

On pages 22-25 of its Brief, GMAC complains at length about the trial court's factual inferences regarding GMAC's activities in Everett Chevrolet's management and operations (App. B 56:4-7). Specifically, GMAC argues: "Claims that a commercial lender improperly interfered with a borrower's management or operations require more than a showing that the lender acted to protect its loan: the lender must act to the control the day-to-day management of the borrower." (GMAC's Brief at 23 (citing *FAMM Steel, Inc. v. Sovereign Bank*, 571 F.3d 93, 103 (1st Cir. 2009)). This argument is flawed for at least two reasons.

First, GMAC is making an argument directed to a fiduciary duty claim, which has not been asserted here. That is, the principle GMAC cites, and the decision on which GMAC relies for that principle, *FAMM Steel*, 571 F.3d 93, involve a borrower's claim that it had a fiduciary relationship with its lender. The "control" principles GMAC cites from that case related to FAMM Steel's burden under Massachusetts law to prove it had a fiduciary relationship with its lender. Here, however, Everett Chevrolet has not asserted a breach of fiduciary duty claim against GMAC and, therefore, *FAMM Steel* and GMAC's corresponding argument are inapposite.

Second, a review of the hearing transcript in which the trial court shared its reasoning reveals that its recitation of the so-called management-and operations-related factual inferences it drew in favor of Everett Chevrolet, as the non-moving party, supported its ultimate conclusion, for summary judgment purposes, that "***GMAC injected itself into the day-to-day management of ECI and then managed it into a default position***, then GMAC made its demand. It is this Court's view those efforts, at least for purposes of summary judgment, show disputed material facts with regard to GMAC's actions under the wholesale security agreement. These acts, if true as construed, indicated a violation of statutory covenant of good faith and fair

dealing, because it is obviously unfair to manage an owner's business in favor of the manager to the owner's detriment. . . ." App. B 56:4-15 (emphasis added). The trial court's point here appears to be that there were sufficient disputed material facts to demonstrate that GMAC's conduct drove Everett Chevrolet into the alleged default that GMAC claimed, in the relevant notice letter, to form the basis for its demand.

In sum, GMAC fails to demonstrate any error with regard to these factual inferences drawn by the trial court.

VI. GMAC'S REQUEST FOR A DIFFERENT JUDGE ON REMAND SHOULD BE DENIED.

Finally, GMAC requests that the Court remand this case to a different trial judge. (GMAC's Brief at 25.) Because GMAC has failed to demonstrate actual or perceived bias, its request should be denied.

At the outset, it is worth highlighting a few legal principles governing GMAC's unusual request. "There is a presumption that a trial judge properly discharged his/her official duties without bias or prejudice. The party seeking to overcome that presumption must provide specific facts establishing bias." *In re Pers. Restraint of Davis*, 152 Wn.2d 647, 692, 101 P.3d 1 (2004) ("[A] trial court is presumed to perform its functions without bias. . . . The appearance of fairness doctrine is violated only when a reasonably prudent and disinterested observer would

conclude that the parties did not obtain a fair, impartial, and neutral hearing." *State v. Kipp*, 171 Wn. App. 14, 34-35, 286 P.3d 68 (2012) (citation omitted). Moreover, "[i]t has long been regarded as normal and proper for a judge to sit in the same case upon its remand, and to sit in successive trials involving the same defendant." *Liteky v. United States*, 510 U.S. 540, 551 (1994); *see also McSherry v. City of Long Beach,* 423 F.3d 1015, 1023 (9th Cir. 2005) (considerations of judicial economy counsels in favor of same judge presiding on remand).

First, GMAC's request for a new trial judge should be denied because, to the best of Respondents' current counsel's knowledge, GMAC "never sought to disqualify the trial court judge nor asked [him] to recuse [himself]." *Magaña v. Hyundai Motor America,* 141 Wn. App. 495, 523-24, 170 P.3d 1165 (2007), *rev'd on other grounds*, 167 Wn.2d 570, 220 P.3d 191 (2009). Just as this Court in *Magaña* rejected a party's similar request for a different trial judge on remand, finding it "prudent to allow the trial court to consider [that party's] arguments in the first instance on remand," *Magaña*, 141 Wn. App. at 523-24, this Court should deny GMAC's request on appeal for a reassignment.

Second, GMAC, as the complaining party, has not satisfied its burden to "submit proof of actual or perceived bias to support an appearance of partiality claim." *Magaña*, 141 Wn. App. at 523. Without

any citation to the record, GMAC first claims bias by merely relying on Judge Lucas's alleged "refusal to apply *Allied* and *Badgett*." (GMAC's Brief at 25.) GMAC's argument can quickly be disposed of because it is well-settled that simply deciding a matter against a party is not evidence of judicial bias. *See, e.g.*, *Liteky*, 510 U.S. at 555 ("[J]udicial rulings alone almost never constitute a valid basis for a bias or partiality motion."); *State v. Kipp*, 171 Wn. App. 14, 34-35, 286 P.3d 68 (2012) (no bias found based on unfavorable legal rulings); *Gold Creek N. Ltd. P'ship v. Gold Creek Umbrella Ass'n*, 143 Wn. App. 191, 206, 177 P.3d 201 (2008) (same); *In re Pers. Restraint of Davis*, 152 Wn.2d at 692 ("Judicial rulings alone almost never constitute a valid showing of bias."); *State v. Scott*, No. 41895-9-II, 2012 Wn. App. LEXIS 1875, at *12 (Wn. App. Aug. 9, 2012) ("an error in applying the law is not evidence of judicial bias"); *see also McSherry*, 423 F.3d at 1025 (denying request for reassignment of case on remand where trial court improperly granted judgment as matter of law prior to presentation of evidence). Accordingly, based on these well-settled principles, even if Judge Lucas had erred in his treatment of *Allied* and *Badgett*, such rulings would not be evidence of judicial bias.

For its only other so-called "proof of actual or perceived bias," GMAC next claims that Judge Lucas "has, on two separate occasions, invented theories of liability, neither of which were [sic] advanced by EC,

in order to deny GMAC relief." (GMAC's Brief at 25.) In support of this argument, GMAC does not bother to provide any record citations, nor does it provide any explanation as to what theories of liability to which it is referring. It is not the obligation of this Court or Everett Chevrolet to divine what GMAC is attempting to argue. In the absence of meaningful briefing and record citations on this issue, GMAC's argument should be rejected.

Third, GMAC's sole citation to the record in support of its recusal argument is to the following statement made by Judge Lucas at the conclusion of the summary judgment hearing: "[S]o that's the way I see it. And I've seen it that way for a while." (GMAC's Brief at 27.) Even if GMAC had explained in its Brief the context in which the trial court's statement was made, such statement is hardly the type of "proof of actual or perceived bias" required to support an assignment to a different trial judge on remand. On the issue of judicial remarks, the U.S. Supreme Court has opined that "judicial remarks during the course of a trial that are critical or disapproving of, or even hostile to, counsel, the parties, or their cases, ordinarily do not support a bias or partiality challenge. They *may* do so if they reveal an opinion that derives from an extrajudicial source; and they *will* do so if they reveal such a high degree of favoritism or antagonism as to make fair judgment impossible." *Liteky*, 510 U.S. at 555

(emphasis in original). Neither possible exception applies to Judge Lucas's unremarkable statement relied on by GMAC here.

Moreover, GMAC's reliance on the authorities it cites is entirely misplaced. (GMAC's Brief at 26.) Incredibly, GMAC asserts that the instant case is "materially similar" to a sexual abuse case, *Saldivar v. Momah*, No. 34891-8-II, 2008 Wn. App. LEXIS 2116, at *4 (2008), in which this Court ordered reassignment to a different trial judge. (GMAC's Brief at 26.) In ordering reassignment, however, this Court expressly stated that "[t]he record contains unusual circumstances warranting remand for trial before a different trial judge." *Id.* at *4. Such circumstances included the trial judge: repeatedly stating her belief that the plaintiff had committed perjury; accusing the plaintiff's attorney of suborning such alleged perjury; and prejudging the credibility of plaintiff's witnesses whom she excluded and stating her belief that such testimony would be false. *Id.* at *5. Thus, contrary to GMAC's assertion, the circumstances of *Saldivar* are hardly "materially similar" to the conduct about which GMAC only vaguely complains here.[19]

[19] GMAC's reliance on *McSherry*, 423 F.3d 1015, is curious at best, because in that case, the court *denied* a request for reassignment. (*See* GMAC's Brief at 26.) And the other case relied upon by GMAC, *In re Custody of R.*, 88 Wn. App. 746, 947 P.2d 745 (1997), was superseded by statute.

Here, there is simply no evidence of actual or perceived bias on the part of Judge Lucas. To the contrary, Judge Lucas treated the parties with fairness and respect. Both sides have "won some and lost some."[20] And recently, on January 16, 2013, Judge Lucas granted — over Everett Chevrolet's objection — GMAC's motion for disbursement of funds from the court registry in a sister proceeding, *General Motors LLC v. Everett Chevrolet, Inc.*, No. 10-2-05222-2. (R. App. D, Order Granting Ally Financial Inc.'s Motion for Disbursement of Funds from Court Registry at 2.)

Finally, taken to its logical conclusion, GMAC's argument would require the assignment to a different trial judge on remand in every appeal where this Court concludes that the trial court erred. The well-settled principles discussed herein cannot be extended so far.

In sum, GMAC's failure to raise the recusal issue in the proceeding below, as well as its lack of citation and/or meaningful analysis in its Brief, demonstrate the lack of merit in GMAC's request for a new judge on remand. GMAC's request for a new trial judge should be denied.

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[20] Notably, on December 6, 2011, following an earlier appeal, GMAC took "no position" on Everett Chevrolet's motion for pre-assignment to Judge Lucas. (R. App. C, Ally's Response to Defendant Everett Chevrolet's Motion for Pre-Assignment and Transfer to Judge Lucas.) That GMAC had no objection to Judge Lucas as of December 2011 highlights the fact that GMAC simply does not like Judge Lucas's summary judgment opinion rendered one month later.

VII. GMAC MISCHARACTERIZES THE TRIAL COURT'S DISCUSSION OF THE FLEET SALES (DPP) AMENDMENT TO THE WSA

On page 18 *et seq.* of its Brief, GMAC argues that the trial court invented a never-argued breach of contract theory, identifying a provision in the Fleet Sales (DPP) Amendment that Everett Chevrolet never pled or argued as a basis for its bad faith claim. GMAC mischaracterizes, however, the trial court's factual inferences and reasoning.

What the trial court actually did was review the transcript of the three week hearing that GMAC submitted in support of its summary judgment motion, and identified a number of practices in which GMAC engaged in bad faith in performance of its own obligations. Specifically, the trial court made the following factual inferences regarding GMAC's practices, resolving any doubts in favor of the non-movant, Everett Chevrolet. First, GMAC implemented an arbitrary three-day rule pursuant to which it "required" payment following the sale of a vehicle, which was "used to limit working capital [w]hen the business most needs flexibility" and which was not uniform among dealers. (App. B at 53:8-54:3.) Second, GMAC conducted daily audits in a manner that interfered with Everett Chevrolet's employees' performance and ability to make sales. (*Id.* at 54:4-20.) Third, GMAC's simultaneous demands on the open account and payment of all credit lines within days of each other,

which, the court inferred, was intended to stop an investment from Motors Holding. (*Id.* at 54-55:6.)

As the trial court explained, it understood GMAC's argument (made during the earlier proceedings and rehashed in its motion for summary judgment) to be that the related financing and security agreements gave GMAC the authority to do more than merely finance Everett Chevrolet, those agreements permitted GMAC to take the actions complained of.[21] (The DPP amendment to the WSA states that "GMAC may take such actions as it deems appropriate to ensure and enforce compliance with this Agreement..." (R. Ex. 7).)

The court went on to conclude that the bad faith acts identified above were not permitted by related financing and security agreements, including the Fleet Sales (DPP) amendment. Thereafter, the court found that "[t]hese inferences in favor of [Everett Chevrolet] show that GMAC injected itself into the day-to-day management of [Everett Chevrolet] and then managed it into a default position, then GMAC made its demand." (*Id.* at 56:4-7.) Nowhere does the trial court state that Paragraph 8 of the DPP, which it quotes on page 50 (App. B) is the contract provision that

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[21] Among other things, the record of that hearing shows that GMAC took the position that the "relevant contract terms" are found in the related financing agreements, taken as a whole: the WSA, the amendments thereto (including the DPP amendment), the Security Agreement and the Revolving Credit Agreement. (RP Vol. XV at 36:8-11, 37:2-25.) In closing, GMAC argued that it did not act in bad faith because these agreements authorized GMAC to undertake the actions complained of. (RP Vol. XV at 35-68.)

provides the basis for Everett Chevrolet's breach of contract claim. (Indeed, the provision that ultimately provides the basis for Everett Chevrolet's breach of contract claim is the "faithfully and promptly" clause explained above in Point IV and in the Counter-Statement of Facts.)

Thus, although GMAC now contends that the trial court concocted some unarticulated theory to arrive at a preferred result, an honest review of the hearing transcript does not support GMAC's argument. Instead, the transcript reveals that the trial court, in its from-the-bench explanation of its ruling, concluded that GMAC was not entitled as a matter of law to judgment on Everett Chevrolet's bad faith claims.

VIII. GMAC HAS ABANDONED ITS ARGUMENT THAT IT IS ENTITLED TO SUMMARY JUDGMENT ON EVERETT CHEVROLET'S CALIMS FOR TORTIOUS INTERFERENCE.

Finally, GMAC evidently does not seek appellate review of the trial court's order insofar as it denied GMAC's motion for summary judgment with respect to Everett Chevrolet's tortious interference claim. Accordingly, GMAC has abandoned and/or waived any such argument, and the trial court's order with respect to Everett Chevrolet's tortious interference claim must stand.

CONCLUSION

For the foregoing reasons, Everett Chevrolet respectfully submits that the trial court's order denying GMAC's Motion for Summary Judgment to Dismiss Everett Chevrolet Inc.'s Bad Faith Claims must be affirmed and the case remanded for further proceedings.

Dated this 29th day of April, 2013.

GRAHAM & DUNN PC

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APPENDIX INDEX

CERTIFICATE OF SERVICE

I hereby certify that I caused a true, correct and complete copy of the foregoing document to be served by the method indicated below, and addressed to each of the following parties:

John E. Glowney STOEL RIVES LLP 600 University Street, Suite 3600 Seattle, WA 98101 jeglowney@stoel.com *Attorneys for GMAC, n/k/a Ally Financial, Inc.*	____ X ____ ____ X	U.S. Mail Hand Delivered Overnight Mail Facsimile Transmission Email
Eleanor M. Roman, *Admitted Pro Hac Vice* Donald H. Cram, *Admitted Pro Hac Vice* Duane M. Geck, *Admitted Pro Hac Vice* SEVERSON & WERSON A Professional Corporation One Embarcadero Center, Suite 2600 San Francisco, CA 94111 emr@severson.com dhc@severson.com dmg@severson.com *Co-Counsel for GMAC, n/k/a Ally Financial, Inc.*	X ____ ____ ____ X	U.S. Mail Hand Delivered Overnight Mail Facsimile Transmission Email
Ingrid L. Moll, *Admitted Pro Hac Vice* MOTLEY RICE LLC 20 Church St., 17th Floor Hartford, CT 06103 imoll@motleyrice.com	X ____ ____ ____ X	U.S. Mail Hand Delivered Overnight Mail Facsimile Transmission Email
Ellen R. Werther, *Admitted Pro Hac Vice* RESSLER & RESSLER 48 Wall Street New York, NY 1005 ewerther@resslerlaw.com	X ____ ____ ____ X	U.S. Mail Hand Delivered Overnight Mail Facsimile Transmission Email

Dated this 29th day of April, 2013.

Susan Allan

Susan Allan, Legal Assistant

R. APP. A

BOB SMITH AUTOMOTIVE GROUP, INC., et al.,	*	IN THE
Plaintiff	*	CIRCUIT COURT
v.	*	FOR
ALLY FINANCIAL, INC.,	*	TALBOT COUNTY
Defendant	*	Case: 20-C-11-007570

MEMORANDUM OPINION AND ORDER

The above matter having come before this Court on April 20, 2012 on Defendant Ally Financial's Motion for Summary Judgment, and, having considered the arguments of the parties and having reviewed the contents of the record, this Court issues the following memorandum opinion and order.

BACKGROUND

Plaintiffs Bob Smith Automotive Group, Inc., ("Bob Smith Automotive") and Giant GMC, Inc., ("Giant GMC") (collectively "the Dealerships") at one point operated car dealerships in Easton, Talbot County, Maryland and Federalsburg, Caroline County, Maryland. During the course of their operation, the Dealerships entered into various finance-related agreements and signed various promissory notes[1] with General Motors Acceptance Corporation (trading as "GMAC"). The finance-related agreements include the following:[2]

Agreements between GMAC and Bob Smith Automotive:

1) Wholesale Security Agreement, dated June 29, 1993
2) Agreement Amending Wholesale Security Agreement and Conditionally Authorizing the Sale of New Floor Plan Vehicles on a Delayed Payment Privilege Basis, dated June 29, 1993
3) Loan Agreement, dated June 29, 1993
4) Security Agreement, dated June 30, 1993
5) Amendment to Wholesale Security Agreement, dated June 10, 1996

[1] The record appears to contain at least nine different promissory notes.
[2] There is no real dispute that GMAC drafted these agreements.

6) Agreement Amending the Wholesale Security Agreement to Initiate the Finance of Certain New Vehicles Acquired from Dealers, dated February 9, 2000
7) Agreement Amending the Wholesale Security Agreement to Permit Use of Floorplanned Vehicles as Demonstrators, dated January 15, 2002
8) Cross-Default and Cross-Collateralization Agreement, dated October 14, 2004
9) Cross-Default and Cross-Collateralization Agreement, dated June 16, 2005
10) Revolving Line of Credit Agreement, dated May 9, 2007

Agreements between GMAC and Giant GMC:

1) Wholesale Security Agreement, dated October 14, 2004
2) Agreement Amending Wholesale Security Agreement and Conditionally Authorizing the Sale of New Floor Plan Vehicles on a Delayed Payment Privilege Basis, dated October 14, 2004
3) Amendment to Wholesale Security Agreement, dated October 14, 2004
4) Agreement Amending the Wholesale Security Agreement to Permit use of Floorplanned Vehicles as Demonstrators, dated October 14, 2004
5) Agreement Amending the Wholesale Security Agreement to Initiate the Finance of Certain New Vehicles Acquired from Dealers, dated October 14, 2004
6) Loan Agreement, dated October 14, 2004
7) Cross-Default and Cross-Collateralization Agreement, dated October 14, 2004
8) Cross-Default and Cross-Collateralization Agreement, dated June 16, 2005
9) General Security Agreement, dated May 9, 2007

Additionally, on October 14, 2004 and June 16, 2005, William Lee Denny ("Mr. Denny"), the majority owner and President of Bob Smith Automotive and Giant GMC, signed two personal Guaranties for debts owed to GMAC by the Dealerships.

During the early months of 2009, for reasons that remain unclear to this Court at this stage in the proceeding, the working relationship between GMAC, on one hand, and Bob Smith Automotive, Giant GMC, and Mr. Denny, on the other, fell apart. Around this time or soon thereafter, GMAC seized vehicles, accounts, and other assets from the Dealerships that were held as collateral under certain of the above-referenced finance-related agreements. Subsequently, on March 24, 2009, Bob Smith Automotive and Giant GMC both signed Power of Attorney and Voluntary Surrender of Collateral Agreements with GMAC. This suit followed.

PROCEDURAL HISTORY

On April 11, 2011, Bob Smith Automotive, Giant GMC, and Mr. Denny (collectively the "Plaintiffs"), filed a six count complaint in this Court alleging: 1&2) Breach of Contract and Breach of Implied Covenant of Good Faith and Fair Dealing (two counts), 3) Intentional Misrepresentation, 4) Intentional Concealment or Non-Disclosure, 5) Negligent Misrepresentation and Negligent Concealment, and 6) Conversion.

On January 17, 2012, Defendant Ally Financial, as successor-in-interest to the entities GMAC LLC, General Motors Acceptance Corporation, and GMAC Financial Services Corporation, filed a Motion for Summary Judgment as to all six counts contained in the complaint. Plaintiffs filed their Opposition on February 21, 2012. Ally Financial filed a Reply on March 20, 2012. Plaintiffs filed a Surreply on April 12, 2012.

On March 30, 2012, Plaintiffs filed a Motion to Compel Third Party Discovery. On April 17, 2012, Ally Financial filed their Response to this motion.

A hearing was held on the above matters on April 20, 2012. The parties were represented by counsel.

OUTSTANDING ISSUES

The issues for this Court to address, as identified by the parties, are:

1) Defendant Ally Financial's Motion for Summary Judgment; and
2) Plaintiffs' Motion to Compel Third Party Discovery.

DISCUSSION

Ally Financial's Motion for Summary Judgment is best addressed divided into three components: 1) the contract claims, 2) the conversion claim, and 3) the remaining tort claims. This Court will respond to said Motion in this fashion.

I. Motion for Summary Judgment on Counts I and II—Contract Claims

Defendant Ally Financial argues that reference solely to the operative loan documents shows that summary judgment should be granted in its favor on the Plaintiffs' claims for breach of contract and breach of implied covenant of good faith and fair dealing. Specifically, Ally Financial argues, in essence, that it did not breach any contract because it made a simple and independent demand for immediate payment upon Bob Smith Automotive and Giant GMC, and that such a demand was authorized by the contracts between the parties. Ally Financial additionally argues that the covenant of good faith and fair dealing does not apply to these facts.

For the reasons stated below, this Court finds that there remain disputed material facts that preclude summary judgment on these claims.

1. Did Ally Financial make a demand for immediate payment?

Ally Financial argues that a single document, a letter sent to both Bob Smith Automotive and Giant GMC on January 9, 2009, constitutes its demand for immediate repayment. Specifically, Ally Financial points to the text of the letters ("DEMAND IS HEREBY MADE" and "This Demand for Payment") as evidence that the letters were, in fact, demands for immediate repayment. The January 9, 2009 letters state, in pertinent part:

> Re: Demand for Immediate Payment and Surrender of Collateral
>
> Dear Mr. Denny
>
> As you know, the dealership is in default of its obligations to GMAC by failing to promptly pay the principal amount financed by GMAC for certain motor vehicles which the dealership has sold. This situation was discovered by us on January 8, 2009.
>
> The dealership's failure to fully cure this default or demonstrate any realistic alternative for solving its longstanding financial problems is unacceptable to GMAC. Nor are we willing to loan the dealership funds in order to solve this serious problem. Accordingly, DEMAND IS HEREBY MADE UPON YOU FOR IMMEDIATE PAYMENT OF ALL OBLIGATIONS IN THE TOTAL AMOUNT OF $2,188,511.84…
>
> …
>
> This Demand for Payment is made without prejudice to any other amounts now or hereafter owing by the dealership to GMAC, including but not limited to, interest accruing after the date set forth above, and obligations arising under the GMAC Wholesale Plan and other financing agreements.
>
> If you fail to make payment as demanded by the close of business on January 12, 2009, GMAC may take possession of all dealership property in which it has a security interest, including but not limited to, all of the motor vehicles financed by GMAC for the dealership…
>
> Nothing in this letter constitutes or should be construed as a waiver of any of GMAC's rights or remedies under applicable law and your dealership's agreements with GMAC, all of which are expressly reserved. GMAC's forbearance from immediately demanding full payment of your wholesale credit line indebtedness is expressly conditioned on your faithful observance of all of the provisions of the Wholesale Security Agreement and other agreements with GMAC. In all events, your dealership's wholesale credit line is subject to the agreements under which it was extended. It is a discretionary credit line that is subject to modification, suspension, and termination at GMAC's election in its sole, absolute discretion. (emphasis in original).

Plaintiffs argue that these letters were notices of default, and not independent demand letters. In support of this view, Plaintiffs argue that the letters are clearly premised upon an alleged default by the Dealerships. As the letters state, "As you know, the dealership is in default…" The letters also reference the dealerships' "failure to fully cure this default" as a reason for their issuance. This suggests, as Plaintiffs argue, that the catalyst for sending these letters was an alleged default and not, as Ally Financial argues, reasons independent of the default. Moreover, Plaintiffs accurately point out that Ally Financial's position in this and other litigation involving these same documents supports the claim that these letters were notices of default. For example, in Ally Financial's Memorandum in Support of its Motion to Dismiss Complaint, filed in this matter on July 8, 2011, Ally Financial refers to the January 9, 2009 letters as notices of default.[3] As the Motion iterates:

> Plaintiffs' Complaint…provides the Court with copies of GMAC's January 9, 2009 letters noticing the "default" to both Dealerships.[4]
>
> …
>
> On or about January 9, 2009, an Event of Default or **general default** occurred with regard to Defendant's **Obligations** to Plaintiff as…detailed…in Notice of Default issued to Defendant…on…January 9, 2009 ("Notice"), **which said general default or event(s) of default remain unpaid, unsatisfied, or uncured**…(emphasis in original).[5]
>
> …
>
> Again, GMAC's Complaints filed February 5, 2009, are premised on the same Notices of Default and Guarantys…[6]

Additionally, in *GMAC v. William Lee Denny*, case number 20-C-09-006639, a case referenced by Ally Financial in its Motion to Dismiss[7] and which involved many of the same documents at issue in this proceeding, Ally Financial refers to the January 9, 2009 letters as notices of default.

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[3] This Court notes that Ally Financial referred to these letters as "demand" letters as well, albeit demand letters with an opportunity to cure. *See, e.g., Ally Financial's Memorandum in Support of its Motion to Dismiss Complaint*, at page 3 ("Twenty seven (27) days after the January 9, 2009, demand letter, and without effective resolution by Dealerships or Denny of the longstanding financial problems, and the state of general default of their "Obligations" remaining uncured or without a realistic solution thereto having been presented by Plaintiffs, GMAC exercised the rights granted to it by Dealerships and Denny under those Agreements."). At best, this observation exemplifies that there remains an issue of material fact surrounding whether the January 9, 2009 letters were notices of default or demands for immediate payment.

[4] *Ally Financial's Memorandum in Support of its Motion to Dismiss Complaint*, at page 3.

[5] *Ally Financial's Memorandum in Support of its Motion to Dismiss Complaint*, at page 4.

[6] *Ally Financial's Memorandum in Support of its Motion to Dismiss Complaint*, at page 10.

[7] Many of the pleadings from this prior matter were, in fact, entered into the record by Ally Financial as exhibits attached to their Motion to Dismiss. This Court has herein referred only to the pleadings entered into the record.

For example, in its Answer to Amended Motion to Vacate or Open and Modify, Ally Financial stated:

> Denny was directly involved in the actions which occurred at the Dealerships that led to being declared in default by GMAC on or about January 9, 2009.[8]
>
> ...
>
> Twenty-seven days passed between the delivery of the Notice of Default to Denny, January 9, 2009, and the date upon which Judgment herein was sought, February 5, 2009. During that period, Denny failed to cure the deficiencies and accruing defaults which occurred thereafter and remained uncured for a period of more than 10 days.[9]

Taken alone, Ally Financial's inability to consistently portray the January 9, 2009 letters as either notices of default or demand letters shows that there remain factual disputes concerning the true nature of these letters. Additionally, that the letters appear to be premised upon an alleged default,[10] that the letters suggest that the Dealerships had a right to cure said default (yet the letters were issued one day after the discovery of the alleged default),[11] and that the language used in the letters is not fully consistent with Ally Financial's claim that these were independent, immediate demands for repayment,[12] all show that there remain factual issues here that are for a fact-finder to ultimately determine.[13]

2. Did Defendant have the right to make a demand for immediate payment?

Assuming, *arguendo*, that the January 9, 2009 letters constituted a demand for immediate payment, Ally Financial argues that four primary agreements establish that it had a right to make such a demand. Specifically, Ally Financial argues that the "on demand" provisions in the 1)

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[8] *GMAC v. William Lee Denny*, case number 20-C-09-006639, *GMAC's Answer to Amended Motion to Vacate or Open and Modify*, at page 3, paragraph 6.

[9] *GMAC v. William Lee Denny*, case number 20-C-09-006639, *GMAC's Answer to Amended Motion to Vacate or Open and Modify*, at page 6, paragraph 8.

[10] *See also Ally Financial's Memorandum of Law in Support of its Motion to Dismiss Complaint*, at page 4 ("By its letter dated January 9, 2009, GMAC exercised its rights to call its Loans and demand payment of all outstanding indebtedness due from the Dealerships upon default represented by recent out of trust sales events and the Dealerships' longstanding financial problems.").

[11] Ally Financial's previous pleadings make multiple references to this cure period. *See Ally Financial's Memorandum of Law in Support of its Motion to Dismiss Complaint*, at page 3; *GMAC v. William Lee Denny*, case number 20-C-09-006639, *GMAC's Answer to Amended Motion to Vacate or Open and Modify*, at pages 3-6.

[12] For example, in the last paragraph, the language used in the letters appears to be inconsistent with the notion that GMAC was making an immediate demand of "all obligations." The letters state: "*GMAC's forbearance from immediately demanding full payment of your wholesale credit line indebtedness* is expressly conditioned on your faithful observance of all of the provisions of the Wholesale Security Agreement and other agreements with GMAC." (emphasis added).

[13] It is worth noting that in *Mente Chevrolet Oldsmobile v. GMAC* (3rd Cir. 2011) (unpublished), GMAC issued a very similar, if not identical, letter to the Mente dealership.

Promissory Notes, 2) Loan Agreements, 3) Revolving Line of Credit, and 4) Cross-Default and Cross-Collateralization Agreements all show that Ally Financial had a contractual right to demand immediate payment from the Dealerships, for any reason or no reason at all.[14] Additionally, Ally Financial argues that the Wholesale Security Agreements ("WSA") are irrelevant in this determination, or, alternatively, that the Wholesale Security Agreements are trumped by the "on demand" provisions of certain other agreements to any extent that they are unclear or inconsistent with this position. In this respect, the Promissory Notes state, for example, in relevant part:

> **ON DEMAND**, for value received, the undersigned promise(s) to pay to the order of **GENERAL MOTORS ACCEPTANCE CORPORATION** ... [insert monetary amount] (emphasis in original).

The Loan Agreements state, in relevant part:

> The Debtor has delivered to the Secured Party a demand promissory note of even date herewith..., which demand promissory note shall bear interest on each advance hereunder...The Debtor shall repay to the Secured Party the amount of each such advance, plus interest as aforesaid, as provided in said security agreements or mortgages, it being understood and agreed that any provision for installments therein shall not in any manner modify the demand promissory note referred to herein.

The Revolving Line of Credit states, in relevant part:

> (d) Repayment: In addition to any other amounts Borrower is obligated to pay GMAC as herein set forth, Borrower will promptly repay to GMAC the Credit Line Advances plus any accrued interest, as follows: ...(C) if demanded, the full amount of the Credit Line Advances plus accrued interest must be paid immediately upon demand by GMAC.

The Cross-Default and Cross-Collateralization Agreements state, in relevant part:

> R.3 Whereas, it is the intention of DENNY, BOB SMITH GROUP, GIANT GMC, and Lender that a default by Denny or Dealerships under any Obligation shall constitute a default under all Obligations.
>
> ...
>
> 3. Cross-Default of Non-Demand Obligations: In addition to and not in substitution of any provisions of the Loan Documents or other instrument

[14] Ally Financial cites *Coffee v. General Motors Acceptance Corporation*, 5 F.Supp. 2d 1365, 1377 (1998) which had similar "on demand" provisions at issue, in support of this position. The *Coffee* court noted: "Thus, while GMAC was entitled to demand payment of the *advances* it had made pursuant to the line of credit at any time, it could not *terminate* the line of credit in the absence of one of the specific events of default enumerated in paragraph 3 of the Loan Agreement." *Id.*

> evidencing the Subject Obligation or any of the Obligations and Security Documents now in effect or hereafter executed, it is agreed that an Event of Default as defined in any such Agreement evidencing an Obligation, or a general default thereof, shall, at Lender's election, be considered and shall constitute an Event of Default or general default under any and all of the Obligations and Loan Documents including Security Documents. *Any demand made upon any of the Obligors for payment of a demand Obligation* or any default of any of the Obligors in the payment or performance of a non-demand Obligation shall constitute a default under each of the Loan Documents creating, evidencing, securing, guaranteeing, or otherwise relating to a non-demand Obligation and Lender shall have all of the rights and remedies upon default provided for in any such Obligation, Security Agreement or by this Agreement. (emphasis added).

These provisions, Ally Financial argues, show that, regardless of what the Wholesale Security Agreements state, Ally Financial had a right to demand immediate repayment. Citing the Cross-Default and Cross-Collateralization Agreements, Ally Financial argues that any such demand automatically equates to a default under all agreements, no matter the reason for the demand, and that, therefore, it had a right to exercise its authority under the contracts as though a default had, indeed, occurred.

Plaintiffs, in response, argue that the Wholesale Security Agreement is the key agreement at issue in this proceeding. In support of this view, Plaintiffs point out that the January 9, 2009 letters reference only the Wholesale Security Agreement. Specifically, and citing the default language in the January 9 letters, Plaintiffs argue that Ally Financial had authority under the WSA to make immediate demand for payment only upon a default by the Dealerships (i.e. not paying for sold or leased vehicles faithfully and promptly), and that, by referring to an alleged default in the letters, Ally Financial acted in accordance with this same interpretation.[15] Three specific provisions in the Wholesale Security Agreements are relevant to this argument. First, the WSA contains the following "on demand" language:

> We agree **upon demand** to pay to GMAC the amount it advances or is obligated to advance to the manufacturer or distributor for each vehicle with Interest at the rate per annum designated by GMAC from time to time and then in force under the GMAC Wholesale Plan. (emphasis added)

Second, the WSA states:

[15] Plaintiffs argue that, under the agreements, the Dealerships were not in default of any loan obligations at the time of the January 9, 2009 letters. Ally Financial disagrees.

> We understand that we may sell and lease the vehicles at retail in the ordinary course of business. We further agree that as each vehicle is sold, or leased, we will, **faithfully and promptly** remit to you the amount you advanced or have become obligated to advance on our behalf to the manufacturer, distributor or seller, with interest at the designated rate per annum then in effect under the GMAC Wholesale Plan. The GMAC Wholesale Plan is hereby incorporated by reference. (emphasis added).

Further, the WSA states:

> In the event we **default** in payment under and according to this agreement, or in due performance or compliance with any of the terms and conditions hereof, or in the event of a proceeding in bankruptcy, insolvency or receivership instituted by or against us or our property, or in the event that GMAC deems itself insecure or said vehicles are in danger of misuse, loss, seizure or confiscation, GMAC may take immediate possession of said vehicles, without demand or further notice and without legal process…(emphasis added).

Plaintiffs argue that the relationship between these provisions is ambiguous.[16] This Court agrees. It is unclear when looking within the four-corners of the Wholesale Security Agreements as to whether the "on demand" provision in the WSA is independent of the "faithfully and promptly" and default provisions, or whether the three provisions are related in the ways alleged by the Plaintiffs. Such ambiguity is for a fact-finder to determine.[17] There is additional ambiguity as to how the agreements (more specifically, the "on demand" provisions within those agreements) referenced by Ally Financial relate to the above-referenced provisions contained in the WSA. The January 9, 2009 letters suggest, at least, that the alleged default was premised upon the Dealerships' failure to "promptly pay" amounts due "for certain motor vehicles which the dealership has sold" and that the issuance of the letters was prompted by this alleged default. Whether this is an accurate interpretation of the January 9 letters, and, if so, how this relates to the "on demand" provisions contained in the other documents is not clear either on the face of

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[16] The real issue here is under what circumstances Ally Financial had authority under the agreements to make immediate demand. Ally Financial argues repeatedly that the contracts allow them to request payment "upon demand." Whether this upon demand authority was conditional, however, is disputed by the Plaintiffs. Therefore, that the agreements contain "on demand" language is not dispositive of the issue.

[17] This view was echoed by the United States Court of Appeals for the Third Circuit in *Mente*, *supra*. *Mente* involved a similar, if not identical, Wholesale Security Agreement that included a similar "on demand" provision, a "faithfully and promptly" provision, and a default provision. The Court in *Mente* found ambiguity in this relationship, and submitted the question to the fact-finder (a jury, in that case). The Court approved this submission in a footnote in the appellate opinion, stating: "GMAC argues that it was entitled to demand immediate payment as a virtue of another clause in the Financing Agreement. The interaction between that clause and the "faithfully and promptly" clause, however, is a question of fact that was properly submitted to the jury." *Mente*, at page 5.

the documents, from the contents of the January 9 letters, or in the undisputed record. Therefore, this is another question that is properly submitted to the fact-finder.[18]

Alternatively, Ally Financial argues that the Dealerships admitted that they were in default when they signed Power of Attorney and Voluntary Surrender of Collateral Agreements on March 24, 2009. Plaintiffs, however, argue that they signed these agreements under duress, and that said agreements are, therefore, voidable. Since there are clearly material factual disputes as to this duress claim, said agreements cannot act to establish a default at this juncture.

3. The Implied Covenant of Good Faith and Fair Dealing

Although this Court has adequately established that material factual disputes remain with respect to the Plaintiffs' breach of contract claims, it will still address Ally Financial's claim that the implied covenant of good faith and fair dealing ("the Covenant") does not apply to these facts. In support of its argument, Ally Financial relies primarily on two Maryland sources. First, Ally Financial cites *Parker v. Columbia Bank*, 91 Md.App. 346, 366 (1992) for the proposition that the Covenant "does not obligate a lender to take affirmative actions that the lender is clearly not required to take under its loan documents." Here, however, the Plaintiffs are not alleging that Ally Financial should have taken any affirmative steps. In fact, Plaintiffs are arguing the opposite—that Ally Financial should not have acted in certain ways. Secondly, Ally Financial cites the Official Comment to *Maryland Code*, Commercial Law Article § 1-208 as persuasive authority for the proposition that the Covenant "has no application to demand instruments or obligations whose very nature permits call at any time with or without reason." However, even if the Official Comment was law in Maryland, which it clearly is not, there are still material factual disputes as to whether the agreements in this matter are simple demand instruments that can be recalled at any time with or without reason, or whether the agreements are more complex arrangements. Therefore, Ally Financial's arguments on this point fail to establish that summary judgment is appropriate here.

4. Statute of Frauds

This Court rejects as irrelevant Ally Financial's claim that the statute of frauds, *Maryland Code*, Courts and Judicial Proceedings Article § 5-408, additionally bars Plaintiffs' contract

[18] Not only do the parties materially dispute which provisions and agreements are central to this dispute, they also dispute whether these agreements should be interpreted in concert with one another, whether only some of the agreements should be interpreted in concert with one another and, overall, the relationship between one agreement to another, including the interaction between the Wholesale Security Agreement and its various amendments.

claims. Plaintiffs are not herein attempting to enforce an oral promise or modify the existing contracts via oral statements or agreements. Instead, Plaintiffs have represented that they are simply trying to enforce the written agreements between the parties. As such, the statute of frauds does not bar the Plaintiffs' claims in this proceeding.

II. Motion for Summary Judgment on Count VI- The Conversion Claim

There appears to be no real dispute, at least for the purposes of summary judgment, that once a default is established, GMAC had a right to seize collateral under certain of the agreements between the parties. In support of this position, Ally Financial cites various agreements, including the following provision in the Wholesale Security Agreements:

> In the event we **default** in payment under and according to this agreement, or in due performance or compliance with any of the terms and conditions hereof, or in the event of a proceeding in bankruptcy, insolvency or receivership instituted by or against us or our property, or in the event that GMAC deems itself insecure or said vehicles are in danger of misuse, loss, seizure or confiscation, GMAC may take immediate possession of said vehicles, without demand or further notice and without legal process; for the purpose and in furtherance thereof, we shall, if GMAC so requests, assemble said vehicles and make them available to GMAC at a reasonable convenient place designated by it, and GMAC shall have the right, and we hereby authorize and empower GMAC, to enter upon the premises wherever said vehicles may be and remove same. (emphasis added).

Ally Financial additionally cites to the Powers of Attorney and Voluntary Surrender of Collateral Agreements that were signed by the Dealerships on March 24, 2009. The Voluntary Surrender of Collateral Agreements read, in relevant part:

> [Dealer] acknowledges that it is indebted to GMAC ("GMAC") pursuant to certain wholesale floorplan financing agreements and other financing accommodations, (the "indebtedness"), as evidenced by various security agreements and promissory notes (the "Agreements" and "Notes"). Dealer has defaulted under its obligations to repay the indebtedness and desires to surrender immediate possession of all "Collateral."
>
> Dealer agrees to voluntarily surrender possession of the Collateral to GMAC. In this connection, Dealer authorizes and grants GMAC privileges to Immediately hereafter enter upon all business premises of Dealer to take possession of and remove from those premises, any and all Collateral in which GMAC holds or claims a security interest.
>
> Neither GMAC nor Dealer waive or relinquish any rights, remedies or benefits conferred upon GMAC or Dealer pursuant to the Agreements and Notes, or applicable law.

This Court finds, however, that there remain material factual issues here that preclude summary judgment. First, as indicated above, there is a factual dispute as to whether the Dealerships defaulted on obligations under the agreements. There are additional factual disputes as to whether GMAC made a demand for payment, and whether the Powers of Attorney and Voluntary Surrender of Collateral Agreements were signed under economic duress,[19] among other factual issues. Ally Financial also ignores the Plaintiffs' claim that, even if GMAC was able, under the agreements, to seize the collateral, it did so in a commercially unreasonable manner. Ultimately, it is clear that there remain genuine issues of material fact as to the Plaintiffs' conversion claim, and, thus, summary judgment is not herein appropriate.

III. Motion for Summary Judgment on Counts III, IV, and V—The Remaining Tort Claims

In counts III, IV, and V, the Plaintiffs bring claims for intentional misrepresentation, intentional concealment or non-disclosure, and negligent misrepresentation and negligent concealment. Ally Financial argues that it should be granted summary judgment on all of these claims. For the reasons stated below, this Court finds that genuine issues of material fact remain as to these claims, and that, therefore, summary judgment is not warranted.

1. Statute of Frauds

First, Ally Financial argues that the above claims are barred by the statute of frauds. However, once again, it appears clear that the Plaintiffs are not trying to recover based on a verbal promise to lend or borrow, and are not trying to enforce a verbal modification of any of the finance-related agreements. Therefore, the statute of frauds does not bar Plaintiffs' tort claims.[20]

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[19] As Plaintiffs also point out, the language used in the Voluntary Surrender of Collateral Agreements does not align with the alleged facts. The Agreements suggest that GMAC is "hereafter" authorized to enter the premises and seize collateral. However, Plaintiffs allege, and there appears to be no real dispute, that the collateral was seized prior to the signing of these agreements.

[20] *See also Pease v. Wachovia SBA Lending*, 416 Md. 211, 231 (2010) ("We hold that the General Assembly did not intend the Maryland Credit Agreement Act to apply to a borrower asserting tort counterclaims against a lender, even where the asserted factual underpinnings of the tort or torts derive from transactions relating to the execution of the credit agreement."). The Court explained that, "In 1989, at the time the legislation was enacted, 'multimillion dollar lawsuits were being filed and recovery was being made based on alleged verbal promises to lend and based on modifications of existing loan agreements. (citations omitted). Thus, the purpose of the bill was to 'protect lenders against claims that the lender made a verbal promise to loan money and then refused to do so, or that the lender verbally agreed to extend the terms of a loan. (citations omitted). We interpret the plain language and the legislative history of the Maryland Credit Agreement Act consistently to mean that a court should only engage the statute of frauds portion of the Act when, either through affirmative claim or defense, a commercial borrower or lender either

2. Justified Reliance

Next, Ally Financial argues that the Plaintiffs cannot prove the justifiable or reasonable reliance element of the above tort claims. Specifically, they argue that any reliance was contrary to and contradicted the terms of the agreements, and is, therefore, unreasonable or not justified at law.[21] Plaintiffs respond that the alleged reliance is not contrary to or in contradiction of the agreements, but instead acts to illuminate the express terms of said contracts.

It is clear that the underlying facts with respect to the justified or reasonable reliance requirement remain in dispute between the parties. Viewing the alleged facts in the light most favorable to the non-moving party, the Plaintiffs have sufficiently plead facts that would establish reliance that was reasonable or justified, in a way that is not contrary to or contradictory of the terms of the agreements between the parties.

3. Economic Loss Doctrine

Finally, Ally Financial argues that the economic loss doctrine bars the Plaintiffs' tort claims. Specifically, Ally Financial argues that "because Plaintiffs' tort claims arise from the parties' contractual relationship and because Plaintiffs' contract claims are not viable, under Maryland law they have no tort claims either."[22] However, it is clear to this Court that the economic loss doctrine does not provide a basis for summary judgment herein for two primary reasons. First, since there remain material disputed facts as to the breach of contract claims, the economic loss doctrine cannot act to bar the Plaintiffs' tort claims at this juncture. Secondly, the majority of the cases cited by Ally Financial in support of its argument involve negligent breach of contract claims. *See Yousef v. Trustbank Savings*, 81 Md.App. 527, 536 (1990); *Heckrotte v. Riddle*, 224 Md. 591, 595-96 (1961); *Board of Education v. Plymouth Rubber*, 82 Md.App. 9, 31 (1990). With such a claim, there exists no tort duty that is independent of a duty arising under the contract. This is so because the alleged tort is a negligent breach. Thus, if it is found that the contract has not been breached, there has, in essence, also been a finding that the contract has not been negligently breached.

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attempts to recover on a verbal promise to lender/borrower, or seeks to enforce a verbal modification of an existing credit agreement." *Id.* at 224-25.

[21] This Court notes that the Plaintiffs maintain that Ally Financial has incorrectly argued the law on this point. This Court, however, will not herein attempt to resolve this potential legal dispute because there remain material factual disputes even assuming the law is as Ally Financial believes it to be.

[22] *Defendant Ally Financial's Memorandum of Law in Support of its Motion for Summary Judgment*, at page 22.

Here, in contrast, the Plaintiffs have pled torts involving intentional and negligent misrepresentation and concealment. Plaintiffs have not complained of a negligent breach of contract and have not otherwise alleged torts that are necessarily dependent upon a finding that the contract was breached. For example, in contrast to the above citations, the standard for negligent misrepresentation was more recently set forth by the Court of Appeals in *Griesi v. Atlantic General Hospital Corporation*, 360 Md. 1, 12-13 (2000).[23] The Court stated: "There is no precise formula for determining the existence of a duty of care between two parties...For claims for economic loss due to negligent misrepresentation, the injured party must prove that defendant owed him or her a duty of care by demonstrating an intimate nexus between them...The intimate nexus may be demonstrated by showing contractual privity or its equivalent." The *Griesi* court established a series of factors to assist in the determination as to whether an intimate nexus exists between two parties. Specifically, the court stated:

> Liability for negligent misrepresentation arises only where there is a duty, if one speaks at all, to give the correct information. And that involves many considerations. There must be knowledge, or its equivalent, that the information is desired for a serious purpose; that he to whom it is given intends to rely and act upon it; that, if false or erroneous, he will because of it be injured in person or property. Finally, the relationship of the parties, arising out of contract or otherwise, must be such that in morals and good conscience the one has the right to rely upon the other for information, and the other giving the information owes a duty to give it with care. An inquiry made of a stranger is one thing; of a person with whom the inquirer has entered, or is about to enter, into a contract concerning the goods which are, or are to be, its subject, is another. (citations omitted).

Id. at 13-14. Here, the Plaintiffs have pled in a manner sufficient to establish that there are, at minimum, material factual disputes as to whether there exists an intimate relationship between the parties. There is evidence that the parties are in contractual privity, that this relationship has been ongoing since the time Mr. Denny took over the Dealerships from his uncle in 1993, that the parties have signed multiple finance-related agreements since 1993, that both GMAC, now Ally Financial, and the Dealerships benefitted economically from this relationship, and that the Plaintiffs were dependent to some degree on GMAC's representations in the conduct of their

[23] *See Griesi*, 360 Md. at 11 ("We have explained that, in its most general sense, negligent misrepresentation arises when the defendant owes a duty of care in communicating information to the plaintiff and that duty is breached, causing pecuniary or personal injury to the plaintiff...It has been said that 'the most common example of the duty to speak with reasonable care is based on a business or professional relationship, or one in which there is a pecuniary interest.").

Honorable Paul W. Grimm, Charles S. Fax, and Paul Mark Sandler for further guidance as to how to handle any additional discovery disputes that may arising in this proceeding.

BOB SMITH AUTOMOTIVE GROUP, INC., et al.,	*	IN THE
	*	
Plaintiff	*	CIRCUIT COURT
	*	
v.	*	FOR
	*	
ALLY FINANCIAL, INC.,	*	TALBOT COUNTY
	*	
Defendant	*	Case: 20-C-11-007570
	*	

CIRCUIT COURT
FOR TALBOT COUNTY
EASTON, MARYLAND
2012 APR 30 AM 11:16

ORDER

For the reasons stated in the foregoing memorandum opinion, it is this 30th day of April 2012, by the Circuit Court for Talbot County, Maryland,

ORDERED that the Defendant's Motion for Summary Judgment shall be and is hereby DENIED in its entirety, and it is further

ORDERED that the Plaintiffs' Motion to Compel shall be set in for a hearing, the date to be hereafter determined.

Broughton M. Earnest, Judge
Circuit Court for Talbot County

R. APP. B

SUPERIOR COURT OF WASHINGTON
FOR SNOHOMISH COUNTY

GMAC, a Delaware corporation, Plaintiff, vs. EVERETT CHEVROLET, INC., a Delaware corporation; and JOHN REGGANS and JANE DOE REGGANS and their marital community, Defendants.	No. 08-2-10683-5 DECLARATION OF JEFFREY BEAVER IN OPPOSITION TO GMAC'S MOTION FOR SUMMARY JUDGMENT

I, Jeffrey Beaver, hereby declare and state as follows:

1. I am one of the attorneys representing Defendants in this matter. I am over the age of 18 years, make this declaration based on personal knowledge and am otherwise competent to testify.

2. Appended hereto as Exhibit 1 is a true and correct copy of the Declaration of John Reggans in Support of Defendants' Response in Opposition to Temporary Restraining Order and Motion to Dismiss filed in this case on January 12, 2009.

3. Appended hereto as Exhibit 2 is a true and correct copy of the Declaration of John Reggans in Support of Motion to Hold Plaintiff in Contempt for Violation of Restraining Order and Motion to Modify Restraining Order filed in this case on February 4, 2009.

GRAHAM & DUNN PC
Pier 70, 2801 Alaskan Way ~ Suite 300
Seattle, Washington 98121-1128
(206) 624-8300/Fax: (206) 340-9599

4. Appended hereto as Exhibit 3 is a true and correct copy of the Declaration of Johnn Reggans in Support of Defendants' Response in Opposition to Plaintiff's Motion to Resolve Defendants' Assertions that GMAC has Violated Temporary Restraining Order.

5. Appended hereto as Exhibit 4 is a true and correct copy of the Declaration of John B. Reggans III in opposition to Debtors' Motion for Rejection of Executory Contract and unexpired Leases With Dealer Everett Chevrolet, Inc. filed in General Motors Corporation's bankruptcy case, U.S. Bankruptcy Court Southern District of New York, Cause No. 09050026 (REG).

6. Appended hereto as Exhibit 5 is a true and correct copy of the Verbatim Report of Proceedings in this case of Judge Eric Z. Lucas' decision of April 10, 2009.

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

EXECUTED at Seattle, Washington this 5TH day of December, 2011

Jeffrey Beaver

GRAHAM & DUNN PC
Pier 70, 2801 Alaskan Way ~ Suite 300
Seattle, Washington 98121-1128
(206) 624-8300/Fax: (206) 340-9599

EXHIBIT 1

2009 JAN 12 PM 3:19

SUPERIOR COURT OF WASHINGTON FOR SNOHOMISH COUNTY

GMAC, a Delaware Corporation, Plaintiff, vs. EVERETT CHEVROLET, INC., a Delaware Corporation; and JOHN REGGANS and JANE DOE REGGANS and their marital community, Defendants.	No. 08-2-10683-5 DECLARATION OF JOHN REGGANS IN SUPPORT OF DEFENDANTS' RESPONSE IN OPPOSITION TO TEMPORARY RESTRAINING ORDER AND MOTION TO DISMISS

I, John Reggans, declare as follows:

1. I make this Declaration of my personal knowledge. I am the President of Everett Chevrolet-Geo, Inc. (hereinafter referred to as "Everett Chevrolet"). Everett Chevrolet operates as a Chevrolet franchised dealership at 7300 Evergreen Way, Everett, WA 98203.

2. From 1996 through 2007, Everett Chevrolet has achieved excellent results from the sale of new vehicles, used vehicles, service and parts sales and has been a very profitable business entity (a true and correct copy of a statement of the dealership's achievements is attached hereto as **Exhibit A**. **Exhibit B** attached hereto

EXHIBIT B

represents the dealership's sales performance as of January 2, 2008 for the calendar year of 2007 ranking the dealership's performance in comparison to other Chevrolet dealers in the Seattle zone).

3. On or about December 10, 1996, Everett Chevrolet entered into a floorplan agreement with General Motors Acceptance Corporation (hereinafter referred to as "GMAC").

4. The floorplan agreement provided for the dealer financing of new vehicles manufactured by General Motors for the purpose of supplying Everett Chevrolet with new vehicle inventory for retail sales to the public; it also provided for the dealership to acquire and inventory used vehicles for retail sales to the public.

5. Attached to this Declaration are true and correct copies of the following documents which in part provide for said wholesale floorplan financing: **Exhibit C** – Wholesale Security Agreement, **Exhibit D** – Amendment to Wholesale Security Agreement, **Exhibit E** – Agreement Amending the Wholesale Security Agreement and Conditionally Authorizing the sale of new floorplan vehicles on a delayed payment privilege basis.

6. On or about December 5, 2008 employees of GMAC arrived at the dealership and demanded payment for 15 specified vehicles which GMAC indicated had been sold and payment allegedly was due.

7. On or about December 5, 2008 th only 10 vehicles were due for payment to GMAC. GM/ GMAC was in error and that the dealership's determinatic due for payment to GMAC by the dealership was correct.

8. During the morning of December 18, 2008 GMAC arrived at the dealership for the purpose of conducting a floorplan audit and the audit was performed.

9. On or about December 18, 2008 at approximately 5:20 P.M. employees of GMAC demanded payment in the amount of $206,000.00, but the GMAC employees could not specify or identify any specific vehicle sales that would justify the payment by the dealership to GMAC in the stated amount. GMAC demanded that payment can only be submitted in the form of a certified check.

10. Prior to GMAC making its demand of $206,000.00 on December 18, 2008, the dealership notified GMAC at approximately 5:15 P.M. that Everett Chevrolet's bank (U.S. Bank of Washington, Everett Branch) had closed due to a snow storm.

11. Everett Chevrolet was unable to submit a certified check to GMAC because Everett Chevrolet's bank had closed prior to GMAC making its demand of $206,000.00 at approximately 5:20 P.M.

12. I discussed with the GMAC employees the unfair demand for $206,000.00 which was submitted by GMAC without any documentation or verification for the bill and GMAC's employees agreed that their demand was unfair to the dealership because there was no specific documentation that would justify the payment of $206,000.00 to GMAC.

13. On or about December 19, 2008, GMAC employees arrived at the dealership and notified said dealership that based upon the dealership's failure to pay the $206,806.18, GMAC demanded immediate payment of the new and used vehicle inventory totaling $6,367,294.89. A true and correct copy of the demand letter is attached hereto and marked **Exhibit F**.

14. The actions of GMAC as referred to in this affidavit are believed by myself to have been committed in bad faith and in breach of the wholesale floorplan and security agreement.

15. The dealership as of December 18, 2008 was functioning as a viable business entity, generating sales from all departments of the dealership (new car department, used car department, service department, and parts department).

16. The temporary restraining order involved in the instant case was served upon the dealership on January 2, 2009 and has severely damaged the dealership's business by its abrupt termination of all sales and revenue generating activity from the new car department, used car department and parts department.

17. GMAC is not legally entitled to possession of the subject inventory or other assets of the dealership.

18. The property of the dealership is not wrongfully detained by the Defendants.

19. Defendants have not defaulted under the financing agreement between GMAC and the dealership.

20. Defendant John Reggans and Jane Doe Reggans (his wife as identified by the pleadings) are not liable under the Floor Plan Agreement, Security Agreement, Wholesale Agreement, or any of the agreements mentioned in this litigation to date.

21. GMAC has demanded payment of the entire new and used vehicle inventory in the form of a cashier's check, which is impossible to perform at this time.

22. None of the dealership employees forcibly ejected GMAC's employees from the dealership premises.

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Dated this 12 day of January, 2008 at Everett, Washington

[signature]

John Reggans

EVERETT
CHEVROLET

John B. Reggans III

I have been the dealer principal of Everett Chevrolet since 1996. During this period of time Everett Chevrolet has achieved some outstanding results.

- I bought out Motors Holding investment in 2 years and 9 months based on a 7 ½ year pro-forma
- The dealership performance has earned us four Profit Enhancement Program (PEP) Awards from General Motors in 1997, 1999, 2004, and 2006. This award is based on the highest net profit of sales group for the year.
- In April 2008 I was elected to serve on the Board of Directors for the Seattle Chevrolet (LMA) Local Market Association.
- Black Enterprise Magazine Top 100 Auto Dealers 11 consecutive years 1997-2008
- Board of Directors GMMDA (General Motors Minority Dealers Association) Chairman, GMMDA Scholarship Committee 2001-Present
- Board of Directors NAMAD (National Association of Minority Automobile Dealers) 2006-2007

Education: Bachelor of Business Administration
Western Michigan University

Member: NADA (National Automobile Dealer Association)
WSADA (Washington State Automobile Dealer Association)
PSADA (Puget Sound Automobile Dealer Association)

7300 EVERGREEN WAY • EVERETT • WASHINGTON • 98203 • PHONE (425) 355-6690

Exhibit A

WHOLESALE SECURITY AGREEMENT

To: General Motors Acceptance Corporation (GMAC)

In the course of our business, we acquire new and used cars, trucks and chassis ("Vehicles") from manufacturers or distributors. We desire you to Finance the acquisition of such vehicles and to pay the manufacturers or distributors therefor.

We agree upon demand to pay to GMAC the amount it advances or is obligated to advance to the manufacturer or distributor for each vehicle with interest at the rate per annum designated by GMAC from time to time and then in force under the GMAC Wholesale Plan.

We also agree that to secure collectively the payment by us of the amounts of all advances and obligations to advance made by GMAC to the manufacturer, distributor or other sellers, and the interest due thereon, GMAC is hereby granted a security interest in the vehicles and the proceeds of sale thereof ("Collateral") as more fully described herein.

The collateral subject to this Wholesale Security Agreement is new vehicles held for sale or lease and used vehicles acquired from manufacturers or distributors and held for sale or lease, and all vehicles of like kinds or types now owned or hereafter acquired from manufacturers, distributors or sellers by way of replacement, substitution, addition or otherwise, and all additions and accessions thereto and all proceeds of such vehicles, including insurance proceeds.

Our possession of the vehicles shall be for the purpose of storing and exhibiting same for retail sale in the regular course of business. We shall keep the vehicles brand new and we shall not use them illegally, improperly or for hire. GMAC shall at all times have the right of access to and inspection of the vehicles and the right to examine our books and records pertaining to the vehicles.

We agree to keep the vehicles free of all taxes, liens and encumbrances, and any sum of money that may be paid by GMAC in release or discharge thereof shall be paid to GMAC on demand as an additional part of the obligation secured hereunder. We shall not mortgage, pledge or loan the vehicles and shall not transfer or otherwise dispose of them except as next hereinafter more particularly provided. We shall execute in favor of GMAC any form of document which may be required for the amounts advanced to the manufacturer, distributor or seller, and shall execute such additional documents as GMAC may at any time request in order to confirm or perfect title or security in the vehicles. Execution by us of any instrument for the amount advanced shall be deemed evidence of our obligation and not payment therefor. We authorize GMAC or any of its officers or employes or agents to execute such documents in our behalf and to supply any omitted information and correct patent errors in any document executed by us.

We understand that we may sell and lease the vehicles at retail in the ordinary course of business. We further agree that as each vehicle is sold, or leased, we will, faithfully and promptly remit to you the amount you advanced or have become obligated to advance on our behalf to the manufacturer, distributor or seller, with interest at the designated rate per annum then in effect under the GMAC Wholesale Plan. The GMAC Wholesale Plan is hereby incorporated by reference.

GMAC's security interest in the vehicles shall attach to the full extent provided or permitted by law to the proceeds, in whatever form, of any retail sale or lease thereof by us until such proceeds are accounted for as aforesaid, and to the proceeds of any other disposition of said vehicles or any part thereof.

In the event we default in payment under and according to this agreement, or in due performance or compliance with any of the terms and conditions hereof, or in the event of a proceeding in bankruptcy, insolvency or receivership instituted by or against us or our property, or in the event that GMAC deems itself insecure or said vehicles are in danger of misuse, loss, seizure or confiscation, GMAC may take immediate possession of said vehicles, without demand or further notice and without legal process; for the purpose and in furtherance thereof, we shall, if GMAC so requests, assemble said vehicles and make them available to GMAC at a reasonable convenient place designated by it, and GMAC shall have the right, and we hereby authorize and empower GMAC, to enter upon the premises, wherever said vehicles may be and remove same. We shall pay all expenses and reimburse GMAC for any expenditures, including reasonable attorney's fees and legal expenses, in connection with GMAC's exercise of any of its rights and remedies under this agreement.

In the event of repossession of the vehicles by GMAC, then the rights and remedies applicable under the Uniform Commercial Code shall apply.

Any provision hereof prohibited by law shall be ineffective to the extent of such prohibition without invalidating the remaining provisions hereof.

IN WITNESS WHEREOF, each of the parties has caused this Agreement to be executed by its duly authorized representative this 10 day of Dec 19 96.

Witness and Attest:

Accepted

GENERAL MOTORS ACCEPTANCE CORPORATION

By: Asst. Treas
Its Authorized Agent

P. O. Box 3517 Seattle, WA 98124
Address

GMAC 178
Ptd. in U.S.A. 08M 11-92

Everett Chevrolet-Geo, Inc.
Dealer's Name

By:

Its: President

7300 Evergreen Way, Everett, WA 98203
Address of Dealer

Exhibit C

AMENDMENT TO WHOLESALE SECURITY AGREEMENT

This agreement, effective the date set forth below, amends the Wholesale Security Agreement dated 10 Dec., 1996, executed by and between the undersigned dealer ("Dealer") and General Motors Acceptance Corporation ("GMAC"), and any other amendment thereto (the "Wholesale Security Agreement").

RECITALS

Whereas, pursuant to the terms and conditions of the Wholesale Security Agreement, GMAC has agreed to finance the purchase of new and used vehicles which the Dealer acquires from manufacturers and distributors; and

Whereas, from time to time Dealer acquires new and used vehicles from other sellers, including, without limitation, auctioneers, dealers, merchants, customers, brokers, leasing and rental companies, and other suppliers (the "Sellers") which vehicles Dealer desires GMAC to finance (the "Other Vehicles").

Whereas, GMAC is willing to finance Dealer's acquisition of the "Other Vehicles", pursuant to the terms and conditions of the Wholesale Security Agreement and this amendment thereto.

AGREEMENT

Now THEREFORE, in consideration of the premises, Dealer and GMAC agree as follows:

1) The Wholesale Security Agreement is hereby amended so that the word "vehicles" as used throughout the Wholesale Security Agreement, shall -- in addition to the description contained therein -- mean and include all Other Vehicles which GMAC elects to finance for Dealer from time to time (the "Other Vehicle Advances").

2) Upon request from GMAC, Dealer shall provide it with satisfactory evidence of the identity, ownership, value, source, status, and other information concerning the Other Vehicles in connection with Other Vehicle Advances, including completion of the GMAC Floor Plan Advice Form (GMAC 178-1).

3) GMAC may deliver the proceeds from Other Vehicle Advances directly to Dealer or Sellers.

4) For all intents and purposes, the Wholesale Security Agreement remains in full force and effect, including, without limitation, that

   a) Dealer agrees upon demand to pay to GMAC the amount it advances or is obligated to advance for each of the Other Vehicles at a rate of interest per annum designated by GMAC from time to time and then in force; and
   b) Any and all credit lines provided by GMAC to Dealer are expressly subject to the written terms of the Wholesale Security Agreement, including this amendment, and are discretionary in that they may be modified, suspended or terminated at GMAC's election; and
   c) To further secure all of the obligations which Dealer now or hereafter owes to GMAC pursuant to the Wholesale Security Agreement, Dealer grants to GMAC a security interest in each of the Other Vehicles now owned or hereafter acquired by Dealer, and any and all additions, replacements, substitutions and accessions pertaining thereto, and the proceeds thereof.

IN WITNESS WHEREOF, GMAC and Dealer have caused this agreement to be executed and delivered by its duly authorized representatives effective the 10 day of Dec., 1996.

General Motors Acceptance Corporation

By: Paul C. Stewart
Paul C. Stewart

Title: Assistant Treasurer

Everett Chevrolet-Geo, Inc.

By: [signature]

Title: President

GMAC Form W-178A
(5/96)

Exhibit D

GMAC 570 (Rev. 10-96)
Printed by L.E.A. 08M 7-96

AGREEMENT AMENDING THE WHOLESALE SECURITY AGREEMENT AND CONDITIONALLY AUTHORIZING THE SALE OF NEW FLOOR PLAN VEHICLES ON A DELAYED PAYMENT PRIVILEGE BASIS

This Agreement is made and executed by and between the undersigned dealer ("Dealer") and General Motors Acceptance Corporation ("GMAC") effective the date set forth below

WHEREAS, Dealer previously, or simultaneous with the execution of this Agreement, executed and delivered to GMAC a Wholesale Security Agreement, by which, among other things, (a) GMAC provides wholesale floor plan financing of motor vehicles for Dealer, and Dealer agrees to promptly pay to GMAC the actual amount financed, as each such financed motor vehicle is sold or leased by Dealer (the "Vehicle Amount Financed"); and (b) GMAC consents to Dealer selling and leasing such financed motor vehicles at retail in the ordinary course of business (the "Routine Disposition of Vehicles"); and

WHEREAS, Dealer has requested the privilege of delaying payment of the Vehicle Amount Financed in the limited instances where such financed motor vehicles are sold by Dealer to a purchaser for whom both Dealer and GMAC have agreed to a delayed payment period (the "Delayed Payment Privilege"); and

WHEREAS, Dealer and GMAC may have previously executed an Agreement for the Delayed Payment Privilege for New Floor Plan Units, which the parties hereby intend be superseded by this Agreement for all such transactions arising on or after the effective date hereof; and

WHEREAS, Dealer and GMAC desire and intend hereby to retain, in full force and effect, the validity, enforceability and relative priority of GMAC's security interest in any and all such financed motor vehicles as are sold or leased by Dealer pursuant to the Delayed Payment Privilege, notwithstanding GMAC's prior consent to the Routine Disposition of Vehicles, unless and until GMAC receives the Vehicle Amount Financed under the terms and conditions as hereinafter set forth.

NOW, THEREFORE, in consideration of the premises, the convenants herein set forth, and for other good and valuable consideration, the sufficiency and receipt of which is hereby acknowledged, Dealer and GMAC hereby agree as follows:

1. The aforementioned Wholesale Security Agreement and any and all documents, plans, instruments or agreements relating, modifying, substituting or attendant thereto, executed between Dealer and GMAC are hereby amended in form and substance by inserting therein the following language as a separate and distinct paragraph:

> Notwithstanding anything contained herein to the contrary, Dealer (i.e., 'we) agrees that GMAC's security interest in any and all vehicles sold or leased, more than one Vehicle per individual transaction, to a customer, and in which the full payment thereof by cash or on a properly perfected retail instalment contract or other security agreement basis is not made contemporaneous with the delivery of such Vehicles by Dealer (the "Delayed Payment Vehicles"), shall remain in full force and effect in such Delayed Payment Vehicles and shall not be relinquished, extinguished, released or terminated as a consequence of such sale or release unless and until the customer makes payment therefore directly to GMAC or jointly to Dealer and GMAC. Moreover, Dealer is expressly prohibited and shall not have any express, implied or apparent authority to sell, lease, transfer or otherwise dispose of any Delayed Payment Vehicles unless and until the express written permission of GMAC is first obtained, and then such authority shall be, in each and every instance, limited to the terms and conditions of such permission; it being further agreed that the terms of this paragraph shall not be altered, modified, supplemented, qualified, waived or amended by reason of any agreement (unless in writing executed by Dealer and GMAC), or by the course of performance, course of dealing, or usage of trade by Dealer and GMAC, or either of them.

2. Any previously executed Agreement for the Delayed Payment Privilege for New Floor Plan Units between Dealer and GMAC is superseded by the terms and conditions of this Agreement for all Delayed Payment Privilege transactions arising on or after the effective date thereof.

3. Dealer shall advise GMAC of each and every potential transaction in which Dealer requests GMAC to grant the Delayed Payment Privilege, and the period of time for which the Delayed Payment Privilege is being requested. Such request shall be made of GMAC in writing and on a form of the type and kind provided by GMAC from time to time. GMAC's consent, if any, to the request must be obtained prior to the sale, lease, transfer or delivery of any vehicles proposed by Dealer to be disposed by the Delayed Payment Privilege (the "Delayed Payment Privilege Vehicles").

4. GMAC's consent to the Dealer's request for disposition of Delayed Payment Privilege Vehicles shall be further subject and contingent upon the following additional terms and conditions:

(a) GMAC may, in its sole and exclusive discretion limit the number of Vehicles, amount outstanding and terms and conditions for which the Delayed Payment Privilege is requested by Dealer.

(b) GMAC may, in its sole and exclusive discretion withdraw, cancel, or suspend the Delayed Payment Privilege at anytime and for any reason upon a ten-day advance written notice and immediately if Dealer is in default of any agreement which Dealer has with GMAC; provided, however, that such withdrawal, cancellation or suspension shall not affect the rights, interests and duties under this Agreement prior thereto.

Exhibit E

(c) Dealer shall complete, execute and deliver to GMAC, immediately upon the delivery of Delayed Payment Privilege Vehicles, a form of the type and kind provided by GMAC from time to time (the "Delivery Schedule").

(d) Dealer shall immediately pay GMAC the Vehicle Amount Financed upon the earliest of (i) demand by GMAC; or (ii) receipt of the amount due from the disposition of each of the Delayed Payment Privilege Vehicles; or (iii) the "Purchaser Payment Date" set forth on the applicable Delivery Schedule.

(e) Dealer shall obtain from the person acquiring the Delayed Payment Privilege Vehicle a duly authorized and executed acknowledgement from the Purchaser confirming that the terms of sale include the continuation of GMAC's security interest in the Delayed Payment Privilege Vehicles. The acknowledgement shall be in writing and on a form of the type and kind provided by GMAC from time to time, which shall be delivered to GMAC prior to any sale, lease, transfer or delivery of any Delayed Payment Privilege Vehicle to such person (the "Acknowledgement of Purchaser").

(f) The grant and exercise of the Delayed Payment Privilege by Dealer shall in no way extinguish, release or terminate GMAC's security interest in the Delayed Payment Privilege Vehicles unless and until the conditions described in the amending paragraph set forth in paragraph 1 of this Agreement and the aforesaid Acknowledgement of Purchaser are first fulfilled, which shall then and thereafter continue in the proceeds thereof.

5. GMAC shall have no duty or obligation to examine, review or consider the creditworthiness of any proposed or actual customer of Dealer for which Dealer seeks GMAC's consent to the Delayed Payment Privilege and any such examination, review or consideration by GMAC shall be for its sole and exclusive use and purposes; the Dealer expressly agreeing that any receipt or reliance on such information from GMAC would be gratuitous and unreasonable, respectively.

6. Dealer's obligation to pay GMAC for the Vehicle Amount Financed shall be absolute, unconditional and primary, notwithstanding (a) GMAC consenting to the Delayed Payment Privilege; or (b) default in the payment or acquisition terms by the customer of the Dealer for Delayed Payment Privilege Vehicles, or that of any of customer's surety, guarantor, co-obligor or lender; or (c) rejection or revocation of acceptance of any Delayed Payment Privilege Vehicles by such customer; or (d) the acceptance by GMAC of any assignment or proceeds from any Delayed Payment Privilege Vehicles; provided, however, that nothing in this paragraph 6 is intended to permit payment to GMAC of any more than the greater of (i) the Vehicle Amounts Financed or (ii) the value of GMAC's security interest in the Delayed Payment Privilege Vehicles.

7. Upon demand by GMAC, Dealer shall provide GMAC with an assignment of all right, title and interest of the Dealer in and to the accounts, contract rights, sale proceeds or any other interest Dealer may then or thereafter have in the Delayed Payment Privilege Vehicle. Said assignment shall be for the purpose of additional security only and shall be on a form of the type and kind provided by GMAC from time to time.

8. GMAC may take such actions as it deems appropriate to assure and enforce compliance with this Agreement, including requesting, for audit purposes, verification from Dealer's customers the fact of delivery, possession, and amount, date and circumstances of payment of any Delayed Payment Privilege Vehicles, and the notification to appropriate persons of any security interest, assignment or other claim in the Delayed Payment Privilege Vehicles of GMAC.

In witness whereof the parties hereto execute this agreement the 10 day of Dec, 19 93.

GENERAL MOTORS ACCEPTANCE CORPORATION

By Paul C. Stewart

Its Asst. Treas.
(Title)

Everett Chevrolet, Inc.
(Dealer's Name)

By [signature]

Its President
(Title)

GMAC FINANCIAL SERVICES

5208 Tennyson Parkway, Suite 120
Plano, TX 75024
800-343-4541 Ext. 2050

SENT VIA FEDERAL EXPRESS AND EMAIL TO JOHNR@EVCHEV.COM

December 19, 2008

Everett Chevrolet, Inc.
Mr. John Reggans
7300 Evergreen Way
Everett, WA 98203

Re: **Everett Chevrolet, Inc.**
NOTICE OF DEFAULT
DEMAND FOR PAYMENT

Dear Mr. Reggans:

You are hereby notified that Everett Chevrolet, Inc. ("Dealership") is in default under its wholesale financing agreements with GMAC for failure to pay GMAC $206,806.18 for vehicles upon their sale or lease.

As a result, GMAC hereby demands that the Dealership immediately remit payment of all amounts owed to GMAC under its wholesale credit line, currently in the following amounts:

(A)	Principal Amount of Vehicles Financed by GMAC (Includes the $206,806.18)	$ 5,602,460.32
(B)	Interest Charges through November 30, 2008	$ 26,834.57
(C)	Revolving Line of Credit Principal Balance	$ 738,000.00
	TOTAL AMOUNT DEMANDED	$ 6,367,294.89

This demand for payment is made without prejudice to any other amounts now or hereafter owing by the Dealership to GMAC, including, without limitation, interest accruing from and after the date of this letter, and obligations arising under the GMAC Wholesale Plan.

If the Dealership fails to make payment as demanded, GMAC may take possession of all Dealership property in which it has a security interest, including, without limitation, all of the motor vehicles financed by GMAC for the Dealership. In this respect, the Dealership may be asked to assemble and present for retaking by GMAC such collateral. GMAC reserves the right to exercise any other remedy it may have pursuant to law or contract.

Sincerely,

Joseph P. McCarthy
Director Commercial Lending

Exhibit F

EXHIBIT 2

SUPERIOR COURT OF WASHINGTON FOR SNOHOMISH COUNTY

GMAC, a Delaware Corporation, Plaintiff, vs. EVERETT CHEVROLET, INC., a Delaware Corporation; and JOHN REGGANS and JANE DOE REGGANS and their marital community, Defendants.	No. 08-2-10683-5 DECLARATION OF JOHN REGGANS IN SUPPORT OF MOTION TO HOLD PLAINTIFF IN CONTEMPT FOR VIOLATION OF RESTRAINING ORDER AND MOTION TO MODIFY RESTRAINING ORDER

I, John Reggans, declare as follows:

1. I make this Declaration of my personal knowledge. I am the President of Everett Chevrolet-Geo, Inc., (hereinafter referred to as "Everett Chevrolet"). Everett Chevrolet operates as a Chevrolet franchised dealership at 7300 Evergreen Way, Everett, WA 98203.

2. Prior to December 5, 2008 Everett Chevrolet had consumer financing arrangements with the following institutions which finance the dealership's new and used vehicle sales transactions:

MARSH MUNDORF PRATT SULLIVAN + McKENZIE, P.S.C.
16504 9TH AVENUE S.E., SUITE 203
MILL CREEK, WA 98012
(425) 742-4545 FAX: (425) 745-6060

EXHIBIT "F"

Whidbey Island Bank
Wachovia Dealer Services
Drive Financial Services
Credit Union Direct Lending
BECU
Alaska USA Federal Credit Union
Washington State Employees Credit Union

3. After December 5, 2008 GMAC issued letters to all of the dealership's consumer finance sources instructing them to remit all retail proceeds directly to GMAC and said instruction remains in effect until the financial institution receives written notice from GMAC to the contrary. True and correct copies of these letters are attached to this Declaration as Exhibits "G", "H" and "I".

4. Immediately upon the consumer finance sources receiving the subject letters the finance sources ceased accepting any new sales transactions from Everett Chevrolet and/or returned unfunded the consumer retail installment contracts which they had received from the dealership. A true and correct copy of a letter from a lender with this information is attached to this Declaration as Exhibit "J".

5. Everett Chevrolet cannot obtain financing through any of its consumer finance sources without GMAC withdrawing the letters referred to as Exhibits "G", "H" and "I".

6. GMAC has interfered in the dealership's ability to sell new and used motor vehicles by their issuance of said letters referred to as Exhibits "G", "H" and "I".

7. Exhibit "B1" attached to this Declaration is a true and correct copy of a document prepared by Everett Chevrolet which lists sales tax monies, warranty monies, and 80% of the dealership's profit which all totals $31,006.42.

MARSH MUNDORF PRATT SULLIVAN
+ McKENZIE, P.S.C.
16504 9TH AVENUE S.E., SUITE 203
MILL CREEK, WA 98012
(425) 742-4545 FAX: (425) 745-6060

EXHIBIT "F"

8. The dealership made a request of GMAC for said funds. A true and correct copy of this request is attached to this Declaration as Exhibit "B2".

9. GMAC refused to reimburse the dealership for the funds which GMAC has in its possession. A true and correct copy of GMAC's reply is attached to this Declaration as Exhibit "B3".

10. Attached to this Declaration as Exhibit "B4" is a true and correct copy of four vehicle sales transactions which had been sent by the dealership to Whidbey Island Bank. As a result of Whidbey Island Bank receiving GMAC's letter (Exhibit "I") the bank returned all of the sales transactions unfunded.

11. Exhibit "B4" also lists four vehicle sales transactions that were forwarded by the dealership to Morgan Chase Bank for funding. When Morgan Chase Bank received a GMAC letter (similar to Exhibit "I"), after January 14, 2009 the bank refused to finance anymore sales transactions referred to them by Everett Chevrolet.

12. The actions of GMAC have severely financially damaged the dealership.

13. All Exhibits and statements referred to in this Declaration are true, accurate and authentic.

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Dated this 4th day of February, 2008 at Everett, Washington

John Reggans

S:\Clients\Everett Chevrolet, Inc\Contempt-Modify RO - Decl of Reggans.doc

MARSH MUNDORF PRATT SULLIVAN + McKENZIE, P.S.C.
16504 9TH AVENUE S.E., SUITE 203
MILL CREEK, WA 98012
(425) 742-4545 FAX: (425) 745-6060

EXHIBIT "F"

GMAC FINANCIAL SERVICES

GMAC Dallas Regional Business Center
5208 Tennyson Parkway, Suite 120
Plano, TX 75024
1-800-343-4541 Ext. 2063

December 22, 2008

SENT VIA FEDEX AND FACSIMILE TO 253-864-1653

America's Credit Union
PO Box 33338
Fort Lewis, WA 85433

Re: Notice of Assignment and Demand for Payment

To Whom It May Concern:

This letter is to notify you that GMAC has a security interest in all assets of Everett Chevrolet, Inc. ("Dealership"), including all motor vehicle inventory and accounts due Dealership. This security interest continues in all proceeds of these vehicles and includes an assignment of amounts your institution owes to Dealership for retail installment sale and/or lease contracts acquired from Dealership now or in the future ("Retail Proceeds").

Effective immediately, GMAC hereby demands that your institution remit all Retail Proceeds directly to GMAC at the address above. As you likely are aware, under Article 9 of the Under Uniform Commercial Code, payment of Retail Proceeds to anyone else, including Dealership, does not relieve your institution of its obligation to pay these amounts to GMAC.

This notice is given in accordance with Section 9-406 of the Uniform Commercial Code and remains in effect until you receive written notice from GMAC to the contrary.

Sincerely,

Pedram Davoudpour
Portfolio Manager
Office: (972) 649-2063
Fax: (972) 649-2218
Pedram.Davoudpour@gmacfs.com

Exhibit "G"

GMAC FINANCIAL SERVICES

GMAC Dallas Regional Business Center
5299 Tunnyson Parkway, Suite 120
Plano, TX 75024
1-800-348-4541 Ext. 2063

December 19, 2008

SENT VIA FEDEX AND FACSIMILE TO 800-562-0939

Washington State Employee Credit Union
PO Box WSECU
Olympia, WA 98507

Re: Notice of Assignment and Demand for Payment

To Whom It May Concern:

This letter is to notify you that GMAC has a security interest in all assets of Everett Chevrolet, Inc. ("Dealership"), including all motor vehicle inventory and accounts due Dealership. This security interest continues in all proceeds of these vehicles and includes an assignment of amounts your institution owes to Dealership for retail installment sale and/or lease contracts acquired from Dealership now or in the future ("Retail Proceeds").

Effective immediately, GMAC hereby demands that your institution remit all Retail Proceeds directly to GMAC at the address above. As you likely are aware, under Article 9 of the Under Uniform Commercial Code, payment of Retail Proceeds to anyone else, including Dealership, does not relieve your institution of its obligation to pay these amounts to GMAC.

This notice is given in accordance with Section 9-406 of the Uniform Commercial Code and remains in effect until you receive written notice from GMAC to the contrary.

Sincerely,

Pedram Davoudpour
Portfolio Manager
Office: (972) 649-2083
Fax: (972) 649-2218
Pedram.Davoudpour@gmacfs.com

Exhibit "H"

GMAC FINANCIAL SERVICES

GMAC Dallas Regional Business Center
5208 Tennyson Parkway, Suite 120
Plano, TX 75024
1-800-343-4541 Ext. 2063

January 7, 2009

SENT VIA FEDEX AND FACSIMILE TO 360-675-7282

Whidbey Island Bank
450 SW Bayshore Dr
Oak Harbor, WA 98277

Re: Notice of Assignment and Demand for Payment

To Whom It May Concern:

This letter is to notify you that GMAC has a security interest in all assets of Everett Chevrolet, Inc. ("Dealership"), including all motor vehicle inventory and accounts due Dealership. This security interest continues in all proceeds of these vehicles and includes an assignment of amounts your institution owes to Dealership for retail installment sale and/or lease contracts acquired from Dealership now or in the future ("Retail Proceeds").

Effective immediately, GMAC hereby demands that your institution remit all Retail Proceeds directly to GMAC at the address above. As you likely are aware, under Article 9 of the Under Uniform Commercial Code, payment of Retail Proceeds to anyone else, including Dealership, does not relieve your institution of its obligation to pay these amounts to GMAC.

This notice is given in accordance with Section 9-406 of the Uniform Commercial Code and remains in effect until you receive written notice from GMAC to the contrary.

Sincerely,

Pedram Davoudpour
Portfolio Manager
Office: (972) 649-2063
Fax: (972) 649-2218
Pedram.Davoudpour@gmacfs.com

Exhibit "I"

Whidbey Island Bank

January 21, 2009

Everett Chevrolet
7300 Evergreen Way
Everett, WA 98203

ATTN: Larry White, Finance Director

Dear Larry,

As we previously discussed, GMAC Financial Services notified Whidbey Island Bank on January 7, 2009 of its security interest in Everett Chevrolet's inventory, accounts, and proceeds thereof. GMAC's notice demanded that Whidbey Island Bank directly disburse to GMAC any Retail Proceeds from any contracts we purchased from Everett Chevrolet from that date forward until further notice.

In consideration of receipt of said Retail Proceeds, we requested GMAC to guarantee to Whidbey Island Bank that the terms of our Master Dealer Agreement with Everett Chevrolet would be met. GMAC declined our request, and then also declined our offer to deliver the retail contracts directly to them to satisfy their security interest.

With GMAC's consent, we are therefore returning the enclosed five retail contracts to Everett Chevrolet. We regret that we are unable to purchase and fund these contracts at this time.

Until GMAC notifies us it has relinquished its requirement that we directly disburse all Retail Proceeds to GMAC, we will not be able to accept any more contracts from Everett Chevrolet.

Sincerely,

Bob Comley
VP / Manager
Dealer Banking Division
360-757-5030

Exhibit "J"

Cc: Pedram Davoudpour - GMAC

TAX, WARRANTY/GAP COST, 80% PROFIT ON UNITS FUNDED DIRECTLY TO GMAC

SALE DATE	STK#	VIN	CUST NAME	FUNDS REC'VD FROM	WA ST TAX	GAP	WARR	80% PROFIT	TOTAL
12/17/2008	80222A	204140	MCENTIRE	AMER'S C.U.	1,691.56	-	1,127.00	1,856.69	4,675.25
12/15/2008	80429	175631	GRADY	WSECU	3,253.09	188.00	1,198.00	9,398.07	14,037.16
12/17/2008	80468AA	514401	BERG	BECU	711.11	-	-	1,216.00	1,927.11
1/2/2009	L9595	803936	JENNINGS	TESORO NW CU	1,334.49	-	1,520.00	391.68	3,246.17
12/20/2008	D9675	545013	HOLLICK	AMER'S C.U.	1,270.93	-	-	1,424.86	2,695.79
12/14/2008	9556BB	C35156	BOSEMAN	WSECU	867.66	-	1,202.00	2,355.28	4,424.94
					9,128.84	188.00	5,047.00	16,642.58	31,006.42

Exhibit "B1"

Terry Cady

From: Terry Cady [terry@evchev.com]
Sent: Monday, February 02, 2009 11:44 AM
To: 'rise.smith@gmacfs.com'
Subject: Requesting funds on deals funded by Credit Unions

Michelle,

Per our request please fund 31,006.42 for those deals funded directly to GMAC by Credit Unions via Smartcash by noon today

Thanks for your assistance.

Terry Cady

Terry Cady
Office Manager
Everett Chevrolet Inc
425-355-6890
425-355-6630 fax

Exhibit "B2"

Terry Cady

From: Smith, Rise M. [rise.smith@gmacfs.com]
Sent: Monday, February 02, 2009 12:16 PM
To: Terry Cady
Subject: RE: Requesting funds on deals funded by Credit Unions

Terry,

As we discussed earlier, the funds in questions were received prior to the TRO and the Dealership is not entitled to the funds. I understand this was discussed by both parties counsel last week and there was no confusion regarding the funds.

Michele

Michele Smith
Operations Manager
GMAC Financial Services
Dallas Regional Business Center
5208 Tennyson Parkway #120
Plano, TX 75024

Office: 972-649-2086
Cell: 503-956-0039
Fax: 972-649-2275
E-Mail Address: rise.smith@gmacfs.com

From: Terry Cady [mailto:terry@evchev.com]
Sent: Monday, February 02, 2009 1:44 PM
To: Smith, Rise M.
Subject: Requesting funds on deals funded by Credit Unions

Michelle,

Per our request please fund 31,006.42 for those deals funded directly to GMAC by Credit Unions via Smartcash by noon today.

Thanks for your assistance.

Terry Cady

Terry Cady
Office Manager
Everett Chevrolet Inc
425-355-6690
425-355-8830 fax

2/2/2009

Exhibit "B3"

Exhibit "B4"

EXHIBIT 3

SUPERIOR COURT OF WASHINGTON FOR SNOHOMISH COUNTY

GMAC, a Delaware Corporation, Plaintiff, vs. EVERETT CHEVROLET, INC., a Delaware Corporation; and JOHN REGGANS and JANE DOE REGGANS and their marital community, Defendants.	No. 08-2-10683-5 DECLARATION OF JOHN REGGANS IN SUPPORT OF DEFENDANTS' RESPONSE IN OPPOSITION TO PLAINTIFF'S MOTION TO RESOLVE DEFENDANTS' ASSERTIONS THAT GMAC HAS VIOLATED TEMPORARY RESTRAINING ORDER

I, John Reggans, declare as follows:

1. I make this Declaration of my personal knowledge. I am the President of Everett Chevrolet-Geo, Inc., (hereinafter referred to as "Everett Chevrolet"). Everett Chevrolet operates as a Chevrolet franchised dealership at 7300 Evergreen Way, Everett, WA 98203.

2. Everett Chevrolet has filed a counterclaim against GMAC for breaching the dealership's wholesale security agreement.

MARSH MUNDORF PRATT SULLIVAN + McKENZIE, P.S.C.
16504 9TH AVENUE S.E., SUITE 203
MILL CREEK, WA 98012
(425) 742-4545 FAX: (425) 745-6060

3. Pursuant to the ordinary course of business, Everett Chevrolet maintains an open account with General Motors Corporation whereby the account contains funds earned by Everett Chevrolet from the operation of its dealership. The funds in the open account in part consist of warranty payments made by General Motors Corporation to Everett Chevrolet as payment for warranty repair work performed on customer vehicles, various rebates and sales incentives paid to Everett Chevrolet by General Motors Corporation for the sale of vehicles completed by Everett Chevrolet.

4. On or about January 30, 2009, I instructed Terry Cady, a dealership employee, to request General Motors Corporation release to the dealership funds earned by the dealership and that were on deposit in the open account of Everett Chevrolet which is maintained by General Motors Corporation. Exhibit "P9" represents various e-mails issued by Everett Chevrolet to General Motors Corporation and the responses to issued by General Motors Corporation. On February 3, 2009 General Motors Corporation notified Everett Chevrolet that GMAC issued an assignment for the purpose of obtaining the funds contained in Everett Chevrolet's open account.

5. On or about February 9, 2009 General Motors Corporation forwarded the open account proceeds of Everett Chevrolet to GMAC and GMAC has refused to transfer said funds to Everett Chevrolet. The memo portion of the $80,000 check indicates GMAC received said funds by the stamp attached thereto.

6. At no time did Everett Chevrolet authorize GMAC to obtain an assignment of the open account funds of Everett Chevrolet that were held in the open account maintained by General Motors Corporation.

MARSH MUNDORF PRATT SULLIVAN + McKENZIE, P.S.C.
16504 9TH AVENUE S.E., SUITE 203
MILL CREEK, WA 98012
(425) 742-4545 FAX: (425) 745-6060

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Dated this 5th day of March, 2009 at Everett, Washington

original to be filed

John Reggans

S:\Clients\Victor Chevrolet, Inc\Resolve Def's Assertions - Decl of Reggans.doc

MARSH MUNDORF PRATT SULLIVAN + McKENZIE, P.S.C.
16504 9TH AVENUE S.E., SUITE 203
MILL CREEK, WA 98012
(425) 742-4545 FAX: (425) 745-6060

EXHIBIT 4

HEARING DATE AND TIME: August 3, 2009 at 9:45 a.m. (Eastern Time)
OBJECTION DEADLINE: July 28, 2009 at 4:00 p.m. (Eastern Time)

Joshua D. Rievman, Esquire
HOGUET NEWMAN REGAL & KENNEY, LLP
10 East 40th Street
New York, NY 10016-0301
Ph: 212-689-8808
Fax: 212-689-5101
Jrievman @hnrklaw.com
Attorneys for Everett Chevrolet, Inc.

James S. Fitzgerald, WSBA #8426
(pro hac vice application pending)
LIVENGOOD FITZGERALD & ALSKOG, PLLC
121 Third Avenue
P.O. Box 908
Kirkland, WA 98083-0908
Ph: 425-822-9281
Fax: 425-828-0908
fitzgerald@lfa-law.com
livengoodfitzgeraldalskog@gmail.com
Attorneys for Everett Chevrolet, Inc.

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re	:	**Chapter 11 Case No.**
GENERAL MOTORS CORP., *et al.*,	:	**09-50026 (REG)**
Debtors.	:	**(Jointly Administered)**

DECLARATION OF JOHN B. REGGANS III IN OPPOSITION TO DEBTORS' MOTION FOR REJECTION OF EXECUTORY CONTRACT AND UNEXPIRED LEASES WITH DEALER EVERETT CHEVROLET, INC.

JOHN B. REGGANS III declares:

CP 108

1. I am the President of Everett Chevrolet, Inc. (hereinafter "ECI" or "Everett Chevrolet"), a Chevrolet dealer located at 7300 Evergreen Way, Everett, Washington, dealer No. 20 on the list of dealer contracts (Exhibit A to the Debtors' motion) General Motors Corporation ("GM") and its affiliated debtors have moved to reject pursuant to 11 U.S.C. § 365. The dealership stopped using the name "Everett Chevrolet-Geo" when GM dropped the Geo. This declaration is made in opposition to the Debtors' motion to reject. I have firsthand knowledge of all matters stated herein and am competent to testify about them.

2. I graduated from Western Michigan University with a degree in Business Administration. I have been a GM dealer for 14 years. Since 1996 I have been a successful Dealer Principal of ECI. Originally I acquired the dealership through a capital investment by Motors Holding, a division of General Motors, which I paid off in full in 2 years 10 months, several years sooner than the 7.5 year pro-forma upon which Motors Holding made the investment. Dealership performance has earned us four Profit Enhancement Program (PEP) Awards from GM in 1997, 1999, 2004, and 2006. This award is based on the highest percent of net profit of sales group for the year.

3. The exceptional sales performance of ECI was recognized in other ways by other business groups. In April 2008 I was elected to serve on the Board of Directors for the Seattle Chevrolet Local Market Association (LMA). Black Enterprise Magazine named me one of the Top 100 Auto Dealers 12 consecutive years from 1997 – 2008. Since 2001 I have been a member of the Board of Directors of the General Motors Minority Dealers Association (GMMDA) and chairman of the GMMDA Scholarship Committee. I was also a member of the Board of Directors of the National Association of Minority Automobile Dealers (NAMAD) for 2006-07. I am a member of the National Automobile Dealer Association (NADA) and state and local dealer associations.

4. Despite the rapid downturn of the economy in general and GM in particular, in 2007 ECI was No. 2 in retail car sales for Chevrolet in the Seattle Zone, which includes 35 dealers (186 cars sold). The dealership is located in Everett, a city of 101,800 residents, and only 25 miles north of Seattle with a population of 602,000. ECI has ranked near the top in 2008 in all important categories of PDS (Purchase and Delivery Score) and SSS (Service Satisfaction Score). In December 2008 ECI ranked above the GM goals in PDS and SSS.

5. Based on our proven track record of sales performance for over 12 years, GM's decision to reject ECI as a dealer is not a rational exercise of business judgment. Although the Debtors claim that rejection is based on a quantitative "Dealership Performance Score" calculated as part of its "Dealership Evaluation Process," they admit the factors considered were both "subjective" and "objective." Motion at 8. GM has not provided its dealer evaluation analysis of ECI to the dealership so that we could participate and have a fair opportunity to be heard and challenge any erroneous data or conclusions in the analysis. The rejection process utilized by GM violates the terms of its dealership contract with ECI and violates the dealer termination laws of the State of Washington codified at R.C.W. 46.96.010 *et. seq.* As explained below, there is an issue of fact regarding the credibility of the Debtors' self-serving assertions of good faith exercise of business judgment in rejecting ECI as a dealer.

6. GM admits that if its decision to reject ECI is based on "bad faith, or whim or caprice," it cannot be sustained by the Court. Motion at 16. There is substantial evidence of bad faith and irrationality in the Debtors' decision to reject ECI as a dealer.

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Bad Faith

7. ECI recently completed a three and a half week replevin hearing against General Motors Acceptance Corporation ("GMAC"), the financing arm of GM that was claiming a default by the ECI dealership and demanding repayment of $6.3 million, as well as the immediate closure of the dealership and repossession of all vehicle inventory collateral by GMAC.

8. On April 10, 2009, Judge Eric Z. Lucas of the Snohomish County Superior Court ruled against GMAC on all claims, making several express findings of "bad faith" by GMAC. A true and correct copy of Judge Lucas's oral decision ("Verbatim Report of Proceedings") in GMAC v. Everett Chevrolet, Inc., et al. Snohomish County Superior Court Cause No. 08-2-10683-5 is attached hereto as Exhibit A (hereinafter referred to as "RP"). A true and correct copy of Judge Lucas's order dated April 10, 2009 is attached hereto as Exhibit B. The Court found no breach of the Wholesale Security Agreement by ECI, or any other wrongdoing by ECI. The Superior Court is allowing ECI to pursue tort and contract damages from GMAC for its wrongful termination of the floorplan line of credit and interference with the dealership.

9. The swiftness of GMAC's efforts to close down ECI is demonstrated by the following timetable:

- On July 31, 2008, GMAC demanded a $800,000 capital injection to the dealership by no later than October 31, 2008, along with a personal guaranty by me as additional security. See Exhibit C attached hereto. Even though ECI was not in breach of the flooring agreement, GMAC threatened that failure to provide either of these would result in suspension or termination of ECI's credit line.

- On October 16, 2008, GMAC advised that "due to current market conditions" it unilaterally suspended its obligation to make credit line advances to ECI and raised the interest rate on outstanding advances. See letter attached as Exhibit D. If I did not agree to the change, GMAC threatened to terminate my credit line and demand full payment of the credit line by November 30, which amounted to approximately $778,000.
- On November 25, 2008, GMAC threatened that unless I provided a personal guaranty and arranged a capital injection of $300,000 to the dealership by November 30, it would suspend or terminate the credit lines. See letter attached as Exhibit E.
- On December 8, 2008, although ECI was not in default or past due on any obligations, GMAC suspended our flooring plan. See letter attached as Exhibit F. GMAC notified GM "to remit to GMAC all accounts owed to the Dealership." See attached Ex. F., page 1.
- On or around December 15, 2008, GMAC terminated ECI's flooring plan and gave me 3 months to find a new lender to pay back the $6.3 million GMAC credit line in full. See letter attached as Exhibit G.
- On December 19, 2008, GMAC declared ECI in default and demanded full payment of the flooring plan, a sum amounting to $6,367,294.89, and threatened to take possession of all Dealership property and vehicles subject to its security agreement. See letter attached as Exhibit H.
- On December 31, 2008, GMAC filed a replevin action in Snohomish County Superior Court to obtain possession of all vehicle inventory, accounts, equipment, receivables and other personal property covered by its security agreement with ECI. Falsely claiming that ECI was out of

trust for failing to pay GMAC an "estimated" $206,806.18 for vehicles sold or leased, GMAC obtained an ex parte temporary restraining order ("TRO")[1] preventing ECI from selling any cars, and basically shutting us down for two weeks until the order was modified at a hearing on January 14 to allow ECI to sell cars and remit proceeds to GMAC. This was extremely harmful to ECI. The TRO was finally dissolved on April 10, 2009 after a lengthy evidentiary replevin hearing conducted March 17 – April 10, 2009.

10. Among Judge Lucas's findings in the replevin action, he ruled that GMAC:

a. Unreasonably delayed responding to dealer requests for funding for the purchase of the dealership land. GMAC's reasons for refusing to fund were unreasonable and lacked credibility. "From a business standpoint, GMAC's position is not reasonable." RP at 5: 8-9. This unreasonableness was not an "isolated occurrence," but indicative of a "pattern of behavior" by GMAC. RP 5 at 13-15.

b. In demanding new and additional securitization measures on July 31, 2008,[2] GMAC attempted to mask GMAC's ulterior motive of termination "by justifying GMAC's actions based on credit trends and performance." RP at 7:14-15. These, the Court found, were false justifications intended to mislead the dealership by "manipulating and withholding information." RP at 7:25 - 8:1.

[1] A true and correct copy of the December 31, 2008 TRO obtained ex parte by GMAC is attached hereto as Exhibit P.
[2] A true and correct copy of GMAC's July 31, 2008 letter, referred to by Judge Lucas, is attached hereto as Exhibit C.

c. Failing to share with the dealership GMAC's "very sophisticated financial analysis" of Everett Chevrolet; setting targets without justification; setting deadlines without notice or justification; demanding a personal guaranty without justification. RP at 8:5-15.

d. GMAC credit managers Vick and Smith were "not credible" witnesses. RP at 6:7, 9:16 and 11:9 ("total lack of credibility").

e. GMAC dealt dishonestly, unreasonably, unfairly and in bad faith with Everett Chevrolet, keeping a "hidden agenda" and failing to disclose material facts to the dealer, including its intention to cease doing business with ECI in the future. RP at 11:12; 11:23-25; 17:6-11 & 19-22; 18:8-12; and 20:14-15. Using "false targets" that GMAC knew the dealership could not achieve, GMAC "manufactured a default" by Everett Chevrolet. RP at 19:13-15. "The goal of the team from GMAC in this case was to shut down the Dealer." RP at 18:11 - 1913. "Given the totality of GMAC's actions, this is the only conclusion this Court can come to." RP at 19:16-17.

f. GMAC imposed a three-day remit requirement that was "arbitrary and not commercially reasonable." RP at 14:15-16.

g. In December 2008, GMAC prevented Everett Chevrolet from accessing funds to finance sales, thus preventing the dealer from reaching sales targets imposed by GMAC. RP at 16:17 - 17:8. Not only did GMAC freeze the open account with GM, shut the business down by TRO, and send demand notices to financing institutions, GMAC's actions were calculated to prevent Everett Chevrolet from

closing a deal on January 9, 2009 with GM's Motors Holding to provide $2.5 million in working capital. Id.; RP at 19:7-10.

h. "The actions taken by GMAC to assault the Dealer's working capital were designed to put him out of business, not merely to protect collateral." RP at 19:22-25.

i. "The law only requires GMAC to be honest with regard to its intentions and not attempt to manufacture defaults, put pressure on a business to fail, or block other contract opportunities. All these things were done in this case, and all are acts of bad faith." RP at 20:1-6.

j. "ECI, under Mr. Reggans, has been profitable every year from 1996 until 2007. The Dunn & Bradstreet report filed as Exhibit #92 indicates that his high year sales were approximately $40 million dollars." RP at 3:4-7.

k. "ECI sold $19 million dollars by October 2008. With these sales, that 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 default. This constitutes bad faith." RP at 20:14 – 21:19.

l. "Here, GMAC aligned all forces in order to make the Dealer fail." RP at 19:13 – 20:14. "GMAC breached the contract by violating the Covenant of Good Faith and Fair Dealing. The request for replevin is denied." RP at 21:22-24.

11. Judge Lucas also dissolved the January 14, 2009 restraining order, finding no breach or other default by ECI that would sustain GMAC's replevin claims. Since

Judge Lucas's ruling, GMAC has appealed to the Court of Appeals seeking emergency injunctions barring ECI from any further vehicle sales, or to reimpose the injunction lifted by the superior court. GMAC claims it had no duty to act in good faith. Twice tthe appeals court has d enied GMAC's motions for emergency injunction. Through the barrage of litigation, GMAC is seeking to bury ECI with litigation and attorney's fees to divert my time, energy and resources away from running a successful dealership.

Retaliation/Bad Faith

12. Since August 2007, I negotiated with GMAC to finance a purchase of real estate where ECI operates in Everett. In a meeting with GMAC branch manager Greg Moffitt, I discussed my plan to acquire the dealership property and utilize the equity to generate working capital for the dealership. Mr. Moffitt supported the plan and requested documentation for GMAC to review.

13. The dealership property is owned by a GM subsidiary called Argonaut Holdings, Inc. When I acquired 100% of the dealership in 1999, the option to purchase the building and land on which the dealership was located was an essential part of my deal with GM. I originally exercised the option to purchase in 1999, but the sale did not close because a large capital improvement construction project was not completed and GM was slow about providing details on "contingencies" that would affect the purchase price.

14. After meetings with GM, I confirmed in writing my exercise of the option to purchase in November 2007 at a price of $4.9 million as provided by contract. See letter attached as Exhibit I. Based on a market appraisal, the purchase would generate $1 million in equity which I could use as additional working capital for the dealership. The sale was originally set to close by December 31, 2007.

15. Two – three weeks later (in early December, 2007) however, GM repudiated the sales deal, informing me that it would not honor my option to purchase. In a letter dated December 12, 2007, Troy Freeman, Project Manager for Worldwide Real Estate Western Region at GM's Economic Development and Enterprise Services wrote that my options had expired. See attached Exhibit J. I referred the matter to my attorney to demonstrate that the option to purchase had not expired.

16. By e-mail dated March 6, 2008, attached hereto as Exhibit K, GM's David Fredrickson informed me for the first time that "...GM Worldwide Real Estate intends to pursue the opportunity to offer the property for sale to the Tenant [ECI], however, at this time is unable to do so due to the constraints imposed by the [General Motors] Corporation's initiative for AHI [Argonaut Holdings, Inc.] to sell these properties as part of a large portfolio sale." I wrote a reply back to Mr. Frederickson to inform him that I did not agree with his account of the discussion. See attached Exhibit L.

17. If the dealership property was sold to a third party charging market rents, ECI's monthly rent of $24,000 would increase to $62,000. Compared with a monthly purchase mortgage payment of approximately $40,000 if ECI bought the property, it would make no financial sense for ECI to stay in business on the property if it were sold to a third party. Because of the urgency of avoiding a nearly 50% increase in rents and losing the equity in the property, it was imperative that the deal close soon.

18. Eventually, after several meetings with Mr. William Powell, an African-American Vice President of Industry and Dealer Affairs at GM in Detroit, differences were resolved with Argonaut and GM. Mr. Powell said "a deal is a deal" -- GM supports its dealers and would recognize my option to purchase the dealership property. A new Purchase and Sale Agreement was signed in May, 2008 for me to acquire the property from Argonaut Holdings at a price of $5.1 million. Earnest money of $50,000 was paid

to Argonaut on May 30, 2008. The purchase was to be financed by GMAC, which over the course of a few months unilaterally changed the deal to raise the interest rate from 12 to 15%, and then required $1.2 million in cash down.

19. With Mr. Powell's assistance, the deal came together with GM, through its affiliate Motors Holding, a GM dealer development program that also provides assistance to minority dealers, to provide up to $3 million to ECI, with $1.2 million of the money to be applied to cash required to buy the dealership property.

20. Around the time that the land sale was being finalized in May - June 2008, GMAC began making unreasonable financial demands that it knew were not feasible, as found by Judge Lucas in his April 10, 2009 oral ruling (Ex. A, RP at 6-8, 10-11). GMAC demanded that I put in an additional $800,000 of working capital into the dealership by October 31, 2009 and that I provide a Personal Guaranty of all obligations of the ECI dealership to GMAC. See July 31, 2008 letter of M. Jerry Vick (Exhibit C hereto). After 11 profitable years in the car business, and not in default with GMAC or GM, I declined to sign the personal guaranty. However, I did offer to seek funds to provide additional working capital into the dealership, and that was being arranged through the Motors Holding investment.

21. Although GMAC managers told me several times that GMAC would finance the land purchase deal, Mr. Vick of GMAC announced in May, 2008 that GMAC would not finance the land purchase. Judge Lucas found that GMAC's refusal to finance the land sale was unreasonable and done in bad faith. Ex. A, RP at 4-5. GMAC's actions to impede the land purchase and place unreasonable demands on the dealership had the effect of stopping ECI's land deal so that GM and Argonaut could proceed with a sale to a third-party, implementing the same strategy of refusal to sell that Mr. Frederickson of GM revealed in his March 6, 2008 email to me (Exhibit K hereto). The people at GM's

Worldwide Real Estate department and Argonaut who had initially opposed the sale were unhappy that the deal was going forward and they appeared to have manufactured a way to block the sale by using GMAC to close us down. Because of the close connection between GM and GMAC, GMAC would not have backed away from the land purchase financing deal without GM's participation in the decision. GM used GMAC's bad faith tactics as a way to avoid selling the dealership property to me.

22. At a meeting with William Powell and Joe Chrzanowski, head of GM's Motors Holding division, on August 28, 2008, Mr. Powell confirmed that GM would invest to recapitalize the ECI dealership. I provided them a copy of GMAC's July 31, 2009 demand letter for $800,000 (Exhibit C hereto). We discussed the need for GM to provide ECI with sufficient funds to satisfy GMAC's demand before the October 31 deadline. After passing a pre-investment audit by GM, GM advanced ECI only $500,000 on October 5, 2008 under a pre-investment agreement, of which $270,825 was paid to GMAC, and the rest went towards paying other critical ECI obligations.

23. The $500,000 was $300,000 less than the $800,000 capital injection demanded by GMAC, and less than what GM indicated would be available in our August 28 meeting. In addition, when the closing papers were presented for my review on October 3, two days before closing, GM demanded a personal guaranty which had not been previously offered or discussed. I was under duress and felt I had no choice but to sign it to make sure the $500,000 and the additional investment would be funded.

24. Shortly after the $500,000 was provided by GM, I spoke to Jim Madaras, Portfolio Manager for Motors Holding at GM, about why the pre-investment amount was less than the $800,000 previously discussed and agreed upon. At that time in October, 2008 GMAC was pressuring me to put more capital into the dealership, or else it would shut the business down. When I spoke to Jim Madaras about GMAC's demand, he said

"hold GMAC off." Mr. Madaras told me if we needed additional funding, "just make a request." Mr. Madaras retired from GM's Motors Holding division on October 31, 2008 and was replaced by Ruby Henderson.

25. When I asked GM Motors Holding to expedite the investment money, Ruby Henderson said they didn't have the money and needed more time to close on the $2.5 million investment. When I told her I needed the money – an additional $300,000 right away– to satisfy GMAC and stay in business, she said there was no more money available at that time. The Pre-Investment Agreement indicated that Motors Holding would not provide me with investment funds to enable me to pay $1.2 million cash down payment required to purchase the dealership property from Argonaut Holdings. However, because GM understood this meant I couldn't exercise my option to purchase the land, GM/Motors Holding agreed to hold the rent to its current rate at $24,000 per month and not implement a rent escalation clause in the lease agreement.

26. Nevertheless, on May 1, 2009, I received a letter from GM's attorneys demanding $674,977 in delinquent rent based on a retroactive adjustment in addition to the $24,000 monthly rent ECI had been paying going back to January 2007. See attached Exhibit M. If the deal to purchase the dealership property had gone forward, the back rent would have been forgiven as arranged by GM and agreed to by Argonaut Holdings. See attached Exhibit N. But because the sale did not close due to Motors Holding not funding the additional investment and GMAC refusing to finance the purchase, GM/Argonaut Holdings proceeded with recalculating an escalation of ECI's rent backdated to January 2007.

27. On December 5, 2008 I made a request to Ms. Henderson for $540,537 from Motors Holding to pay current and due expenses of $358,715 as well as $175,000 in payroll and taxes due December 2008 and January 2009. She informed me a few days

later that they didn't have more money to loan, and my December 5 request for funds had been denied by the investment committee.

28. At the end of October 2008, after William Powell retired as Vice-President of Dealer & Industrial Affairs, ECI lost its only advocate at GM. GM abruptly stopped supporting ECI's deal and began to work with GMAC to put me out of business. In November 2008 Clarence Oliver, GM's Director of Motors Holding Field Operations – Public Companies & Strategic Investments, told me that several people at GM resented my "going over their heads" to get support from William Powell on the land purchase deal and Motors Holding funding and that I "didn't go through the proper channels." He told me that with William Powell gone, "there is no support for this deal." In the weeks that followed, GM sought to postpone the closing date on the Motors Holding investment and would not permit an earlier closing in order to relieve heightened financial pressure exerted by GMAC.

29. When GMAC suspended our floorplan on December 9, 2008, without notice GM unilaterally froze ECI's open account within two days, and refused to disburse funds to ECI. The open account is the way GM pays ECI for dealer rebates, incentives, warranty, and the like. Normally, the account is $20-30,000 at any given time, but because GM froze the account at GMAC's mere request within two business days, money accumulated in the account that remained unavailable to ECI. Typically, it takes no more than 10 days to resolve a problem with GM regarding a frozen account and to have the account unfrozen. In this case, however, GM wrongfully refused to unfreeze the open account and would not disburse funds to ECI without GMAC approval.

30. In December 2008 I asked the GM regional dealer support manager, Rick Sitek, to identify the person from GMAC who told GM to freeze ECI's open account. He asked me if I was recording the phone conversation. When I answered that the call was

not being recorded, but that others were present in the room with me, Mr. Sitek abruptly hung up the phone and never called back. As of July 2, 2009, there is still $261,254 in the open account that GM controls and refuses to disburse to ECI.

31. In late January, 2009 we requested that GM release $80,000 from the open account to provide much needed working capital for the dealership. On February 3, 2009 Rick Sitek informed ECI by e-mail that "I found out that GMAC has invoked their assignment on the account, so the release of funds will be in a check that will be sent to GMAC." GM provided the $80,000 check payable to ECI directly to GMAC at its request and GMAC cashed our check without ECI's participation or consent. During the replevin hearing, Judge Lucas found this action unreasonable and ordered GMAC to pay the $80,000 proceeds into the registry of the court, and later ordered the entire funds disbursed to ECI.

GM Pulls Out of Investment

32. By letter dated January 23, 2009, attached hereto as Exhibit O, GM provided written notice that it refused to proceed with the $2.5 million investment in ECI based on nondisclosure of "pending actions...as of the date of this Agreement," claimed as a breach of the October 9, 2008 pre-investment agreement. This was a pretext for GM's breach. There were only two "pending actions." One was the GMAC action, which has been extensively referenced above. The other was a very small, even routine, claim known as the "Gardner" action, filed in Snohomish County Superior Court under Case No. 08-2-07242-6 against ECI and Ford Motor Co. It involved a breach of warranty claim by a customer who purchased a used Ford truck from ECI and believed that the engine had a problem – of which problem ECI had no knowledge. Nevertheless, on its own initiative ECI, though its attorneys, reported the Gardner action to GM's auditor, Henry & Horne, PLC, by letter dated December 1, 2008. GM never requested details

from ECI or its attorneys about the Gardner action. Ford Motor Co. was primarily liable because the express warranty was Ford's. ECI decided upon a nuisance-value settlement of the Gardner claim for $3,000 in mediation and was dismissed from the case. In short, the Gardner action was not a legitimate basis for GM to refuse to follow through on its investment agreement with ECI.

33. The only other reason cited by GM for refusing to invest in ECI was the mere filing of replevin action by GMAC in December 2008, which GM determined was conclusive evidence that investment in ECI was not a "commercially reasonable business investment," although ECI passed two audits: the first pre-investment audit by Motors Holding (no irregularities found) and a second audit by an independent auditor/CPA, Henry Horne, for Motors Holding for due diligence (no irregularities found) and Judge Lucas found that GMAC acted dishonestly and in bad faith to close ECI down. GM's decision not to proceed with the deal was made unilaterally without discussions with or requests for information from ECI. Because GM assumed the good faith veracity of each and every allegation made by GMAC against ECI, and presumed every doubt against ECI without a due diligence investigation, the facts indicate that GM and GMAC were working together, conspiring in bad faith to close down ECI. Since GM relied on GMAC's actions, GMAC's bad faith must also be imputed to GM. Not only did GM refuse to invest further in ECI, in February 2009 GM demanded repayment of the $500,000 investment made to ECI in October, 2009. Within weeks after Judge Lucas's ruling against GMAC on April 10, 2009, GM sent notice to ECI on May 14, 2009 of its intention not to renew its contractual relationship with ECI beyond October 2010. By continually siding with GMAC against ECI, despite express findings of bad faith by a judge, GM has demonstrated its steadfast and unreasoning loyalty to its financial ally,

GMAC, regardless of ECI's proven track record of Chevrolet sales performance and trust in GM. This is wrong and devastating to ECI, its employees, me and my family.

34. GM tried to use the GMAC dispute as a pretext to avoid its commitment to invest $2.5 million in ECI. GM's actions deprived me of the opportunity to pursue other options such as sale of the dealership to interested third parties. Although I had a valid Sales and Service Agreement at the time, no disputes and had not expressed any desire to sell the dealership, I was approached by one interested dealer who said he had discussed purchasing my dealership with GM's zone manager. This was a surprise to me since I had no interest in selling at the time.

35. Since GM's decision to reject ECI as a dealer is tainted by bad faith (its own as well as the judicially-established bad faith of GMAC), the Court should not allow GM to reject ECI's dealer contract. The Court is requested to require the assumption of the ECI dealer contract and order the New GM to recognize ECI as a Chevrolet dealer on an ongoing basis with terms as favorable as other renewed dealers permitted to sell cars in the State of Washington under a Participation Agreement with terms and conditions approved by the Washington State Attorney General. This is the only relief that fairly restores the dealership rights that ECI enjoyed before the bad faith efforts of GMAC, acting in concert with GM, to shut ECI down and put us out of business.

36. Even though Judge Lucas ruled in ECI's favor on all issues and found GMAC acted in bad faith, GM has furnished no vehicles to ECI since December 9, 2008, the date when GMAC suspended ECI's line of credit. Without claiming any default by ECI and without prior notice or any opportunity to be heard, GM unilaterally prevented ECI from ordering new vehicles in the computer order system and rescinded all existing orders in the system. In this manner, GM acted in concert with GMAC to close our business down by preventing us from ordering cars.

37. GM is rejecting ECI's contract as retaliation for standing up to GMAC's bad faith tactics and defeating their wrongful collection actions in litigation. Further discovery by deposition and requests for production is likely to show that GMAC and GM conspired to close down ECI and take away my dealership by improper means. GMAC would not have taken such aggressive action to shut down ECI, a Chevrolet dealer for over 12 years, without the advance knowledge and consent, if not active participation, of GM.

Sales Damaged by Bad Faith Actions of GM and GMAC

38. ECI sold 346 new vehicles and 608 used vehicles for calendar year 2008. In 2007, 531 new vehicles and 955 used vehicles were sold at ECI. After December 2008 until the present, ECI has financially suffered as a result of the wrongful actions of GMAC in trying to shut ECI down.

39. Even after Snohomish County Superior Court injunction was dissolved on April 10, 2009, and ECI has not breached any agreement with GMAC or GM, GMAC wrongfully refuses to return to ECI titles to vehicles that were not floorplanned by GMAC. The titles to these vehicles represent approximately $270,000 in used vehicles that are a liquid asset just like cash to ECI because the vehicles can be sold to wholesale or retail buyers at any time. Without those titles, ECI cannot sell the vehicles and GMAC further squeezes the ECI dealership financially.

40. Among our staff of 14 employees, we have technicians who are qualified to support the Chevrolet line make. At the peak of sales, ECI employed 80 persons.

Racial Discrimination

41. I have continuously stood up for dealer rights in the various associations I belong to. I am a member of the National Association of Minority Automobile Dealers ("NAMAD"), and was on the NAMAD Board of Directors from 2006-07. As an

African-American member and director, I have been an advocate for minority dealers' rights. I participated in promoting NAMAD's 15% program, which tries to obtain commitments from major car manufacturers to increase the number of minority owned dealers to at least 15 percent of all active dealers. Rick Wagoner, the President of GM at the time, was asked by NAMAD to support the 15% program. On behalf of GM, he refused to commit to the 15% program.

Detrimental Effect of Contract Rejection if Granted

42. Elimination of the line make – Chevrolet cars and trucks – will financially damage the dealership to the extent that it must close all operations and let all employees go. Since ECI is a single point Chevrolet dealership and sells no other lines (GM denied my requests to sell Cadillac or Mazda lines), there would be no cars to sell. I have personally committed all my resources to developing the ECI dealership at its present location. The Chevrolet dealership is my main livelihood and source of income. Without continuation of my dealership with GM, I will have no business to generate income with. ECI's dealership is located in a viable market in Everett with customers located throughout Western Washington. In all likelihood, there will continue to be a Chevrolet dealer in Everett. Since I have built up the Everett dealership for the past 12 and a half years, and know the market here and have considerable good will in the community, I am in the best position to operate the dealership going forward.

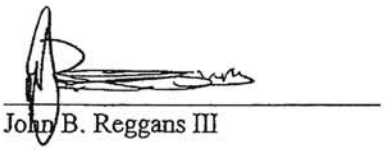
43. The dealership and I enjoy an excellent reputation and the highest goodwill in the community. If the Rejection Motion is granted, ECI's Chevrolet business will be destroyed, its customer good will lost, and employees let go.

44. ECI costs GM nothing to continue as a dealer. Through its franchise agreement with GM, ECI pays the total costs of operation, including but not limited to: inventory, parts, tools, salaries, and plant costs. There would be no benefit to the

Debtors' estate for GM to reject ECI's contract. In fact, rejection would produce a detriment to the debtor estates by eliminating the No. 2 leading seller of Chevrolet cars in the Seattle-Everett area (2007). GM sales will be harmed when ECI customers buy cars from other manufacturers. At a time when GM is struggling to regain market share, terminating a successful Chevrolet dealer who has the closest relationship with buyers is self-defeating.

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

SIGNED AND DATED this 27th day of July, 2009 at Kirkland, Washington.



John B. Reggans III

EXHIBIT A

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR THE COUNTY OF SNOHOMISH

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

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

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

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

And these are my Findings of Fact.

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

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

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

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

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

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

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

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

In September of 2007, Mr. Jerry Vick became GMAC

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

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

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

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

increased the revolving line of credit.

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

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

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

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

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

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

One was a charge of $500 per audit.

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

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

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

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

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

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

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

manipulating and withholding information and resting

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

basis for ECI's default.

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

First, a target for cash injection is set that can

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

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

Next is the $500 audit charge.

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

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

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

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

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

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

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

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

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

The three day 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. This rule is not a contract term, and it is not uniform among dealers. Some have a five business day remit rule. And there was no testimony in the record concerning how it was applied or who got three and who got five.

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

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

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

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

question that this Court resolves against GMAC.

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

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

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

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

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

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

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

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

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

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

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

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.

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

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

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

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

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

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

In the instant case, GMAC did not conduct itself honestly. There was a hidden agenda throughout the time from when Mr. Vick took control until the catastrophic demands in 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 manufacture a default.

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

want to do business with ECI in the future openly and honestly, then he would have had recourse to alternatives. But instead the Dealer was led to believe his past good relationship with GMAC still existed all the while secret actions were taking 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 financing from Motor's Holding, which closing date was less than thirty days away.

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

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

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

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

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

ECI sold 19 million dollars by October of 2008.

With these sales, that 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 default. This constitutes bad faith.

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

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

The request for replevin is denied.

And I think consistent with that, the motion to

amend the complaint is also denied.

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

Anybody have anything else they want to say?

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

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

Mr. Hausmann?

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

MR. WHEELER: Your Honor --

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

THE COURT: The Court is treating this as the

final ruling in this case.

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

THE COURT: I will grant that.

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

THE COURT: I am not sure.

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

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

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

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

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

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

THE COURT: The rest of the trial?

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

THE COURT: On the replevin motion.

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

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

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

THE COURT: Oh, is it a replevin bond?

MR. HAUSMANN: It is a replevin bond.

MR. GLOWNEY: It is.

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

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

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

against the bond is --

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

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

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

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

MR. HAUSMANN: Okay.

THE COURT: That's what I contemplated.

MR. HAUSMANN: Right.

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

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

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

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

MR. GLOWNEY: So the injunction is lifted?

THE COURT: The injunction is lifted.

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

MR. HAUSMANN: They are still contractually bound.

MR. WHEELER: We will pay the floorplan amount.

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

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

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

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

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

injunction is lifted or not.

THE COURT: It is lifted.

MR. HAUSMANN: Thank you, your Honor.

MR. WHEELER: Thank you, your Honor.

THE COURT: So I'm not quite sure what you all want to do in terms of an order, but in an hour I'm

going to be heading over to juvenile court.

Mr. Hausmann, you know where juvenile court is.

MR. HAUSMANN: Yes.

THE COURT: If you need me to sign something today, I will be available over there.

MR. WHEELER: Yes, we do.

THE COURT: You just need to go over there and speak with the court coordinator.

MR. HAUSMANN: That's down at Denny.

THE COURT: Have you been there lately? Just go in the main front entrance, once you go through the metal detector and all that, there is a little booth.

MR. HAUSMANN: Kiosk.

THE COURT: Yes, kiosk, and just ask them. I will either be in courtroom one after three o'clock, or I will be upstairs in staffing.

MR. GLOWNEY: Are you going to prepare an order or do you want me to --

MR. HAUSMANN: We will work together.

MR. GLOWNEY: We need to get it entered today.

THE COURT: Anything else?

MR. GLOWNEY: I don't think so.

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

EXHIBIT B

filed 4-10-09

SUPERIOR COURT OF WASHINGTON FOR SNOHOMISH COUNTY

GMAC, a Delaware Corporation, Plaintiff, vs. EVERETT CHEVROLET, INC., a Delaware Corporation; and JOHN REGGANS and JANE DOE REGGANS and their marital community, Defendants.	No. 08-2-10683-5 ORDER DENYING PLAINTIFF'S REQUEST FOR REPLEVIN AND DENYING MOTION TO AMEND COMPLAINT

THIS MATTER having regularly come before this Court upon a show cause hearing for replevin; GMAC's motion to amend its complaint; and GMAC's motion to Enforce January 14 Injuction Order. The Defendants being represented by their attorneys, William J. Wheeler and Marsh Mundorf Pratt Sullivan + McKenzie, P.S.C., by Karl F. Hausmann, Plaintiff being represented by its attorneys Stoel Rives LLP, by Andrew A. Guy and John E. Glowney, and the Court having heard the testimony of witnesses and considered exhibits, and considered the pleadings submitted by the parties and heard oral argument and reviewed the records and file herein and being fully advised in the premises, NOW, THEREFORE,

IT IS HEREBY ORDERED, ADJUDGED and DECREED as follows:

1. GMAC's request for replevin is denied. The court finds and concludes that GMAC has breached its Wholesale Security Agreement and violated its duty of good faith and fair dealing under the Washington UCC and Washington common law.

2. The Restraining Order entered December 31, 2008 and modified January 14, 2009, is dissolved.

3. This is the final ruling on the show cause hearing for replevin. However, Findings of Fact and Conclusions of Law will be entered upon presentation by the parties.

4. The $32,000.00 held in the Registry of the Court shall be paid immediately in and expedited manner by wire transfer to the U.S. Bank account of Everett Chevrolet. Counsel for Everett Chevrolet will provide wiring instruction to the Clerk of the Court.

5. This Court will retain jurisdiction over the case to resolve all remaining issues related to the request for replevin, including the resolution of the Two Million Dollar ($2,000,00.00) court bond on file.

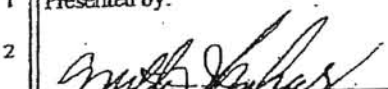
6. GMAC's Motion to Amend its Complaint is denied.

7. GMAC's motion to enforce the January 14th injunctive order is denied.

DONE IN OPEN COURT this 10th day of April, 2009.

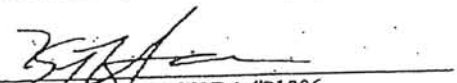
JUDGE ERIC Z. LUCAS

Presented by:



William J. Wheeler, Jr., Esq.
Pennsylvania Bar #22443
Pro Hac Vice
Co-Counsel for Defendants

MARSH MUNDORF PRATT SULLIVAN
+ McKENZIE, P.S.C.



Karl F. Haussmann, WSBA #21006
Local Counsel
Co-Counsel for Defendants

Copy Received, Approved for Entry and
Notice of Presentation Waived:

STOEL RIVES LLP

Andrew A. Guy, WSBA #9278
John E. Glowney, WSBA #12652
Attorneys for Plaintiff

[illegible]

EXHIBIT C

GMAC

July 31, 2008

Mr. John Reggans, President
Everett Chevrolet, Inc.
7300 Evergreen Way
Everett, WA 98203

Dear Mr. Reggans:

Thank you for meeting with me on June 10, 2008 to discuss a number of concerns GMAC has with the unsatisfactory credit base, operating trends and wholesale performance of Everett Chevrolet, Inc. (the "Dealership"). This letter serves to confirm our discussion.

Based on an analysis of the Dealership's operating trends, repayment capacity and available security, GMAC is unable to increase the limit of the Dealership's Revolving Line of Credit or extend a working capital loan to the Dealership.

Further, the deteriorating operating trends and credit base of the Dealership and its poor wholesale performance increase GMAC's credit risk associated with the Dealership's account. In order to continue the financing arrangement between the Dealership and GMAC and to help mitigate GMAC's credit risk, GMAC requires, at a minimum, the following:

- By no later than October 31, 2008, an unencumbered capital injection of $800,000 must be made into the Dealership.
- By no later than October 31, 2008, the personal guaranty of John Reggans of all obligations of the Dealership to GMAC must be provided to GMAC as additional security.
- As always, the Dealership must remit payments for vehicles "faithfully and promptly" upon their sale or lease, as required by the Dealership's Wholesale Security Agreement with GMAC, and strictly comply with all provisions of the Wholesale Security Agreement.

If the Dealership is unwilling or unable to comply with the above requirements, GMAC may suspend or terminate the Dealership's wholesale credit lines.

In addition, pursuant to the Dealership's Revolving Line of Credit Agreement with GMAC, in addition to interest charges, GMAC will bill the Dealership a minimum principal payment of $10,000 each month.

Additionally, as we discussed, in accordance with the terms and conditions of the Dealership's Wholesale Security Agreement, effective August 1, 2008, GMAC will assess a fee of $500.00 on audits ("Audit Fee"). The Audit Fee will appear on the Dealership's wholesale billing statement or a separate billing. GMAC, in its sole discretion, may waive the Audit Fee if the results of the audit reflect wholesale payoff delays of less than 25%.

You are reminded that:

1. Audit results are for GMAC's use and will not necessarily be shared with you or the Dealership. Audit results may not be relied upon by third parties without GMAC's prior written consent.
2. Audit results do not constitute business, investment, financial, or other advice from GMAC to you or the Dealership.
3. Audits are based on information provided by the Dealership, and GMAC relies on the accuracy and completeness of such information in completing audits. GMAC does not ordinarily verify the accuracy or completeness of such information.

EXHIBIT
1
Reggans

CP 161

4. Audits conducted by GMAC do not create a fiduciary or other trust relationship between the Dealership and GMAC.
5. GMAC is not liable for any loss or damage incurred by you or the Dealership arising out of or related to any Dealership audit.

Nothing in this letter constitutes or should be construed as a waiver by GMAC of any of its rights or remedies under any of the Dealership's agreements with GMAC or applicable law, such rights being expressly reserved. Notwithstanding the foregoing, the Dealership's wholesale credit lines are expressly subject to the terms of the agreements under which they were extended. They are discretionary lines of credit and may be modified, suspended or terminated at GMAC's election, in its sole discretion.

Should you have any questions or comments, please do not hesitate to call me.

Sincerely,

M. Jerry Vick
Branch Manager

cc: R. Michele Smith, GMAC

GMAC Financial Services
5208 Tennyson Parkway #120
Tel: 206-418-8683 - Plano, TX 07524
E-Mail: mjerry.vick@gmacfs.com

EXHIBIT D

GMAC FINANCIAL SERVICES

Mailing Address: P.O. Box 650300 Dallas, TX 75265-0300
Telephone: 1-800-343-4541 ext. 2073

BRANCHES THROUGHOUT THE WORLD

EXECUTIVE OFFICES DETROIT

October 16, 2008

John Reggans
Everett Chevrolet, Inc.
7300 Evergreen Way
Everett, WA 98203

Re: Everett Chevrolet-Geo, Inc. ("Borrower") Revolving Line of Credit Agreement

Dear Mr. Reggans:

Everett Chevrolet-Geo, Inc. is the Borrower under the Revolving Line of Credit Agreement dated October 16, 2000 ("Agreement"). Due to current market conditions:

- GMAC can no longer make this credit line available to the Borrower and hereby suspends its obligation to make Credit Line Advances to the Borrower as of the date of this letter; and
- GMAC needs to raise the rate of interest on any outstanding Credit Line Advances to 600 basis points above the previous month's average of the 30-day LIBOR rate.

This rate increase requires an amendment of the Agreement that must be signed by the Borrower and GMAC. As such, GMAC proposes to amend Section 1(f) of the Agreement, which is captioned "Interest", to read as follows:

1. Strike the first paragraph in its entirety and replace it with the following:

   "The Credit Line Advances will bear interest on the principal amount of and from the date of each advance to the date of repayment in full of the Credit Line Advances. Only one interest rate will apply to the Credit Line Advances at any given time. The rate of interest on the Credit Line Advances will be 600 basis points (one basis point equals one hundredth of one percent) above the previous month's average of the 30-Day LIBOR rate (as hereinafter defined). Such previous month's average of the 30-Day LIBOR rate as of October 1, 2008 is Two and Seventy Two One Hundreds percent (2.72%). Upon each subsequent increase or decrease in the previous month's average of the 30-Day LIBOR rate, the rate of interest will be increased or decreased by the same amount as the increase or decrease in the previous month's average of the 30-Day LIBOR rate, effective on the first day of the next monthly interest billing period. In no event will the applicable interest rate exceed the maximum permitted by law.

2. Strike the second paragraph in its entirety.

The foregoing amendments would be effective on December 1, 2008, and all other paragraphs of Section 1(f) and all other terms and conditions of the Agreement will remain unchanged and in full force and effect as written.

EXHIBIT
3
Reggans
3-4-09

Please indicate the Borrower's agreement to this amendment, effective December 1, 2008, by signing below where indicated and return a signed copy of this letter to GMAC at the address indicated above by October 31, 2008.

If GMAC does not receive the Borrower's signed agreement by October 31, 2008, then:

- GMAC will deem the ERLC Agreement terminated effective November 30, 2008.
- The Borrower must pay the full amount of the Credit Line Advances plus accrued interest by November 30, 2008.

In the interim, the ERLC Agreement remains unchanged and in full force and effect as written.

If you have any questions about this matter, please contact me at telephone number 972-649-2086.

Capitalized terms used in this letter and not otherwise defined in it have the meanings ascribed to them in the Agreement.

Sincerely,

Michele Smith
Operations Manager

Acknowledged and Agreed

Everett Chevrolet, Inc.

Signature: _____

By (print name): JOHN B. REGGANS

Title: PRESIDENT

Date: 10/30/08

EXHIBIT E

GMAC Financial Services

5208 Tennyson Parkway, Ste 120
Plano, TX 75024
800-343-4541

BRANCHES THROUGHOUT THE WORLD

EXECUTIVE OFFICES DETROIT

November 25, 2008

SENT VIA EMAIL AND FACSIMLE ON NOVEMBER 25, 2008

Mr. John Reggans
Everett Chevrolet, Inc.
7300 Evergreen Way
Everett, WA 98203

RE: Everett Chevrolet, Inc. ("Dealership")

Dear Mr. Reggans:

This letter confirms the conversation between you and GMAC on November 21, 2008 regarding the Dealership's failure to meet all of the requirements as stipulated in a letter sent to you by GMAC dated July 30, 2008. In that letter, GMAC required the following in order to continue the financing arrangements between the Dealership and GMAC:

- By no later than October 30, 2008, an unencumbered capital injection of $800,000 must be made into the Dealership.
- By no later than October 30, 2008, the personal guaranty of John Reggans of all obligations of the Dealership to GMAC must be provided to GMAC as additional security.
- As always, the Dealership must remit payment for vehicles "faithfully and promptly" upon their sale or lease, as required by the Dealership's Wholesale Security Agreement with GMAC, and strictly comply with all provisions of the Wholesale Security Agreement.

As of the date of this letter:

- GMAC has received unencumbered funds in the amount of $500,000.
- The personal guaranty of John Reggans of all obligations of the Dealership to GMAC has not been received.
- The Dealership has not remitted payment for vehicles "faithfully and promptly" upon their sale of lease, as required by the Dealership's Wholesale Security Agreement with GMAC, as proven on four separate wholesale inventory audits completed on August 22, 2008 (17 out of 22 sampled vehicles), September 4, 2008 (7 out of 16 vehicles sampled), September 23, 2008 (9 out of 15 vehicle sampled), and October 27, 2008 (5 out of 13 vehicles sampled).

EXHIBIT
4
Reggans
3-4-09

As discussed, despite the fact that GMAC's requirements have not been fully met, GMAC is agreeable to temporarily continue the Dealership's credit line if the following requirements are met by November 30, 2008:

- The personal guaranty of John Reggans of all obligations of the Dealership to GMAC (document enclosed for signature).
- An unencumbered capital injection of $300,000.00 into the Dealership.

If the Dealership is unwilling or unable to comply with the above requirements, GMAC may suspend or terminate the Dealership's wholesale credit lines.

Nothing in this letter constitutes or should be construed as a waiver of any of GMAC's rights or remedies under applicable law or under the Dealership's agreements with GMAC, all of which are expressly reserved.

Notwithstanding the foregoing, the Dealership's credit line is subject to the agreements under which it was extended. GMAC financing is demand financing of a discretionary nature and thus may be modified, suspended or terminated at GMAC's election, in its sole, absolute discretion.

Sincerely,

R.M. Smith
Operations Manager

EXHIBIT F

GMAC FINANCIAL SERVICES

5208 Tennyson Parkway, Ste 120
Plano, TX 75024
(972) 649-2086 fax: (972) 649-2218

December 8, 2008

Mr. John Reggans
Everett Chevrolet, Inc.
7300 Evergreen Way
Everett, WA 98203

Re: Everett Chevrolet, Inc. ("Dealership")

Dear Mr. Reggans:

On November 25, 2008, GMAC sent the Dealership a letter regarding certain requirements as stipulated from a previous letter sent to you on July 30, 2008. The requirements that were to be met by November 30, 2008 were:

- Provide GMAC with your personal guaranty of all obligations of the Dealership to GMAC.
- An unencumbered capital injection of $300,000.00 into the Dealership.

As of December 1, 2008, neither of these requirements had been met.

Further, GMAC sent the Dealership another letter dated November 6, 2008, which required principal balance reduction payments totaling $172,279.00 on the following units by November 30, 2008:

- Prior model-year units financed by GMAC that have been in the Dealership's inventory for more than 180 days.
- Used vehicles financed by GMAC that have been in the Dealership's inventory for more than 120 days.

As of December 8, 2008, GMAC has not received these principal reduction payments.

Lastly, on December 5, 2008, GMAC conducted a wholesale inventory audit which revealed 75% payment delays (12 out of 16 vehicles sampled). It was determined that eight vehicles financed by GMAC, totaling $131,637.98, were due on or before December 5, 2008. As of December 8, 2008, GMAC has not received payment for these vehicles.

Despite the Dealership's promise under its Wholesale Security Agreement to pay GMAC on demand for amounts advanced, as of the date of this letter, GMAC has not received the aforementioned payments. Therefore, the Dealership is in default under the Wholesale Security Agreement. As a result, GMAC has suspended the Dealership's wholesale credit line, effective December 9, 2008, and GM has been notified to remit to GMAC all accounts owed to the Dealership.

EXHIBIT
5
Reggans

Nothing in this letter constitutes, or may be construed as, a waiver of GMAC's rights or remedies, all of which are expressly preserved.

If you have any questions or concerns regarding this matter, please feel free to contact me at 972-649-2086.

Sincerely,

R.M. Smith
Operations Manager

EXHIBIT G

GMAC FINANCIAL SERVICES

GMAC Dallas Regional Business Center
5208 Tennyson Parkway, Suite 120
Plano, TX 75024
1-800-343-4541 Ext. 2063

SENT VIA FEDEX AND EMAIL TO JOHNR@EVCHEV.COM

December 15, 2008

Mr. John Reggans, President
Everett Chevrolet, Inc.
7300 Evergreen Way
Everett, WA 98203

Re: Wholesale Credit Line of Everett Chevrolet, Inc. ("Dealership")

Dear Mr. Reggans:

As you know, GMAC has communicated with you on several occasions this year about the declining creditworthiness of the Dealership. Due to its concerns, GMAC has requested in various communications that certain actions be taken within a specified period of time in order to reduce the risk to GMAC. Beginning with the meeting on June 10, 2008 between you and Jerry Vick, the requested actions included, among other things:

- Make an injection of unencumbered funds in the amount of $800,000 into the Dealership
  - This was only partially achieved; only $500,000 was invested
- Provide your personal guaranty of the Dealership's obligations
  - This has not been done yet
- Remit vehicle payments "promptly and faithfully" as required under the Wholesale Security Agreement ("WSA")
  - Dealership wholesale payment performance has not improved, as determined by audits taken on 8/22/2008, 9/04/2008, 9/23/2008, 10/27/2008, 11/11/2008, 11/20/2008, and 12/05/2008. Most notably, the recent sale out of trust on December 5, 2008 of approximately $132,000 was unacceptable, and is a serious default under GMAC's WSA.
- Pay principal reductions as billed on prior model year inventory, as well as on used vehicles financed more than 120 days
  - To date, reduction payments have not been made, in full, as billed.

GMAC also advised you on numerous occasions that the Dealership has exceeded its credit line limit and has had an excessive number of financed vehicles in inventory for an extended period of time. As of the date of this letter, the Dealership's New Vehicle Credit Line is at 110 units (temporarily increased on 10/1/08 to 138 units) with 165 units currently financed by GMAC; which equates to a 196 days supply based on the October 31, 2008 GM Operating Report (54 of the 165 units currently financed by GMAC are Prior Model Year Units [2008 and older]). The Dealership's Used Vehicle Credit Line is at 110 units with 89 units currently financed by GMAC (38 units have been financed greater than 120 days).

EXHIBIT
6
Reggans
3-4-09

Due to the above, this letter is to advise the Dealership that GMAC has decided to terminate the Dealership's wholesale credit line and terminate the Dealership's Revolving Line of Credit Agreement with GMAC dated October 16, 2000 (the "Revolving Line of Credit").

Accordingly, GMAC hereby demands full payment of all amounts due, including principal, unpaid accrued interest and any other charges, in connection with the Dealership's wholesale credit line and all amounts due under the Dealership's Revolving Line of Credit (all such amounts, along with any accrued interest and applicable fees, the "Dealership Obligations"). The principal amounts of such Dealership Obligations are as follows:

- Dealership's wholesale line of credit $5,530,666.13
- Dealership's Revolving Line of Credit Agreement $738,000.00

Payment for such Dealership Obligations is due on or before March 13, 2009 (the "Due Date") and the wholesale credit line and Revolving Line of Credit will be terminated on the Due Date. Interest on Dealership Obligations will continue to accrue and is payable with the outstanding principal balances and any other unpaid charges.

The failure of the Dealership to pay its wholesale credit obligations to GMAC by the Due Date will constitute a default of our WSA by the Dealership. In that event, GMAC will charge the Dealership a noncompliance fee of $42,000.00, which will be immediately due and payable. The noncompliance fee would be in addition to any amounts owing to GMAC under the Dealership's wholesale credit line. This fee will neither extend the Dealership's wholesale credit line nor waive its default for failure to make the required payment. Further, GMAC will have all its rights and remedies under our Agreements and applicable law to collect the Dealership Obligations.

You are also advised that so long as the Dealership Obligations remain unpaid, the following conditions are in effect until further notice from GMAC:

- GMAC must retain possession of MCOs, titles, and keys to inventory.
- GMAC will continue to charge $500 for each audit.
- The Dealership will be charged for security service required to protect GMAC's collateral.
- All demonstrator vehicles must be returned to the Dealership premises and "taken out of demonstrator service.

As always, you and the Dealership must strictly comply with all agreements with GMAC.

GMAC expressly reserves its rights under its agreements or applicable law. The Dealership's wholesale credit line is a discretionary line of credit and may be modified, suspended, or terminated at GMAC's election, in its sole discretion.

Sincerely,

Joseph P. McCarthy
Director Commercial Lending

EXHIBIT H

GMAC FINANCIAL SERVICES

5208 Tennyson Parkway, Suite 120
Plano, TX 75024
800-343-4541 Ext. 2050

SENT VIA FEDERAL EXPRESS AND EMAIL TO JOHNR@EVCHEV.COM

December 19, 2008

Everett Chevrolet, Inc.
Mr. John Reggans
7300 Evergreen Way
Everett, WA 98203

Re: Everett Chevrolet, Inc.
NOTICE OF DEFAULT
DEMAND FOR PAYMENT

Dear Mr. Reggans:

You are hereby notified that Everett Chevrolet, Inc. ("Dealership") is in default under its wholesale financing agreements with GMAC for failure to pay GMAC $206,806.18 for vehicles upon their sale or lease.

As a result, GMAC hereby demands that the Dealership immediately remit payment of all amounts owed to GMAC under its wholesale credit line, currently in the following amounts:

(A)	Principal Amount of Vehicles Financed by GMAC (Includes the $206,806.18)	$ 5,602,460.32
(B)	Interest Charges through November 30, 2008	$ 26,834.57
(C)	Revolving Line of Credit Principal Balance	$ 738,000.00
	TOTAL AMOUNT DEMANDED	$ 6,367,294.89

This demand for payment is made without prejudice to any other amounts now or hereafter owing by the Dealership to GMAC, including, without limitation, interest accruing from and after the date of this letter, and obligations arising under the GMAC Wholesale Plan.

If the Dealership fails to make payment as demanded, GMAC may take possession of all Dealership property in which it has a security interest, including, without limitation, all of the motor vehicles financed by GMAC for the Dealership. In this respect, the Dealership may be asked to assemble and present for retaking by GMAC such collateral. GMAC reserves the right to exercise any other remedy it may have pursuant to law or contract.

Sincerely,

Joseph P. McCarthy
Director Commercial Lending

EXHIBIT
7
Reggans
3-4-09

EXHIBIT I

EVERETT
CHEVROLET

November 27, 2007

General Motors Corporation
EDES-WorldWide Real Estate, Western Region
Attention: David Frederickson, Regional Manager
Troy B. Freeman, Project Manager
515 Marin Street, #211
Thousand Oakes, California 91360

Re: Everett Chevrolet, 7300 Evergreen Way, Everett, WA
Purchase of dealership real Property from Argonaut, Inc.

Dear David and Troy:

Thank you for speaking with me concerning my efforts to purchase the real property upon which Everett Chevrolet is located from Argonaut Holdings, Inc. Please consider this letter to be my confirmation of my intention to purchase both parcels of property that comprise Everett Chevrolet from Argonaut for an amount equal to the "Total Project Cost" that you quoted to me in our meeting that totals $4,989,333.27, comprised of $4,061,272.01 for the Main Parcel (7300 Evergreen Way), and $928,061.26 for the Used Car Parcel (7428 Evergreen Way).

I intend to purchase the property under the name of Reggans Investment, L.L.C., a Washington limited liability company.

I am currently in the process of negotiating the details for the financing of this purchase with the goal of closing the purchase on or before December 31, 2007. I will cause a Purchase and Sale Agreement to be prepared which sets forth the agreement to purchase the Everett Chevrolet property for the total purchase price described in this letter. Thank you for your anticipated cooperation.

Sincerely,

EVERETT CHEVROLET

John Reggans, President

EXHIBIT J

Economic Development
and Enterprise Services

Troy B. Freeman
Project Manager
Worldwide Real Estate
Western Region
515 Marin Street, Suite 211
Thousand Oaks, CA 91360
Phone: (805) 373-9516
Fax: (805) 373-9594
troy.freeman@gm.com

December 12, 2007

Everett Chevrolet
Attn: John Reggans
7300 Evergreen Way
Everett, WA 98203

Re: 7300 & 7428 Evergreen Way, Everett WA

Dear John:

This letter is being sent in response to yours of November 27, 2007. Please note as follows:

Per the terms of your master lease dated December 9, 1996 pertaining to the premises located at 7300 Evergreen Way, Argonaut Holdings, Inc., regrets to inform you that your option to purchase said real property is no longer valid. As stated in your lease, the Option Period in which your notice was due commenced upon your "buy out" of the Motors Holding investment and ran for a period lasting the earlier of five years following your buy out of the Motors Holding investment or ten years following the rent commencement date. The earlier of these two timeframes is five years following your Motors Holding buy out; regardless however, both of these timeframes have lapsed.

Additionally, per the terms of your master lease dated September 11, 1998 pertaining to the premises located at 7428 Evergreen Way, Argonaut Holdings, Inc., regrets to inform you that your option to purchase said real property is no longer valid. As stated in your lease, the Option Period in which your notice was due commenced upon your "buy out" of the Motors Holding investment and ran for a period lasting the earlier of five years following your buy out of the Motors Holding investment or ten years following the rent commencement date. The earlier of these two timeframes is five years following your Motors Holding buy out. Unfortunately, based upon the completion of your buy out in 1999/2000, this timeframe has also lapsed

In light of our previous discussions, I would encourage you to continue to search through your files for any documentation that substantiates your position that this option was previously exercised. Upon receipt of said documentation, I will re-submit

this information through the proper channels in hopes of reaching an amicable resolution.

Please feel to contact me with any questions.

Sincerely,

Troy B. Freeman
Project Manager

EXHIBIT K

Everett Chevrolet

From: david.frederickson@gm.com
Sent: Thursday, March 06, 2008 4:11 PM
To: johnr@evchev.com
Cc: jay.a.malott@gm.com; jim.gentry@gm.com; troy.freeman@gm.com
Subject: Thank you...

John,

I just wanted to send you a quick note to say thank you for spending the time with us Tuesday night to talk through our challenges with the Everett Chevrolet property. We recognize that you took time out of your evening to do so, and it is greatly appreciated. I think we all agree that the issues we face are extremely important, and reaching a swift but fair solution is imperative. To that end, I believe it is critical that we maintain clear communication as we proceed to avoid any future misunderstandings. Therefore, I have briefly summarized some of the key points of our discussion, and certain action items, below:

- Based on a review of the past documents and correspondence, it the position of Argonaut Holdings Inc. ("Landlord") that the option to purchase under the Master Lease has not been exercised. Although there is record of correspondence that would indicate Everett Chevrolet-Geo, Inc. ("Tenant") had an intent pursue a purchase of the property, there is no evidence that a notice of Tenant's election to exercise the option to purchase in accordance with the terms of the Master Lease was ever delivered to Landlord. Additionally, the terms and conditions at which Tenant was prepared to proceed with a purchase, as articulated in the correspondence that is on file, was drastically inconsistent with the option terms under the lease, and thus cannot be construed as a valid exercise of the option.
- At this time, the Option Period under the Master Leases for both properties has expired.
- Although the Option Periods have expired, GM Worldwide Real Estate intends to pursue the opportunity to offer the property for sale to the Tenant, however, at this time is unable to do so due to the constraints imposed by the Corporation's initiative for AHI to sell these properties as part of a large portfolio sale. GM-WRE will monitor the status of the portfolio sale and continue to pursue the special dispensation for the approval needed to separate this property from the portfolio. However, Tenant has been explicitly advised that the authority to make these decisions falls outside of the control of GM-WRE and AHI.
- At this time, neither GM-WRE nor AHI have made any indications as to the price at which these properties are to be sold, whether as part of a large portfolio sale, or otherwise. Although GM-WRE did provide Tenant with the current Total Project Cost for these properties, this act should in no way be misconstrued by the Tenant as an indication of the properties value, or the price at which AHI would be prepared to sell. Only if and when the approval were granted to separate these properties from the portfolio sale will GM-WRE and AHI begin to evaluate the terms of a proposed sale, including price.
- GM-WRE has emphasized to Tenant that as distinct and separate issue from the potential sale of the property, the rental rate per the terms of the lease is overdue for recalculation and adjustment. Tenant has been provided with a notice indicating the Landlord's findings of fair market rent for the property, yet Tenant has failed to respond to that notice. At this time, Landlord has implemented the adjustment based on its findings of fair market rent, however, Tenant has not its monthly rental payments nor begun any repayment of the retroactive rent now due and payable.
- Per our discussion, Landlord will re-issue the rent recalculation letter to Tenant, with a deadline by which Tenant must either agree to the rent recalculation or formally, in writing, notify Landlord of Tenant's intent to dispute Landlord's findings. That letter will be issued immediately and Tenant shall have until Friday, 3/11/08 to respond.

I hope you find my summary of our discussion to be accurate. If you have any additional comments or concerns, please do not hesitate to share them. Otherwise, Troy Freeman drafted a revised rent letter and placed in the today's Fed Ex for delivery tomorrow. Once you receive the letter, please contact Troy or myself with any

- Based on a review of the past documents and correspondence, it the position of Argonaut Holdings Inc. ("Landlord") that the option to purchase under the Master Lease has not been exercised. Although there is record of correspondence that would indicate Everett Chevrolet-Geo, Inc. ("Tenant") had an intent pursue a purchase of the property, there is no evidence that a notice of Tenant's election to exercise the option to purchase in accordance with the terms of the Master Lease was ever delivered to Landlord. Additionally, the terms and conditions at which Tenant was prepared to proceed with a purchase, as articulated in the correspondence that is on file, was drastically inconsistent with the option terms under the lease, and thus cannot be construed as a valid exercise of the option.
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I hope you find my summary of our discussion to be accurate. If you have any additional comments or concerns, please do not hesitate to share them. Otherwise, Troy Freeman drafted a revised rent letter and placed in the today's Fed Ex for delivery tomorrow. Once you receive the letter, please contact Troy or myself with any questions. Thank you.

Regards,

DWF

David W. Frederickson
Regional Manager
General Motors Corporation
EDES – Worldwide Real Estate
Western Region
Tel: 805.373.9540
Fax: 805.373.9594
Email: david.frederickson@gm.com

EXHIBIT L

"Dear Mr. Fredrickson: I have reviewed your e-mail to me dated March 6, 2008 regarding the purchase by me of the dealership property for Everett Chevrolet. In fact, I do not find your summary of our discussions to be accurate. Without going into any great detail I wish to reconfirm that:

1. Your conclusion regarding the exercise of the option is totally erroneous. In fact, I formally exercised the Option to Purchase. This fact is known by all who participated in that transaction.

Following the formal exercise of the option, the transaction was proceeding to closing, with the establishment of a formal escrow, issuance of a title commitment and preparation of final closing papers and escrow instructions. Financing was in place and all of the documents to close the purchase were in place with the escrow Agent. However, Argonaut Holdings was unwilling to sell the property for the required "Total Project Costs"; The amount demanded by Argonaut Holdings for the purchase of the Dealership Property exceeded the "Total Project Cost" by at least $350,000.00; If you will consider the historical correspondence, you will see that I objected to the amount demanded by Argonaut as the Purchase Price as it represented a sum in excess of the Total Project Cost; and

2. In November, 2007, World Wide Real Estate/Argonaut Holdings finally agreed to sell the Dealership Property for $4,989,333.27, comprised of the "Total Project Costs" of $4,061,272.01 for the Main Parcel (7300 Evergreen Way), and of the "Total Project Costs" of $928,061.26 for the Used Car Parcel (7428 Evergreen Way). I sent a letter to you confirming our agreement for the purchase of the Dealership Property for the correct amount of the "Total Project Cost"; I was then instructed to secure a commitment for financing for a present sale of the Dealership Property. I secured the required financing commitment and I was and I am prepared to close the purchase of the Dealership Property.

3. The Dealership Property was, in fact, offered to me in November, in part to resolve the dispute over Argonaut's failure to comply with the terms of the Option; and with the exception of your latest e-mail, no one has ever stated about the inability to sell the Dealership Property due to the "large portfolio sale".

4. I do not intend on waiving my rights to acquire the Dealership Property and I intend on pursuing this issue through all available means.

5. As your e-mail memo to me dated March 6, 2008 is not accurate and as it does not reflect the historical facts, I reject it as a "summary" of our discussions." Respectfully, John Reggans

EXHIBIT M

LOWE, FELL & SKOGG, LLC
370 SEVENTEENTH STREET, SUITE 4900
DENVER, COLORADO 80202
PHONE 720.359.8200
FAX 720.359.8201

KIRSTEN J. PEDERSON
DIRECT DIAL 720.932.2631
E-MAIL KPEDERSON@LFSLAW.COM

May 1, 2009

VIA OVERNIGHT MAIL

Everett Chevrolet, Inc.
Attn: John Reggans
7300 Evergreen Way
Everett, WA 98203

Re: Lease Agreement dated December 6, 1996, as amended by that certain Assignment of and First Amendment of Master Lease dated December 31, 1997 (collectively, the "Dealership Lease"), between Argonaut Holdings, Inc., as successor to Harrington Chevrolet-Geo, Inc. ("Landlord"), and Everett Chevrolet, Inc., as successor to Everett Chevrolet-Geo, Inc. ("Tenant"), for the property located at 7300 Evergreen Way in Everett, Washington (the "Dealership Premises"), and Lease Agreement dated September 11, 1998 (the "Parking Lease"), between Landlord and Tenant for the property located at 7428 Evergreen Way in Everett, Washington (the "Parking Premises", and together with the Dealership Premises, the "Premises").

Dear Mr. Reggans:

This firm represents Landlord and has been authorized by Landlord to send this letter on Landlord's behalf. All initially capitalized terms not otherwise defined in this letter shall have the meanings given such terms in Dealership Lease or the Parking Lease.

Pursuant to Section 3.1 of the leases, Tenant is obligated to pay Monthly Rent to Landlord for the Dealership Premises and the Parking Premises on the first day of each month. Tenant has (1) for the Dealership Premises, failed to pay the full Monthly Rent since January of 2007 and has failed to pay any Monthly Rent for March or April of 2009, and (2) for the Parking Premises, failed to pay the full Monthly Rent since January of 2009 and has failed to pay any Monthly Rent for March or April of 2009, and all of which totals $674,977.00 (the "Delinquent Rent"). A detailed list of the Delinquent Rent is attached to this letter.

Landlord requests that Tenant immediately submit the Delinquent Rent within ten (10) days of receipt of this letter. In the event Tenant does not submit the Delinquent Rent by that time, Landlord reserves the right to pursue all of its rights, powers, and remedies, which are available to it by reason of Tenant's default under the Dealership Lease and the Parking Lease. In addition to Landlord's remedies under the leases, pursuant to Section 17.10 of the Dealer Sales and Service Agreement between Tenant

and General Motors Corporation, Landlord has the right to obtain any money owed by Tenant through Tenant's open account with General Motors Corporation.

Should Tenant have any further questions about the contents of this letter, please contact Landlord through David Frederickson at (805) 373-9540.

Sincerely,

Kirsten J. Pederson
for
LOWE, FELL & SKOGG, LLC

Attachment

KJP/cs
cc: D. Frederickson (via email)

7300 Evergreen Way, Everett, WA			
Date	Rent Paid	Actual Rent	End of Period Balance
1/1/2007	$ 17,299.00	$ 39,600.00	$ 22,301.00
2/1/2007	$ 17,299.00	$ 39,600.00	$ 22,301.00
3/1/2007	$ 17,299.00	$ 39,600.00	$ 22,301.00
4/1/2007	$ 17,299.00	$ 39,600.00	$ 22,301.00
5/1/2007	$ 17,299.00	$ 39,600.00	$ 22,301.00
6/1/2007	$ 17,299.00	$ 39,600.00	$ 22,301.00
7/1/2007	$ 17,299.00	$ 39,600.00	$ 22,301.00
8/1/2007	$ 17,299.00	$ 39,600.00	$ 22,301.00
9/1/2007	$ 17,299.00	$ 39,600.00	$ 22,301.00
10/1/2007	$ 17,299.00	$ 39,600.00	$ 22,301.00
11/1/2007	$ 17,299.00	$ 39,600.00	$ 22,301.00
12/1/2007	$ 17,299.00	$ 39,600.00	$ 22,301.00
1/1/2008	$ 17,299.00	$ 39,600.00	$ 22,301.00
2/1/2008	$ 17,299.00	$ 39,600.00	$ 22,301.00
3/1/2008	$ 17,299.00	$ 39,600.00	$ 22,301.00
4/1/2008	$ 17,299.00	$ 39,600.00	$ 22,301.00
5/1/2008	$ 17,299.00	$ 39,600.00	$ 22,301.00
6/1/2008	$ 17,300.00	$ 39,600.00	$ 22,300.00
7/1/2008	$ 17,300.00	$ 39,600.00	$ 22,300.00
8/1/2008	$ 17,300.00	$ 39,600.00	$ 22,300.00
9/1/2008	$ 17,300.00	$ 39,600.00	$ 22,300.00
10/1/2008	$ 17,300.00	$ 39,600.00	$ 22,300.00
11/1/2008	$ 17,300.00	$ 39,600.00	$ 22,300.00
12/1/2008	$ 17,300.00	$ 39,600.00	$ 22,300.00
1/1/2009	$ 17,300.00	$ 39,600.00	$ 22,300.00
2/1/2009	$ 17,300.00	$ 39,600.00	$ 22,300.00
3/1/2009	$ -	$ 39,600.00	$ 39,600.00
4/1/2009	$ -	$ 39,600.00	$ 39,600.00
Totals	$ 449,783.00	$ 1,108,800.00	$ 659,017.00

7428 Evergreen Way, Everett, WA			
Date	Rent Paid	Actual Rent	End of Period Balance
1/1/2009	$ 6,820.00	$ 7,400.00	$ 580.00
2/1/2009	$ 6,820.00	$ 7,400.00	$ 580.00
3/1/2009	$ -	$ 7,400.00	$ 7,400.00
4/1/2009	$ -	$ 7,400.00	$ 7,400.00
Totals	$ 13,640.00	$ 29,600.00	$ 15,960.00

Total Rent Delinquency	$	$ 674,977.00

EXHIBIT N

May 19, 2008

VIA OVERNIGHT/ CERTIFIED MAIL

Everett Chevrolet, Inc.
7300 Evergreen Way
Everett, Washington 98203

Re: Lease Agreement dated December 6, 1996, as amended by that certain Assignment of and First Amendment of Master Lease dated December 31, 1997 (collectively, the "Dealership Lease"), between Argonaut Holdings, Inc., as successor to Harrington Chevrolet-Geo, Inc. ("Landlord"), and Everett Chevrolet, Inc., as successor to Everett Chevrolet-Geo, Inc. ("Tenant"), for the property located at 7300 Evergreen Way in Everett, Washington (the "Dealership Premises"), and Lease Agreement dated September 11, 1998 (the "Parking Lease"), between Landlord and Tenant for the property located at 7428 Evergreen Way in Everett, Washington (the "Parking Premises", and together with the Dealership Premises, the "Premises").

Dear Mr. Reggans:

Landlord and Reggans Investment, LLC ("Reggans"), an affiliate of Tenant, are negotiating for Reggans to purchase the Premises from Landlord. Provided that (i) Landlord and Reggans enter into a Purchase and Sale Agreement (the "Purchase Agreement") for the Premises on or before June 6, 2008, (ii) Reggans purchases the Premises on or before the Closing Date (as defined in the Purchase Agreement) unless the closing is delayed pursuant to the terms of the Purchase Agreement, and (iii) Tenant is not in default under either the Dealership Lease or the Parking Lease from the date hereof through to the closing of the sale of the Premises, then upon the closing of the sale of the Premises Landlord will forgive the additional Basic Rent (as defined in the Dealership Lease) due from Tenant for the Dealership Premises for the recalculation of the Basic Rent for the third Rental Period (as defined in the Dealership Lease). In addition, Landlord and Tenant acknowledge and agree that Tenant's option to purchase (a) the Dealership Premises pursuant Article 22 of the Dealership Lease, and (b) the Parking Premises pursuant Article 22 of the Parking Lease, has expired and is of no further force and effect. If the foregoing accurately sets forth the understanding of the parties, please so indicate by executing in the space provided below and returning a fully executed copy to Landlord. If you have any questions, please contact us.

Very truly yours,

ARGONAUT HOLDINGS, INC., a Delaware corporation

By: Jay Malott
Name: JAY MALOTT
Its: PRESIDENT

EXECUTION RECOMMENDED
WORLDWIDE REAL ESTATE
BY

(00801192.3 07138-0432 5/15/2008 12:42 PM)

CP 192

The undersigned hereby consents to and agrees with the terms of this letter agreement.

EVERETT CHEVROLET, INC., a Delaware corporation

By: _____
Name: JOHN B. REGGANS, III
Its: PRESIDENT

EXHIBIT O

General Motors Corporation

January 23, 2009

Via Federal Express Overnight Delivery

John Reggans
c/o Everett Chevrolet, Inc.
7300 Evergreen Way
Everett, WA 98203

Everett Chevrolet, Inc.
7300 Evergreen Way
Everett, WA 98203
Attn: John Reggans

Re: Pre-Investment Agreement dated as of October 9, 2008 (the "Agreement"), by and among General Motors Corporation ("GM"), Everett Chevrolet, Inc. (the "Company") and John Reggans ("Operator").

Dear Mr. Reggans:

This letter is being delivered to you in connection with GM's proposed investment in the Company. All initially defined terms not otherwise defined herein shall have the meanings set forth in the Agreement.

This letter constitutes notice to the Company and Operator that GM is terminating discussions regarding a proposed investment by GM in the Company. Pursuant to the Sixth Section of the Agreement, Operator and the Company represented and warranted to Motors Holding that there were no proceedings pending against the Company. Notwithstanding such representation, Case Number 08-2-07242-6 was filed in Snohomish County Superior Court against the Company and the Company filed a Notice of Appearance in this lawsuit on or about September 22, 2008. The Company and Operator have breached their representations and warranties set forth in the Sixth Section of the Agreement. Furthermore, on December 31, 2008, GMAC filed a lawsuit against the Company and Operator in Snohomish County Superior Court, Case Number 08-2-106835-5, wherein GMAC has received a temporary restraining order against the Company and Operator and it appears that GMAC is seeking to recover on its loans to the Company. Pursuant to the Agreement, GM has no obligation to invest in the Company unless GM determines, in its sole discretion, that such investment is a commercially reasonable business investment. GM has determined that it will not proceed with this transaction.

Concurrent with the execution of the Agreement, GM provided $500,000 to the Company and the Company executed and delivered to GM a Promissory Note dated October 9, 2008 (the "Note"). Pursuant to the Note, in the event that the Company, Operator and GM failed to execute the Stock Purchase Agreement on or before January 9, 2009, the Note became due and payable in full. This letter also constitutes GM's written demand to the Company for payment of all amounts due and owing under the Note, with such payment to be received within fifteen (15) days of this letter.

If you have any questions about the foregoing, please contact Ruby Henderson at (805) 373-8476.

Very truly yours,

GENERAL MOTORS CORPORATION, a
Delaware corporation

By: Valerie A. Schuster
Name: Valerie A. Schuster
Title: Assistant Secretary

cc: Jerome Carpenter, Esq. (via Federal Express)
William J. Wheeler, Esq. (via Federal Express)
Kirsten J. Pederson, Esq. (via facsimile)

EXHIBIT P

CL13229957

FILED
2008 DEC 31 AM 10:15
SONYA KRASKI
COUNTY CLERK
SNOHOMISH CO. WASH

IN THE SUPERIOR COURT OF WASHINGTON
COUNTY OF SHOHOMISH

GMAC, A Delaware Corporation

PLAINTIFF,

Vs.

EVERETT CHEVROLET, a Delaware corporation; and JOHN REGGANS and JANE DOE REGGANS and their marital community

DEFENDANTS.

NO 08 2 10683 5

TEMPORARY RESTRAINING ORDER AND ORDER TO SHOW CAUSE

This matter came before the Court on December 31, 2008 on GMAC (hereinafter GMAC) Motion for a Temporary Restraining Order against Defendants Everett Chevrolet and John Reggans & Jane Doe Reggans (hereinafter Defendants) and Order to Show Cause. Defendants received notice of the motion by phone, facsimile and electronic message on December 30, 2008.

Adorno Yoss Caley Dehkhoda & Qadri
2340 130th Ave NE #D-150
Bellevue, WA 98005
(425) 869-4040 Fax (425) 869-4050

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The Court heard oral argument of counsel for the GMAC and counsel for the Defendants. The Court considered the pleadings filed in this action and the following evidence including the Declaration of Counsel, Dianna Caley; Declaration of GMAC Officer, Mr. Joseph P. McCarthy and the supporting security agreement and UCC filings.

Based on the argument of counsel and the evidence presented, the Court finds that the GMAC is in danger of losing their property and their remedies under the security agreement signed by both parties. For the reasons set forth above, IT IS HEREBY ORDERED:

1. GMAC's motion is granted.

2. Defendants, their agents, servants, employees, attorneys, and all persons in active concert and participation with Defendants who receive actual notice of this order, are enjoined from selling, leasing, renting, moving, encumbering or concealing any of the vehicles or other property in which the GMAC has a security interest.

3. Defendants, their agents, servants, employees, attorneys, and all persons are enjoined from removing, ejecting, or forcibly evicting GMAC's personnel, employees, agents, and or collateral specialist agents.

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Bellevue, WA 98005
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4. This order is conditioned upon GMAC first ~~giving~~ posting bond with the court ~~security~~ in the amount of $ 2,000,000 for the payment of costs and damages which may be incurred by any party found to be wrongfully restrained by this order.

5. This temporary restraining order shall expire 1/14/09 from entry.

6. Defendants shall appear before at 1/14/09 at 9:30 AM on the civil motions Judge calendar and show cause, if any, why he should not be enjoined during the pendency of this action from the acts described in paragraph 2 of this order.

Date and hour of issuance:

Dated 31st December, 2008.

R J Weiss
Judge Bruce E. Weiss

Presented by:
Adorno Yoss Caley Dehkhoda & Qadri

Dianna J. Caley, WSBA#23413
Attorney for Plaintiff
GMAC

Adorno Yoss Caley Dehkhoda & Qadri
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EXHIBIT 5

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR THE COUNTY OF SNOHOMISH

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

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

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

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

And these are my Findings of Fact.

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

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

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

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

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

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

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

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

In September of 2007, Mr. Jerry Vick became GMAC

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

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

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

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

increased the revolving line of credit.

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

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

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

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

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

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

One was a charge of $500 per audit.

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

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

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

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

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

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

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

manipulating and withholding information and resting

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

basis for ECI's default.

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

First, a target for cash injection is set that can

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

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

Next is the $500 audit charge.

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

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

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

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

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

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

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

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

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

The three day 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. This rule is not a contract term, and it is not uniform among dealers. Some have a five business day remit rule. And there was no testimony in the record concerning how it was applied or who got three and who got five.

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

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

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

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

question that this Court resolves against GMAC.

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

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

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

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

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

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

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

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

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

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

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

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.

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

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

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

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

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

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

In the instant case, GMAC did not conduct itself honestly. There was a hidden agenda throughout the time from when Mr. Vick took control until the catastrophic demands in 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 manufacture a default.

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

want to do business with ECI in the future openly and honestly, then he would have had recourse to alternatives. But instead the Dealer was led to believe his past good relationship with GMAC still existed all the while secret actions were taking 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 financing from Motor's Holding, which closing date was less than thirty days away.

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

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

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

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

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

ECI sold 19 million dollars by October of 2008.

With these sales, that 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 default. This constitutes bad faith.

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

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

The request for replevin is denied.

And I think consistent with that, the motion to

amend the complaint is also denied.

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

Anybody have anything else they want to say?

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

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

Mr. Hausmann?

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

MR. WHEELER: Your Honor --

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

THE COURT: The Court is treating this as the

final ruling in this case.

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

THE COURT: I will grant that.

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

THE COURT: I am not sure.

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

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

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

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

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

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

THE COURT: The rest of the trial?

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

THE COURT: On the replevin motion.

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

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

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

THE COURT: Oh, is it a replevin bond?

MR. HAUSMANN: It is a replevin bond.

MR. GLOWNEY: It is.

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

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

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

against the bond is --

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

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

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

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

MR. HAUSMANN: Okay.

THE COURT: That's what I contemplated.

MR. HAUSMANN: Right.

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

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

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

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

MR. GLOWNEY: So the injunction is lifted?

THE COURT: The injunction is lifted.

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

MR. HAUSMANN: They are still contractually bound.

MR. WHEELER: We will pay the floorplan amount.

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

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

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

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

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

injunction is lifted or not.

THE COURT: It is lifted.

MR. HAUSMANN: Thank you, your Honor.

MR. WHEELER: Thank you, your Honor.

THE COURT: So I'm not quite sure what you all want to do in terms of an order, but in an hour I'm

going to be heading over to juvenile court.

Mr. Hausmann, you know where juvenile court is.

MR. HAUSMANN: Yes.

THE COURT: If you need me to sign something today, I will be available over there.

MR. WHEELER: Yes, we do.

THE COURT: You just need to go over there and speak with the court coordinator.

MR. HAUSMANN: That's down at Denny.

THE COURT: Have you been there lately? Just go in the main front entrance, once you go through the metal detector and all that, there is a little booth.

MR. HAUSMANN: Kiosk.

THE COURT: Yes, kiosk, and just ask them. I will either be in courtroom one after three o'clock, or I will be upstairs in staffing.

MR. GLOWNEY: Are you going to prepare an order or do you want me to --

MR. HAUSMANN: We will work together.

MR. GLOWNEY: We need to get it entered today.

THE COURT: Anything else?

MR. GLOWNEY: I don't think so.

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

R. APP. C

NOTED: 12/8/11 @ 9 A.M.

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

GMAC n/k/a Ally Financial Inc, a Delaware corporation, Plaintiff, v. EVERETT CHEVROLET , INC., a Delaware Corporation; and JOHN REGGANS and JANE DOE REGGANS and their marital community Defendants.	No. 08-2-10683-5 CONSOLIDATED
ALLY FINANCIAL INC., a Delaware corporation, Plaintiff, v. JOHN REGGANS, an individual; and the marital community of JOHN REGGANS and CARMENLYDIA REGGANS, husband and wife, Defendants.	No. 11-2-08883-7 ALLY'S f/k/a GMAC's RESPONSE TO DEFENDANT EVERETT CHEVROLET'S MOTION FOR PRE-ASSIGNMENT AND TRANSFER TO JUDGE LUCAS

Plaintiff Ally Financial Inc. f/k/a GMAC ("Ally") takes no position on the motion for pre-assignment and submits this short response to defendant Everett Chevrolet Inc.'s ("EC")

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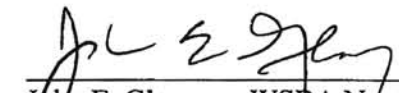
motion for pre-assignment of these consolidated actions to Judge Eric Z. Lucas to clarify and correct the record before the Court.[1] While EC is correct that Judge Lucas is familiar with GMAC's claims against EC because he conducted a hearing on GMAC's request for replevin against EC in early 2009, EC's statement of the relevant procedural and factual background is deficient because it omits the central basis upon which Ally obtained discretionary review of the pre-trial replevin show cause hearing.[2] The Court of Appeals' Commissioner granted discretionary review to Ally by determining that Judge Lucas' ruling of bad faith was "probable error." Attached hereto is a true and correct copy of the Commissioner's Order Granting Discretionary Review. The Court of Appeals reversed all of Judge Lucas' other rulings in its Opinion dated October 11, 2010.

DATED: December 6, 2011.

STOEL RIVES LLP



John E. Glowney, WSBA No. 12652
Attorneys for Plaintiffs
Ally Financial Inc., f/k/a GMAC

[1] A stipulated order consolidating *Ally v. Reggans* with *GMAC v EC* was entered on December 1, 2011.

[2] The motion contains other inaccuracies. There were not 20-25 witnesses in the replevin hearing. Ally submitted the record from the prior replevin hearing as a courtesy to the court and EC's current counsel, who is new to the case. Ally's summary judgment motion relies upon two controlling Washington cases: *Allied Sheet Metal Fabricators, Inc. v. Peoples National Bank of Washington*, 10 Wn. App. 530, 536, 518 P.2d 734, *review denied*, 83 Wn.2d 1013, *cert. denied*, 419 U.S. 967 (1974) and *Badgett v. Security State Bank*, 116 Wn.2d 563, 807 P.2d 356 (1991).

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DATED: December 6, 2011.

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CERTIFICATE OF SERVICE

I certify that the foregoing pleading is being served on the parties as set forth below **via pdf/email & U. S. Mail** and filed with the Court:

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R. APP. D

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2013 JAN 16 PM 1:35

SONYA KRASKI
COUNTY CLERK
SNOHOMISH CO. WASH

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

GENERAL MOTORS LLC,

Plaintiff,

v.

EVERETT CHEVROLET, INC.,

Defendant.

v.

ALLY FINANCIAL INC.,

Intervenor

v.

WILLIAM WHEELER & ASSOC. PC,

Intervenor.

No. 10-2-05222-2

~~[PROPOSED]~~
ORDER GRANTING ALLY FINANCIAL INC.'S MOTION FOR DISBURSEMENT OF FUNDS FROM COURT REGISTRY

This matter came before the Court on January 16, 2013 on the motion of Intervenor Ally Financial Inc. ("Ally") for disbursement of funds from the Court Registry. In adjudicating this motion, the Court heard oral argument by counsel and reviewed the following pleadings:

1. Intervenor Ally Financial Inc.'s Motion for Disbursement of Funds from the Court Registry to Ally Financial Inc.;

2. Request to Take Judicial Notice in Support of Intervenor Ally Financial Inc.'s Motion for Disbursement of Funds from the Court Registry to Ally Financial Inc., and exhibits thereto;

3. Everett Chevrolet, Inc.'s Opposition to Ally Financial Inc.'s Motion for Disbursement of Funds;

4. Declaration of Jeffrey A. Beaver in Support of Everett Chevrolet, Inc.'s Opposition to Ally Financial Inc.'s Motion for Disbursement of Funds, and exhibits thereto;

5. Request for Judicial Notice in Support of Everett Chevrolet, Inc.'s Opposition to Ally Financial Inc.'s Motion for Disbursement of Funds, and exhibits thereto;

6. Intervenor Ally Financial Inc.'s Reply to Everett Chevrolet, Inc.'s Opposition to Ally Financial Inc.'s Motion for Disbursement of Funds from the Court's Registry;

Based upon the foregoing; for the reasons articulated on the record and for good cause appearing, IT IS HEREBY ORDERED THAT:

Ally's Motion for Disbursement of Funds is GRANTED; and it is further ordered that Ally shall post an additional replevin bond of $500,000 in the case of *GMAC v. Everett Chevrolet, Inc., et al.*, Case No. 08-2-10683-5 (consolidated with Case No. 11-2-08883-7), (the "*GMAC v EC Action*"), and upon presentation of a copy of such bond and this order and service upon Everett Chevrolet, Inc., the Clerk of the Court shall disburse the funds in the court registry in this case to Ally.

The remaining issue in this case concerning the indebtedness Everett Chevrolet, Inc. owes to Ally shall be consolidated with the GMAC v. EC Action.

DONE IN OPEN COURT this 16th day of January 2013.

HON. ERIC Z. LUCAS, Judge

Presented by:

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AND REGIONAL DEFENDANT B.

R. APP. E

C

University of Chicago Law Review
Summer 1998

Comment

"MEND THE HOLD" AND ERIE: WHY AN OBSCURE CONTRACTS DOCTRINE SHOULD CONTROL IN FEDERAL DIVERSITY CASES

Robert H. Sitkoff [FNd1]

Suppose an insurance company rejects a policyholder's claim, giving a specific reason for the denial in a declination letter. Convinced that this reason is not valid, the policyholder sues the company for breach of contract. Should a court permit the insurance company to raise defenses not based on the specific reason given in the declination letter? [FN1] Under one version of the common law "mend the hold" doctrine, the answer is no. Furthermore, despite the procedural flavor of the rule, under modern Erie analysis the mend the hold doctrine represents the sort of state prerogative that federal courts sitting in diversity must respect.

The phrase "mend the hold" comes from nineteenth century wrestling parlance where it meant "get a better grip (hold) on your opponent." [FN2] Its first appearance in a judicial opinion was in a nineteenth century Supreme Court decision that refused a party in a contract suit the right to defend its nonperformance with a defense that it had not raised before the close of evidence. [FN3] Since then, the doctrine has evolved into two modern forms. Under the Illinois (minority) version of the rule, absent a good faith justification for a change in position, a defendant in a breach of contract action is confined to the first defense raised once the litigation is underway. [FN4] In contrast, the majority version of the doctrine limits the nonperforming party's potential defenses to those based on the explanation given at the time of the nonperformance. [FN5]

The majority formulation has been applied especially to insurance contracts, [FN6] has been discussed as a rule of real estate brokerage contracts, [FN7] and a closely related version has been codified in the Uniform Commercial Code. [FN8] Yet despite the doctrine's apparently wide reach, modern contracts scholars have for the most part overlooked it. [FN9]

Because mend the hold is a hybrid of a substantive rule of contract law and a procedural rule governing pleading, it is unclear whether federal courts should apply mend the hold in diversity cases. Application of the doctrine would make rigid "the system of pleading that the Federal Rules of Civil Procedure seek to make supple." [FN10] Traditional analysis under Erie Railroad Co v Tompkins, [FN11] provides no clear answer. To the extent that the rule represents a

state's attempt to channel prelitigation behavior and to make it easier to win breach of contract cases, it should control in federal diversity suits. [FN12] But at the same time, when a state rule conflicts with a Federal Rule of Civil Procedure, the state rule must yield. [FN13] Thus, it is not surprising that when confronted with mend the hold arguments, federal courts have come to inconsistent conclusions. The differences in mend the hold across the various jurisdictions recognizing the doctrine further complicate the issue. [FN14]

This Comment explores the mend the hold doctrine and its "vexing" [FN15] Erie analysis. Part I sketches the doctrinal distinctions between mend the hold, equitable estoppel, and judicial estoppel, and then presents an outline of mend the hold as a rule of contract law. With that background in place, Part I explores some of the more significant modern manifestations of the mend the hold principle in the law of contracts. Part II considers whether federal courts sitting in diversity should enforce the mend the hold doctrine. First, it contrasts mend the hold with the flexible pleading requirements of the Federal Rules of Civil Procedure. Second, it examines the operation of the doctrine in light of Erie's "twin aims" of avoiding forum shopping and inequitable administration of the law. [FN16] The first half of Part II argues that no Federal Rule directly conflicts with the doctrine, and thus the Rules pose no bar to its application in federal diversity actions. The second half argues that, under Erie, mend the hold is a substantive rule of law. This Comment concludes, therefore, that mend the hold is the sort of state prerogative that federal courts sitting in diversity must respect.

I. The "Mend the Hold" Doctrine

Before exploring the mend the hold doctrine in detail, it is helpful to compare judicial and equitable estoppel to mend the hold. Because all three doctrines have common historical roots and share the characteristic of denying a party the right to shift its position from one asserted earlier, they are sometimes confused. [FN17] Nevertheless, their present doctrinal definitions are quite distinct.

A. Mend the Hold, Equitable Estoppel, and Judicial Estoppel

The mend the hold doctrine, in its majority (and most severe) form, limits a party's defenses for breaking a contract to those based on a prelitigation explanation for nonperformance given to the other party. [FN18] The most common justification for the doctrine is that it allows a contracting party to rely on the given explanation as exclusive. Thus, if the party willing to perform wishes to save the deal, it may try to obviate the other party's reason for not performing with the assurance that other impediments to performance are not lurking in the background. [FN19] The mend the hold doctrine, by definition, applies only to contract disputes. [FN20]

The doctrine of equitable estoppel differs from mend the hold in that it binds a party to a prior position during subsequent litigation only if the other party has relied to its detriment on that prior position. [FN21] This requirement of detrimental reliance reflects equitable estoppel's underlying policy of protecting litigants from "less than scrupulous opponents." [FN22] In contrast, mend the hold has the narrower focus of ensuring an opportunity to cure.

The third doctrine, judicial estoppel, bars a party from asserting a position inconsistent with one that it prevailed with in a prior litigation. [FN23] Unlike mend the hold and equitable estoppel, which focus on the effect of shifting positions on the other party, judicial estoppel aims to protect the integrity of the judicial system. The doctrine prevents

perjury and ensures that no two courts rule in a party's favor on conflicting theories, for then one would have to be wrong. [FN24] As with equitable estoppel, judicial estoppel is applicable in any type of case, not just contract disputes.

With the distinctions between these three doctrines established, an examination of mend the hold's evolution as a rule of contract law will further illustrate how it differs from judicial and equitable estoppel. This history will also shed light on why modern courts continue to confuse the three.

B. Evolution of Mend the Hold as an Independent Contract Rule

In its majority version, the mend the hold doctrine limits a nonperforming party's potential defenses for breaking a contract to those based on the prelitigation explanation for nonperformance that was given to the other party. [FN25] In its minority form, mend the hold permits the changing of a contracting party's litigation posture only when that change comports with the implied duty of good faith that modern courts read into every contract. [FN26] Both versions of the doctrine trace their roots to the Supreme Court's 1877 opinion in Railway Co v McCarthy, [FN27] the first reported decision to use the phrase.

In McCarthy, the defendant railroad refused to perform on a delivery contract, explaining that it lacked enough cars to make the delivery. [FN28] After the litigation began, the railroad, having fortuitously refused to perform on a Sunday, tried to defend its nonperformance under West Virginia's Sunday Law, which forbade Sunday (Sabbath) deliveries. [FN29] The Supreme Court affirmed the trial judge's refusal to instruct the jury on the Sunday law defense, calling it "an after-thought( ) suggested by the pressure and exigencies of the case." [FN30] It further explained:

> Where a party gives a reason for his conduct and decision touching any thing involved in a controversy, he cannot, after litigation has begun, change his ground, and put his conduct upon another and a different consideration. He is not permitted thus to mend his hold. He is estopped from doing it by a settled principle of law. [FN31]

This passage may boast among its legacy the mend the hold doctrine [FN32] as well as numerous judicial and equitable estoppel decisions. [FN33] Indeed, some courts focused on the mention of "estoppe(l)" in the passage and therefore refused to enforce mend the hold independently of equitable estoppel. [FN34] The Supreme Court also quoted the McCarthy mend the hold passage in its first judicial estoppel case, [FN35] causing confusion that lingers even today. [FN36]

Although they lack the catchy wrestling phrase, a number of pre-McCarthy opinions employ mend the hold reasoning, of which the McCarthy Court cited six. Three of these cases, Everett v Saltus, [FN37] Holbrook v Wight, [FN38] and Winter v Coit, [FN39] were actions of replevin or trover stemming from contractual relationships. [FN40] In each, the court rejected the defendant's claim of a lien on the contested property, reasoning that the defendant had failed to assert that defense at the time the plaintiff (or the plaintiff's agent) demanded return of the property. [FN41] Put another way, these courts held that the defendants' prelitigation explanations barred them from mending their hold at trial.

The other three cases cited by the McCarthy Court involved waivers of arguments by failure to assert them when

rejecting a tender. In Wright v Reed, [FN42] a 1790 English case, one judge opined that because no objection was made at the time, "bank notes" drawn on the Bank of England constituted a valid performance even though the contract called for consideration in "money." [FN43] In Gould v Banks & Gould, [FN44] a New York trial court found that the plaintiff had stated at the time that he would not accept a shipment of books because they were in poor condition, not because they were late. Therefore, it held that "(u)pon well settled principles, this was a waiver of all other objections to the tender." [FN45] Finally, only seven years before McCarthy, the New York Court of Appeals in Duffy v O'Donovan [FN46] explained:

> It is urged that the tender was insufficient, as it was not in money. But it was not refused for that reason. It was rejected because not made in time, and not because the certified check was not money or legal tender. It cannot now be objected, that the party could not have been compelled to accept a certified check in lieu of money. He waived his right to demand the money by not asserting it at the proper time. . . . The objection to the tender could have been obviated, and, therefore, was waived, not having been taken. [FN47]

Building upon this foundation, courts in the early 1900s further developed the doctrine. [FN48] Some limited its application to cases in which the party asserting the doctrine could have cured the reason for the other party's nonperformance. [FN49] (The language in Duffy excerpted above suggests this limitation.) Other courts, in what would lead to the modern majority rule, applied an absolute form of the doctrine. That is, these courts limited a breaching party's defenses to a prelitigation explanation for nonperformance regardless of that party's good faith reasons for changing positions and the other party's ability to cure. [FN50] Foreshadowing what would become the modern minority rule, the Supreme Court of Michigan connected the rule to the obligation of contracting parties to act in good faith. [FN51]

Finally, departing from the context of contracts and estoppel, some post-McCarthy courts employed the phrase "mend the hold" to refer to the familiar rule of appellate procedure that arguments not raised at trial are waived on appeal; [FN52] to sundry other rules barring amendment of one's position; [FN53] and to describe the shifting of one's grounds. [FN54] None of these uses is particularly relevant to the present inquiry into the contract law mend the hold principle, other than perhaps to illustrate that several judges have (or had) a tendency to use the phrase repeatedly, suggesting that, although possibly quirky [FN55] or quaint, [FN56] this relatively esoteric phrase endears itself to those who encounter it. [FN57]

C. The Majority Rule: Prelitigation

Presently, the dominant form of the mend the hold doctrine limits a contracting party's defenses for nonperformance to those based on explanations given at the time of the nonperformance. Hence the doctrine binds contracting parties, during litigation, to prelitigation statements. Over the last fifty years, courts applying the laws of Delaware, the District of Columbia, Georgia, Iowa, Kansas, Michigan, Nebraska, New Jersey, New York, Oregon, Tennessee, Texas, and Vermont have enforced this version of the doctrine either by name or in practice at least once. [FN58]

The majority rule is one of general application, meaning that it does not discriminate between types of contracts. [FN59] Nevertheless, the rule has been discussed as especially applicable to insurance coverage [FN60] and real estate brokerage contract disputes, [FN61] and in both of these contexts, some courts have limited the rule's otherwise wide reach. [FN62] Similarly, UCC § 2-605 modifies the rule in disputes over contracts for the sale of goods. [FN63]

1. Mend the hold in the insurance context.

The comparatively more frequent use of the mend the hold doctrine in insurance cases may stem from insurance companies' practice of writing letters to policyholders to explain their reasons for denying a claim. Certainly at a minimum these letters, typically referred to as "declination letters," ameliorate the problems of proof associated with a verbal refusal to perform. Whatever the reason for its more frequent invocation in insurance disputes, this relative frequency has engendered a number of interesting doctrinal developments.

For example, the Vermont Supreme Court has recast the doctrine as the "insurance defense waiver rule." [FN64] Vermont courts justify this version of the doctrine with a "public policy" of honesty. [FN65] The motivating notion is to hold an insurer to his word once he "puts his refusal to pay on a specified ground." [FN66] Vermont courts operate on the assumption that the insured has relied on the declination letter in bringing the suit, [FN67] thus moving the doctrine closer to equitable estoppel. Yet despite these nuances, the insurance defense waiver rule appears to have little practical utility. Its effect is to give incentive to insurance companies simply to reserve all of their rights in a declination letter, rather than limiting themselves to a specific reason for refusing to pay. [FN68]

In contrast to Vermont, where the insurance defense waiver rule remains alive and well, [FN69] both Nebraska and Oregon have consistently eschewed enforcing a robust form of the doctrine in insurance coverage cases. [FN70] Both of these states have recently carved out an exception to mend the hold for policy exclusions and other defenses that go to the original scope of the coverage. That is, regardless of the reasons asserted in a prelitigation declination letter, in Nebraska (with an exception discussed below) and Oregon, an insurance company may always defend its refusal to pay by arguing that the insured's loss does not fall within the policy's ambit. [FN71]

The Oregon exception incorporates into mend the hold the common rule of insurance law that policyholders cannot invoke estoppel to extend the scope of coverage. [FN72] The relevant inquiry thus becomes how to distinguish matters of forfeiture from questions about the scope of coverage. A forfeiture of coverage occurs when "there is insurance coverage for the loss in the first place, but acts of the insured nullify the coverage, such as the filing of a false statement . . . ." [FN73] In other words, an insurance company in Oregon may always raise a policy exclusion defense [FN74] or argue that a claim does not fall "within the insuring clause originally granting coverage." [FN75] Insureds, however, may still defeat defenses based on a forfeiture argument (as opposed to a coverage argument) if the insurance company fails to raise that defense in its declination letter. [FN76]

Two observations about this modification are worth noting. First, it provides another example of the influence of estoppel on the development of mend the hold; the change represents nothing more than the grafting of a limitation on estoppel onto the mend the hold doctrine. Second, so long as insurance companies consistently reserve all of their rights in their Oregon declination letters, the modification will have no practical effect.

The Nebraska version of this exception tracks the Oregon version--indeed, it was in part inspired by it. [FN77] Nebraska, however, has added an additional wrinkle: plaintiffs showing "detrimental good faith reliance" may invoke "the rule as to 'mending one's hold"' in disputes over coverage as well as forfeiture. [FN78] Thus, in Nebraska, mend the hold operates no differently than equitable estoppel in disputes over the scope of insurance coverage.

2. Mend the hold in the real estate context.

Whereas the use of mend the hold in insurance contract disputes is driven by notions of honesty and the difference between forfeiture and scope of coverage, the doctrine's application to brokerage contracts is animated by a desire to ensure to the broker an opportunity to cure cited defects in a tendered buyer's offer. [FN79] The idea is that the broker, who has a commission on the line, will work to "obtain concessions on minor problems from the prospective buyer." [FN80] But the traditional mend the hold rule created at best mixed incentives. It encouraged sophisticated sellers to couch their refusal of a prospective buyer in general terms, thereby protecting all possible defenses for potential subsequent litigation. [FN81] By virtue of the generality of the refusal, the seller deprived the broker of his opportunity to cure. [FN82]

To avoid this problem, courts have limited the reach of mend the hold in brokerage contract disputes to curable defects. [FN83] Modern courts also require the seller to provide the broker with an explanation for rejecting a tendered buyer. [FN84] This modified mend the hold rule lessens the broker's vulnerability to opportunistic behavior by the seller while ensuring the broker an opportunity to cure insubstantial defects in the tendered buyer's offer. Thus, it represents a sensible change. This configuration of the doctrine may be subsumed within the more general rule that, in the face of curable defects in a tendered buyer's offer, the seller's silence waives those defects as defenses in a subsequent suit by the broker for his commission. Courts have embraced this more general rule almost universally. [FN85] Moreover, the modified rule, by requiring disclosure of curable defects, is a more efficient route to protecting a broker from the seller's strategic behavior than either mend the hold (with its incentive structure stacked against helpful disclosures) or equitable estoppel (which does not foster disclosure of curable defects).

By tying the rule's operation to the lost opportunity to cure, and by creating an affirmative obligation on the part of the rejecting party, this configuration of the doctrine begins to resemble UCC § 2-605, a provision specifically designed to remedy the mixed incentives created by the common law version of mend the hold.

3. UCC § 2-605: A codification of mend the hold?

When the common law held exclusive dominion over disputes regarding contracts for the sale of goods, the application of mend the hold to a buyer's rejection of a seller's tender would have been straightforward: a buyer who gave an explanation for his rejection would be limited to that explanation as his only defense in a subsequent suit. [FN86] However, as with disputes over real estate brokerage contracts, the traditional mend the hold rule created an incentive not to disclose even curable defects for fear of being limited to that defense in later litigation. [FN87] It also "penalized the buyer who gave a quick and informal notice of specific defects upon rejection." [FN88] The Uniform Commercial Code ("UCC") attempted to remedy these problems.

UCC § 2-605 provides:

> The buyer's failure to state in connection with rejection a particular defect which is ascertainable by reasonable inspection precludes him from relying on the unstated defect to justify rejection or to establish breach . . . where the seller could have cured it if stated seasonably. [FN89]

This configuration incorporates the most salutary aspects of traditional mend the hold without its unfortunate side effect of mixed incentives. In the words of Section 2-605's official commentary:

> The present section rests upon a policy of permitting the buyer to give a quick and informal notice of defects in a tender without penalizing him for omissions in his statement, while at the same time protecting a seller who is reasonably misled by the buyer's failure to state curable defects. [FN90]

Although judicial exegesis of Section 2-605 is scarce, courts have applied it without difficulty, [FN91] and one court even noted the connection between Section 2-605 and mend the hold. [FN92]

Interestingly, Section 2-605 also rests on the UCC's universal obligation of good faith. [FN93] Viewed from that perspective, Section 2-605 begins to resemble the Illinois version of mend the hold and its Massachusetts and Texas analogues.

D. The Minority Rule: Postlitigation Good Faith

Massachusetts and Texas have both explicitly rejected the majority, prelitigation version of mend the hold. [FN94] In these two states, a party to a contract suit may advance any defense regardless of whether that party gave a different explanation at the time of nonperformance. However, both Massachusetts and Texas have restricted this general rule, and disallow new defenses when the nonperforming party changes positions in bad faith. [FN95] Although the precise definition of "bad faith" is unclear, the courts of both states distinguish bad faith from detrimental reliance, [FN96] suggesting that the bad faith inquiry is distinct from the reliance inquiry under equitable estoppel.

The Illinois lower courts--despite the Illinois Supreme Court's 1905 explicit adoption of the traditional McCarthy mend the hold rule [FN97]--have similarly recast the rule so that it no longer applies to prelitigation statements. [FN98] This modification began in 1953 with Larson v Johnson. [FN99] The Larson court, after rejecting an argument that mend the hold was no more than a fancy name for equitable estoppel, [FN100] announced that it would refuse to enforce mend the hold where "the casual character of the repudiation . . . would (make it) inequitable to apply the doctrine . . . ." [FN101] The court also confirmed the doctrine's status as a rule of contract law, noting that mend the hold "expresse(s) and intend(s) something more with respect to the conduct of one who enters into a solemn written engagement and then repudiates it." [FN102] Thus, the court grounded the doctrine in what is described today as the implied duty of good faith between contracting parties. [FN103]

Since then, Illinois courts have used mend the hold to limit contracting parties to positions taken during (not before) the litigation only. [FN104] A party defending a refusal to perform must "stand by the first defense raised after the litigation has begun." [FN105] Litigation has "begun" once it has moved beyond the initial pleadings stage. [FN106] The idea is to allow the defendant time to put together his defense, [FN107] but once that time is up, the duty of good faith between contracting parties requires the defendant to proffer all of his defenses or lose them forever. [FN108]

Whether the Illinois Supreme Court would approve of tying the doctrine to the duty of good faith is uncertain. [FN109] But in the face of that court's silence on the subject since 1912, the present understanding of the test in Illinois for an impermissible attempt to mend the hold is whether the change in litigation posture is made in good faith.

[FN110] Importantly, in this configuration, the Illinois version of mend the hold purports to do the same thing--at least once the litigation has begun--as the Texas and Massachusetts rule proscribing bad faith alterations to argument. However, because Texas and Massachusetts have no decisional law to illustrate the application of their bad faith test, this conclusion is not certain. [FN111]

II. Flexible Federal Pleading, the Erie Doctrine, and the Application of Mend the Hold by Federal Diversity Courts

Since the 1938 promulgation of the Federal Rules and Supreme Court decision in Erie Railroad Co v Tompkins, [FN112] federal courts sitting in diversity, while operating under the Federal Rules of Civil Procedure, apply the substantive law of the appropriate state. [FN113] This Part explores whether the mend the hold doctrine is a substantive rule of law that federal diversity courts must enforce. The analysis involves two steps. The first is to determine whether any Federal Rule conflicts with mend the hold. If so, then the Federal Rule controls. [FN114] The Federal Rules always trump conflicting state law regardless of whether the given state law is substantive or procedural. [FN115] If there is no direct conflict, then the second step is to determine whether mend the hold is a substantive rule of law in light of Erie's twin aims of avoiding both forum shopping and an inequitable administration of the law. [FN116]

A. Does a Federal Rule Preempt Mend the Hold?

Under the Federal Rules of Civil Procedure, the "pleadings kick off a course of pretrial discovery expected to result in modifications in the parties' positions." [FN117] Mend the hold thus stands in stark contrast to the spirit of the Federal Rules, for application of mend the hold would rigidify "the system of pleading that the (Federal Rules) seek to make supple." [FN118] The question, however, is whether there is a specific Federal Rule whose interpretation "is 'sufficiently broad' (as) to cause a 'direct collision' with" mend the hold, "thereby leaving no room for the operation of" the doctrine. [FN119] The likeliest candidates are Rules 8 and 15.

1. Rule 8.

Rule 8(e)(2) permits parties to federal litigation to raise "as many separate claims or defenses as the party has regardless of consistency," subject only to the ethical commands of Rule 11. [FN120] In contrast, the majority version of mend the hold limits a party's defenses to those based on the explanation for nonperformance given at the time of that nonperformance. The relevant determination is whether these rules can coexist, "each controlling its own intended sphere of coverage . . . ." [FN121] An expansive reading of Rule 8 conflicts with mend the hold; [FN122] the Rule explicitly permits all parties, including contract litigants, to state as many defenses as they wish.

The Supreme Court, however, has instructed courts construing the Federal Rules for these purposes to be sensitive to the state's interest in its rule. [FN123] So a better interpretation is that Rule 8 permits litigants to raise any and all defenses that survive the mend the hold rule, regardless of their consistency. [FN124] Unlike Burlington Northern Railroad Co v Woods, [FN125] where the Supreme Court held that a Federal Rule preempted state law because their operations and underlying purposes conflicted, the suggested interpretation gives effect to the policies animating both Rule 8 and mend the hold. After all, Rule 8 is designed "to liberate pleaders from the inhibiting requirement of technical consistency." [FN126] Mend the hold, on the other hand, is concerned not with technical consistency between a

party's various arguments, but with avoiding the lost opportunities to cure that result from the performing party's reliance on the nonperforming party's explanation. [FN127] Thus, Rule 8 leaves room for the operation of mend the hold because the doctrine permits inconsistent pleadings; it only limits the universe of potentially inconsistent arguments to those based on the explanation given at the time of nonperformance. [FN128]

Rule 8 poses less of an obstacle to the minority version of mend the hold because it applies only to the pleadings. [FN129] In contrast, the Illinois version of mend the hold only applies once the pleadings are complete. [FN130] Thus, the two doctrines do not collide. Moreover, even if courts were to apply mend the hold to the pleadings stage, [FN131] it still would not conflict with Rule 8. The Illinois version of the doctrine does not purport to limit contracting parties' freedom to plead all of their claims or defenses regardless of consistency. [FN132]

Thus, neither the majority nor the minority version of the mend the hold doctrine conflict with Rule 8 to such an extent as to preempt the doctrine's application by federal diversity courts.

2. Rule 15.

Rule 15(a) provides that any party may amend its pleadings "by leave of court," which "leave shall be freely given when justice so requires." [FN133] Therefore one can easily imagine a situation where the Rule appears to conflict with the majority version of mend the hold. A party to a contract might give an insufficient explanation for its nonperformance at the time of the breach. Then, during the course of discovery, this party learns of other facts that would have excused its nonperformance. By its terms, Rule 15 appears to allow the party to amend its pleadings to include the new defense--to mend its hold. Thus, if "justice requires" a court to hear the newly discovered defense, Rule 15 may preempt mend the hold. There is, however, an equally plausible interpretation of Rule 15--one that is more sensitive to the relevant state interests. Under this interpretation, a party to a breach of contract suit may seek leave to amend its pleadings to raise any issue except those lost by virtue of the mend the hold doctrine. The key to this interpretation is the term "justice." "Justice" can also be served by forbidding a party from mending its hold. [FN134] Indeed, the judicial gloss on Rule 15 is consistent with the suggested interpretation: courts routinely reject amendments for, among other reasons, bad faith and undue prejudice. [FN135] Reading mend the hold into Rule 15's "justice" language retains liberal federal pleading while also giving effect to the states' mend the hold rule.

A recent Sixth Circuit decision illustrates the thrust of the suggested approach. [FN136] The district court had excluded a defense based on "newly discovered evidence" on grounds other than the mend the hold doctrine. [FN137] On appeal, the Sixth Circuit characterized the exclusion as "unjust under the facts and circumstances of this case." [FN138] Nevertheless, demonstrating how the Federal Rules and mend the hold could peaceably coexist, the court held that the defense could not be raised because "the law of Tennessee precludes" defendants from "justifying their conduct retroactively on a ground that is different from that which was proffered at the time of" nonperformance. [FN139]

Similar analysis reveals no direct conflict between Rule 15 and the minority version of mend the hold. At first it might appear that by permitting changes in position only when those changes comport with the duty of good faith, the minority version of mend the hold operates in the same field as Rule 15(a). [FN140] District courts, however, have wide latitude to deny leave to amend when the amendment is not proposed in good faith. [FN141] Thus, Rule 15(a)

and the minority version of mend the hold can be harmonized: the Rule does not require that federal district courts grant leave to amend when the amendment is an attempt to mend the hold, because by definition in Illinois an attempt to mend the hold is an amendment not made in good faith. [FN142] Following this approach, in a case where a party sought leave to add a defense that it had been aware of since its original pleading, one district court fused Illinois mend the hold with Rule 15 to bar the amendment. [FN143]

In sum, Rule 8 and Rule 15 can peacefully coexist with both the majority and minority versions of the mend the hold doctrine. With no Federal Rule directly on point, even if mend the hold embodies "an antithetical conception of the litigation process" than the Federal Rules, [FN144] the Rules pose no bar to applying mend the hold in federal court. [FN145]

B. Is the Mend the Hold Doctrine Substantive or Procedural?

The preemption analysis, however, resolves only half of the issue. The next question is whether mend the hold is a substantive rule of law that, under Erie, federal courts sitting in diversity must respect. [FN146] Even though the Supreme Court has refined the substance versus procedure inquiry over the years, [FN147] it still can be "a challenging endeavor." [FN148] Doctrines such as mend the hold (and judicial estoppel) that have both substantive and procedural dimensions resist categorical labels. [FN149] If the rule channels the behavior of contracting parties outside the courtroom, it looks substantive. [FN150] But if mend the hold merely controls what issues litigants may raise over the course of a case, it looks procedural. In the Supreme Court's most recent foray into the area, Gasperini v Center for Humanities, Inc, [FN151] the Court confirmed that the dispositive question is whether the state rule is outcome determinative when considered in light of Erie's twin aims of avoiding forum shopping and an inequitable administration of the laws.

1. Erie and the majority (prelitigation) version of mend the hold.

While the majority version of mend the hold presented a challenging analysis when deciding whether it conflicted with the Federal Rules, its treatment under traditional Erie twin aims analysis is less difficult. The doctrine, which by definition applies only to contracts cases, limits a party's defenses to those based on the explanation for nonperformance given at the time of that nonperformance or repudiation. Thus, as demonstrated by the modifications to the doctrine in insurance and brokerage contracts disputes, [FN152] mend the hold represents an effort to enforce certain substantive contract law policies. In other words, because it channels the prelitigation behavior of contracting parties, "the State's objective is manifestly substantive." [FN153]

Put into more traditional Erie "twin aims" vernacular, this means that failing to apply the doctrine in federal court would lead both to an inequitable administration of the laws and to forum shopping, thus bringing mend the hold squarely within the substantive umbrella. First, a federal refusal to enforce mend the hold would lead to forum shopping because more defenses would be available in federal court than in state court. Depending on whether these defenses would be beneficial or not, parties will attempt to manipulate the choice of forum accordingly. [FN154]

Second, by offering a more extensive menu of potential defenses, federal courts would systematically advantage nonperforming parties. Therefore, a federal refusal to enforce the doctrine would align behavioral incentives differ-

ently based only on the happenstance of diversity. The most frequently offered rationale for the mend the hold doctrine, after all, is to allow a contracting party to rely on the explanation for nonperformance given by the other party as exclusive. Thus, if a party wishes to save the deal, she may cure the cited defect with the assurance that the mend the hold doctrine will protect her from other reasons for nonperformance hidden in the background. [FN155] But if federal courts refuse to enforce mend the hold, then contracting parties of diverse citizenship would proceed without the doctrine's protection from unmentioned problems. Such an inequitable administration of the law is not tolerable under the Erie doctrine. [FN156]

2. Erie and the minority (postlitigation) version of mend the hold.

The minority version of the rule becomes relevant only once litigation has begun. [FN157] Even then it permits a party to change positions based on new information or other good faith reasons. [FN158] Thus, a state's interest in the minority version of mend the hold is not as obviously substantive; the rule has a strong procedural flavor.

But the minority version applies during the litigation of contract disputes only, which suggests that it is a substantive rule. [FN159] Its present incarnation, a corollary of the duty of good faith between contracting parties, represents a substantive choice by Illinois to treat litigants in contract disputes more strictly. Illinois expects "something more with respect to the conduct of one who enters into a solemn written engagement and then repudiates it." [FN160] Therefore, because the minority version of mend the hold is "'bound up with' the rights and obligations of" the parties, the "objectives of the Erie doctrine" militate in favor of applying the rule in federal court. [FN161]

Twin aims analysis, too, suggests that the Illinois version of mend the hold is substantive. First, a federal refusal to apply the doctrine could lead to forum shopping. Because a federal court would allow greater agility during the course of the litigation, nonperforming contracting parties would systematically choose federal court over state court. [FN162] Second, permitting the happenstance of diversity to dictate whether the implied duty of good faith continues into the litigation context results in an inequitable administration of the laws. [FN163] To be sure, the Illinois doctrine is less clearly a substantive rule of law than the majority version. Nonetheless, even the Illinois version of mend the hold advances a substantive policy-- holding contracting parties to a higher standard. [FN164] Therefore, without a conflicting federal policy, federal courts sitting in diversity should enforce the Illinois version of mend the hold when Illinois law supplies the rule of decision.

Conclusion

Overlooked by modern contracts scholars, the mend the hold doctrine remains alive and well (although infrequently invoked) in a number of jurisdictions. In its majority version, the doctrine limits a contracting party's potential defenses to those based on the explanation for nonperformance asserted at the time of that nonperformance. In its minority formulation, mend the hold permits a contracting party to change its litigation position once the pleadings are complete only if that change comports with the implied duty of good faith.

The rule has mixed effects on incentives. On the one hand, it protects a party who wants to save the deal by ensuring that the other party will not raise other impediments to performance later on. On the other hand, strategically minded parties who refuse to perform will simply reserve all their defenses by refusing to give any explanation at all.

Thus, it is not clear that embracing an absolutist version of the majority rule is good policy. Whether a rule is good or bad policy, however, has no bearing on whether it should control in federal diversity actions. Without a Federal Rule to preempt the doctrine's operation, and because Erie twin aims analysis suggests that mend the hold is a substantive rule of law, mend the hold represents the sort of state prerogative that federal courts sitting in diversity must respect.

[FNd1]. B.A. 1996, The University of Virginia; J.D. Candidate 1999, The University of Chicago.

[FN1]. This hypothetical draws on Kevin Walsh and Michele Levy, "Mend the Hold"--An Old Doctrine May Be A Policyholder's Best Friend, The Metropolitan Corporate Counsel 13 (Sept 1995).

[FN2]. Harbor Insurance Co v Continental Bank Corp, 922 F2d 357, 362 (7th Cir 1990).

[FN3]. Railway Co v McCarthy, 96 US 258, 267-68 (1877) ("Where a party gives a reason for his conduct and decision touching any thing involved in a controversy, he cannot, after litigation has begun, change his ground, and put his conduct upon another and a different consideration. He is not permitted thus to mend his hold. He is estopped from doing it by a settled principle of law.") (emphasis added).

[FN4]. Israel v National Canada Corp, 276 Ill App 3d 454, 462, 658 NE2d 1184, 1191 (1996) (holding that a party must stand by the first defense raised once litigation has begun). See also Cole Taylor Bank v Truck Insurance Exchange, 1994 US Dist LEXIS 3705, *14-15 (N D Ill) ("As pre-trial discovery revealed an alleged basis for the defenses of waiver and estoppel, this Court holds that application of the doctrine of 'mend the hold' to bar the Defendant's assertion of waiver and estoppel is not appropriate.").

[FN5]. See, for example, Heidner v Hewitt Chevrolet Co, 166 Kan 11, 14-15, 199 P2d 481, 484 (1948) ("Since the defendant here, before litigation was commenced, gave only as its reason for nonperformance a ground which was inadequate, it could not, after suit was filed, 'mend its hold' and rely upon other and different defenses. It was limited in the trial to the single defense it asserted at the time of breach.").

[FN6]. See, for example, Erickson v Carhart, 1996 Neb App LEXIS 234, *10-11 ("The rule is that an insurer that gives one reason for its conduct and decision as to a matter of controversy cannot, after litigation has begun, defend upon another and different ground."); Hamlin v Mutual Life Insurance Co, 145 Vt 264, 267, 487 A2d 159, 161 (1984) (referring to the "insurance defense waiver rule").

[FN7]. See, for example, Weldon v Lashley, 214 Ga 99, 103, 103 SE2d 385, 388 (1958) ("If this was the sole ground of objection assigned by the owner at the time of such refusal, other grounds of objection then known to her were waived, and would not avail her as a defense to an action for the commission.") (internal quotations and citations omitted).

[FN8]. UCC § 2-605 (ALI 1994) ("Waiver of Buyer's Objections by Failure to Particularize"). See text accompanying note 89.

[FN9]. Aside from the occasional reference to the problem of a posteriori justifications, see Comment, Remedies for Total Breach of Contract under the Uniform Revised Sales Act, 57 Yale L J 1360, 1363 (1948), the explicit treatment of the doctrine in journal commentary is cursory at best. See, for example, Howard Ende, Eugene R. Anderson, and Susannah Crego, Liability Insurance: A Primer for College and University Counsel, 23 J Coll & Univ L 609, 710-11 (1997) (outlining the doctrine in six paragraphs). Modern casebooks and treatises, moreover, are silent on the topic. Neither "mend the hold" nor Railway Co v McCarthy (the first mend the hold case) appear in the indices or tables of cases of the following: John D. Calamari and Joseph M. Perillo, Contracts 997, 1038, 1041 (West 3d ed 1987); John P. Dawson, William Burnett Harvey, and Stanley D. Henderson, Cases and Comment on Contracts xli, 1027-28 (Foundation 6th ed 1993); E. Allan Farnsworth, Farnsworth on Contracts 741 (Little, Brown 1990); Charles L. Knapp and Nathan M. Crystal, Problems in Contract Law: Cases and Materials 1277, 1315 (Little, Brown 3d ed 1993). Williston on Contracts does cite McCarthy, but the discussion is under the head of "equitable estoppel," not mend the hold. Richard A. Lord, 4 Williston on Contracts § 8:3 at 35 n 7 (Law Co-op 4th ed 1992). On the relationship between equitable estoppel, McCarthy, and mend the hold, see Part I.

[FN10]. Harbor Insurance, 922 F2d at 364.

[FN11]. 304 US 64, 78 (1938).

[FN12]. See S.A. Healy Co v Milwaukee Metropolitan Sewerage District, 60 F3d 305, 312 (7th Cir 1995) ("Under Erie, this 'favoritism' is to operate even when the persons who have a dispute over state law find themselves in a federal court."); Barron v Ford Motor Company of Canada, Ltd, 965 F2d 195, 199 (7th Cir 1992) (explaining that "a substantive rule is concerned with the channeling of behavior outside the courtroom").

[FN13]. See Burlington Northern Railroad Co v Woods, 480 US 1, 4-5 (1987). See also S.A. Healy Co, 60 F3d at 310 (describing cases in which a Federal Rule conflicts with a state rule as "pretty clear"); Charles Alan Wright, Arthur R. Miller, and Edward H. Cooper, 19 Federal Practice and Procedure: Jurisdiction 2d § 4511 at 311-12 (West 2d ed 1996) (explaining that there is no longer any significant Erie problem with regard to matters covered by a Federal Rule).

[FN14]. The Seventh Circuit has "left open the question whether the (Illinois) 'mend the hold' doctrine . . . is substantive or procedural for purposes of the Erie doctrine." AM International, Inc v Graphic Management Associates, Inc, 44 F3d 572, 576 (7th Cir 1995). However, a more recent opinion suggests that the Seventh Circuit will ultimately characterize mend the hold as a substantive rule. See Horwitz-Matthews, Inc v City of Chicago, 78 F3d 1248, 1251-52 (7th Cir 1996) (explaining that, even though the pleadings were not yet complete, "the 'mend the hold' doctrine" would not permit the defendant to change its position later on because it had "emphatically assert(ed) its position" on appeal). Lower federal courts applying Illinois law have come down on both sides. Compare In re Apex Automotive Warehouse LP, 205 Bankr 547, 553-54 (Bankr N D Ill 1997) (avoiding a conflict between Illinois mend the hold and the Federal Rules by refusing to apply the doctrine "at the pleading stage of a litigation"), with Cleveland Hair Clinic, Inc v Puig, 949 F Supp 595, 600 n 10 (N D Ill 1996) (assuming that the doctrine is substantive), and Mellon Bank, N.A. v Miglin, 1994 US Dist LEXIS 15439, *16 (N D Ill) (Adopted Magistrate's Opinion), affd, 1995 US Dist LEXIS 2202, *6 (N D Ill) (applying Illinois mend the hold despite possible conflict with FRCP 15). The Sixth Circuit, in contrast, recently enforced the Tennessee version of the doctrine without noting a potential Erie problem. Life Care Centers of America, Inc v Charles Town Associates Ltd, 79 F3d 496, 508-09 (6th Cir 1995). See note 139. The Second

Circuit and various lower federal courts have applied versions of the doctrine in diversity cases without pausing to consider whether it is a substantive rule or not. See, for example, Corporacion De Mercadeo Agricola v Mellon Bank International, 608 F2d 43, 48 (2d Cir 1979) (explaining that under New York law, "when a bank offers one reason for refusing a draft on a letter of credit, and that reason is later refuted, it cannot at trial point to an entirely different reason for sustaining the refusal"); Village of Morrisville Water & Light Department v United States Fidelity & Guaranty Co, 775 F Supp 718, 724 n 7 (D Vt 1991) (treating the Vermont version as though it were substantive); Emmons v Ingebretson, 279 F Supp 558, 573 (N D Iowa 1968) (treating the Iowa version as though it were substantive).

[FN15]. Northrop Corp v Litronic Industries, 29 F3d 1173, 1177 (7th Cir 1994).

[FN16]. Hanna v Plumer, 380 US 460, 468 (1965).

[FN17]. The similarity between the mend the hold doctrine and judicial estoppel has not gone unnoticed by the courts. See Harbor Insurance, 922 F2d at 364 (distinguishing mend the hold from judicial estoppel).

[FN18]. See, for example, Heidner, 199 P2d at 484 ("Since the defendant here, before litigation was commenced, gave only as its reason for nonperformance a ground which was inadequate, it could not, after suit was filed, 'mend its hold' and rely upon other and different defenses. It was limited in the trial to the single defense it asserted at the time of breach.").

[FN19]. See, for example, Nashville Marketplace Co v First Capital Institutional Real Estate, Ltd, 1990 Tenn App LEXIS 212, *16 ("Nashville Marketplace could have attempted to cure these problems before the expiration of the earn-out period had they been mentioned in the rejection notice."); Duclos v Cunningham, 102 NY 678, 679, 6 NE 790, 790 (1886) ("No such objection was taken at the time by the defendants, and, had it been, the difficulty, no doubt, would have been obviated at once by the (broker).").

[FN20]. See, for example, Friel v Jones, 42 Del Chanc 148, 153-54, 206 A2d 232, 235 (1964) (recognizing the mend the hold principle, but finding it inapplicable on the facts of the case presented because the claim did not arise from contractual rights).

[FN21]. See, for example, Schroeder v Texas Iron Works, Inc, 813 SW2d 483, 489 (Tex 1991) (explaining that equitable estoppel requires a showing of "(1) a false representation or concealment of material facts, (2) made with knowledge, actual or constructive, of those facts, (3) with the intention that it should be acted on, (4) to a party without knowledge, or the means of knowledge of those facts, (5) who detrimentally relied upon the misrepresentation").

[FN22]. Edwards v Aetna Life Insurance Co, 690 F2d 595, 598 (6th Cir 1982).

[FN23]. Id; Chaveriat v Williams Pipe Line Co, 11 F3d 1420, 1427-28 (7th Cir 1993).

[FN24]. See Rissetto v Plumbers and Steamfitters Local, 94 F3d 597, 600-01 (9th Cir 1996) (explaining that judicial estoppel "precludes a party from gaining an advantage by taking one position, and then seeking a second advantage by

taking an incompatible one"); Chaveriat, 11 F3d at 1427-28 (explaining that courts enforce judicial estoppel "to prevent situations from arising in which one of two related decisions has to be wrong because a party took opposite positions and won both times"); Edwards, 690 F2d at 598 (explaining that judicial estoppel protects the integrity of the judicial process by avoiding inconsistent judicial decisions).

[FN25]. See note 58 and accompanying text.

[FN26]. See notes 103-08 and accompanying text.

[FN27]. 96 US 258, 267-68 (1877).

[FN28]. Id at 265.

[FN29]. Id at 265-67.

[FN30]. Id at 267.

[FN31]. Id at 267-68 (emphasis added).

[FN32]. See, for example, Gibson v Brown, 214 Ill 330, 341, 73 NE 578, 582 (1905), quoting McCarthy, 96 US at 267-68. See also note 48.

[FN33]. See Seminole Securities v Southern Life Insurance Co, 182 F 85, 97 (Cir Ct E D NC 1910), quoting McCarthy to support its refusal to allow three defendants to take inconsistent positions in different suits; Winmark Limited Partnership v Miles & Stockbridge, 345 Md 614, 620, 693 A2d 824, 827 (1997), quoting McCarthy's mend the hold language in support of the "doctrine of judicial estoppel"; Salcedo v Asociacion Cubana, Inc, 368 S2d 1337, 1339 (Fla Dist Ct App 1979) ("In earlier times, the rule we apply in this case (estoppel) was said to reflect the feeling that a party may not 'mend his hold' . . . ."), citing McCarthy, 96 US at 268. Compare American Sulphur Royalty Co v Freeport Sulphur Co, 276 SW 448, 459 (Tex App 1925) (rejecting mend the hold in favor of equitable estoppel).

[FN34]. See, for example, Second National Bank of Allegheny v Lash Corp, 299 F 371, 372 (3d Cir 1924) ("The concluding words clearly indicate that the rule is founded on equitable estoppel."); American Sulphur, 276 SW at 459 (rejecting McCarthy's mend the hold rule in favor of equitable estoppel and its reliance requirement); Amsinck & Co v Springfield Grocer Co, 7 F2d 855, 859-60 (8th Cir 1925) (explaining that "the doctrine" announced by McCarthy "is based on equitable estoppel"). Compare Larson v Johnson, 1 Ill App 2d 36, 46, 116 NE2d 187, 191 (1953) ("We have concluded from our examination of the cases that so far as the Illinois doctrine is concerned, it is not limited to equitable estoppel. The reviewing courts which announced the principle were familiar with the doctrine of equitable estoppel and there was no occasion for dressing it up with a subtitle.").

[FN35]. Davis v Wakelee, 156 US 680, 690-91 (1895), quoting McCarthy, 96 US at 267-68.

[FN36]. See, for example, Patz v St Paul Fire & Marine Insurance Co, 15 F3d 699, 703 (7th Cir 1994) ("By their mention of judicial estoppel the (plaintiffs) may have been groping for a related but separate doctrine, that of 'mend the hold' . . . ."); Rottmund v Continental Assurance Co, 813 F Supp 1104, 1111 (E D Pa 1992), citing Harbor Insurance, 922 F2d at 362-65, to support its use of the "common law 'mend the hold' doctrine" to bar a party from taking a position in the present litigation different from "the position ( ) it took in the prior litigation" unless "new information" justified the change.

[FN37]. 15 Wend 474, 474 (S Ct NY 1836).

[FN38]. 24 Wend 168, 169 (S Ct NY 1840).

[FN39]. 7 NY 288, 288 (1852).

[FN40]. At common law, replevin and trover were writs by which one obtained a judgment ordering the return of, or awarding damages in the value of, his or her property wrongfully in the possession of another. See Grant S. Nelson, William B. Stoebuck, and Dale A. Whitman, Contemporary Property 30-31 (West 1996).

[FN41]. Everett, 15 Wend at 478 ("But if the defendants had a lien, they waived it by not putting themselves upon that ground when the property was demanded by the plaintiff's agent.") (emphasis omitted); Holbrook, 24 Wend at 179 ("But if this were not so, and supposing the question of lien to rest on what the defendant's partner said when the demand was made, omitting to mention a lien and taking other ground, waives it."); Winter, 7 NY at 293-94 ("The jury were properly instructed as to the waiver of the defendants' lien for their charges for insurance, freight, cartage, labor, storage and fire insurance, that if on being apprised of the plaintiff's claim, they put themselves not upon their lien but only upon the denial of plaintiff's right, they could now assume a different ground."), citing Holbrook, 24 Wend at 169.

[FN42]. 3 D & E 554, 100 Eng Rep 729 (KB 1790).

[FN43]. 100 Eng Rep at 729 (opinion by Buller).

[FN44]. 8 Wend 562, 567 (S Ct NY 1832).

[FN45]. Id.

[FN46]. 46 NY 223 (1871) (citations omitted).

[FN47]. Id at 227-28 (citations omitted). Note the striking resemblance to the dispute over whether "bank notes of the bank of England" constituted a tender of "money" in Wright, 100 Eng Rep at 729.

[FN48]. See, for example, Oakland Sugar Mill Co v Fred W. Wolf Co, 118 F 239, 248-50 (6th Cir 1902) (deciding not to "permit the purchaser . . . to change the issues and propound new defenses"), citing McCarthy, the six cases cited in

McCarthy, and a number of other cases; E.E. Taenzer & Co v Chicago, Rhode Island & Pacific Railway Co, 191 F 543, 551 (6th Cir 1911) (excepting from mend the hold defenses based on "contravention of the public policy of the United States as expressed by its positive statutes," and describing the Sunday law part of McCarthy as "more or less obiter"); Continental National Bank v National City Bank of New York, 69 F2d 312, 318-19 (9th Cir 1934) (collecting cases and describing the conflict among the courts in interpreting the McCarthy rule). See also Larson, 116 NE2d at 192 ("This is how the doctrine emerges from the cases which have considered it. . . . (T)his is the common method for the development of our law . . . .").

[FN49]. See, for example, Continental National Bank, 69 F2d at 319 ("In the relevant cases in this circuit, the requirement that the plaintiff should have been misled to his damage has not been expressly stated, but it appeared from the facts that there was some possibility that he might have cured the defects had they been called to his attention, although perhaps not within the time limits of the contract."); Western Grocer Co v New York Oversea Co, 28 F2d 518, 520-21 (N D Cal 1928) ("A party to a contract is not permitted to refuse to perform a contract upon one ground, and later to rely upon another ground, which might have been remedied, had it been called to the attention of the performing party.").

[FN50]. See, for example, Luckenbach S.S. Co, Inc v W.R. Grace & Co, 267 F 676, 679 (4th Cir 1920) ("But the further and equally conclusive answer is found in the settled rule of law that one who breaches his contract for reasons specified at the time will not be permitted afterwards, when sued for damages, to set up other and different defenses. This rule has been long established and frequently applied."); Wyatt v Henderson, 31 Or 48, 54, 48 P 790, 792 (1897) ("The defendants, having denied, upon information and belief, that the plaintiff was the owner or entitled to the possession of any of the said oats, cannot now be permitted to say that their refusal to deliver the grain in question was caused by the failure of the plaintiff to pay the storage thereon.").

[FN51]. Smith, County Treasurer v German Insurance Co, 107 Mich 270, 279, 65 NW 236, 239 (1895) ("It is apparent that the ground, and the only ground, upon which all liability was denied, was the storage of gasoline . . . . Good faith required that the (insurance) company should apprise the plaintiff fully of its position; and, failing to do this, it estops itself from asserting any defense other than that brought to the notice of plaintiff.").

[FN52]. See, for example, Vileski v Pacific-Atlantic Steamship Co, 163 F2d 553, 555-56 (9th Cir 1947) (explaining that the "(l)ibelant on this appeal seeks to raise a new issue," but holding that the "libelant is not entitled so to mend his hold"); Arkansas Anthracite Coal & Land Co v Stokes, 2 F2d 511, 515 (8th Cir 1924) ("But it is also well-nigh universal and fundamental, as a rule of appellate procedure, that a litigant may not mend his hold on the way up to an appellate court by seeking to reverse a case, because the theory on which it was tried below, and in which appellants then acquiesced, is, in fact, erroneous. In short, to state the rule simply and baldly, the theory on which a case is tried nisi is the theory in which it must, on appeal, be weighed for error."); Bob v Hardy, 222 Ga App 550, 554, 474 SE2d 658, 662 (1996) ("One cannot expand the scope of review or supply additional issues through a process of switching, shifting, and mending your hold.") (internal citations and quotation marks omitted); Beard v Montgomery Ward and Co, 215 Kan 343, 349, 524 P2d 1159, 1165 (1974) ("If a case has been tried upon one theory, it is too late to mend his hold and advance another theory which might have been, but was not, presented at the trial.") (internal citations and quotation marks omitted); H.W. Ivey Construction Co v Transamerica Insurance Co, 119 Ga App 794, 795, 168 SE2d 855, 856 (1969) (explaining that on appeal the plaintiff "must stand or fall upon the position taken in the trial court,"

and thus he "cannot . . . 'mend his hold'"); Harlan Production Credit Association v Schroeder Elevator Co, 253 Iowa 345, 349, 112 NW2d 320, 323 (1961) (rejecting an argument on appeal because the "record indicates the contention was not made in the trial court and is an attempt by plaintiff to mend its hold here"). Compare Domino Sugar Corp v Sugar Workers Local Union 392, 10 F3d 1064, 1068 (4th Cir 1993) ("Ordinarily an appellate court does not give consideration to issues not raised below.").

[FN53]. See, for example, Claeys v Moldenschardt, 260 Iowa 36, 41, 148 NW2d 479, 482 (1967) ("Rather she attempted to mend her hold under rule 252 by asserting a new and independent action upon a basis foreign to that rule under the guise of an amendment. This she could not do."); Norton v Crescent City Ice Manufacturing Co, Inc, 178 La 135, 145, 150 § 855, 858 (1933) ("They did not choose to (amend their pleadings), and we do not think that at this late date they should be permitted to mend their hold and to subject defendant to the annoyance and expense of further litigation . . . .").

[FN54]. See, for example, Babbitt v Sweet Home Chapter of Communities for a Great Oregon, 515 US 687, 734 (1995) (Scalia dissenting) ("The second point the Court stresses in its response seems to me a belated mending of its hold."); In re Berkowitz, 3 Kan App 726, 747, 602 P2d 99, 114 (1979) (noting that a second criminal trial "permits the prosecution to 'mend its hold' in the light of experience in the first trial"); Seaboard Sand & Gravel Corp v American Stevedores, Inc, 151 F2d 846, 847 (2d Cir 1945) ("As the scales tipped one way or the other, or remained even, as the trial proceeded, either party could, of course, mend its hold as its evidence enabled it to do; but if in the end the proof did not preponderate at least to a slight extent to show negligence the libelant failed to prove a case.").

[FN55]. Harbor Insurance, 922 F2d at 363 ("Harbor and Allstate describe the 'mend the hold' doctrine as 'quirky.' The name is quirky, but . . . .").

[FN56]. Edwards Manufacturing Co v Bradford Co, 294 F 176, 181 (2d Cir 1923) ("But afterthoughts in litigations do not permit a party 'to mend his hold,' as was quaintly but effectively said in Railway Co. v. McCarthy.") (citations omitted).

[FN57]. Learned Hand, for example, used the phrase in three different opinions, each time descriptively. See Schwartz v Horowitz, 131 F2d 506, 508 (2d Cir 1942); Cohan v Richmond, 86 F2d 680, 682 (2d Cir 1936); Connolly v Medalie, 58 F2d 629, 630 (2d Cir 1932).

[FN58]. See, for example, Friel v Jones, 42 Del Chanc 148, 153-54, 206 A2d 232, 235 (1964) (recognizing the mend the hold doctrine, but finding it inapplicable because suit did not arise from contractual rights); Keefe v Moskin Stores, 95 A2d 336, 339 (DC App 1953) (barring a store manager who had refused to recognize his termination "from denying his obligation under the employment contract"); Weldon v Lashley, 214 Ga 99, 102-04, 103 SE2d 385, 388-89 (1958) (recognizing the mend the hold doctrine, but finding it inapplicable because the defendant had made no prior inconsistent justification for the alleged breach). But compare Adler's Package Shop, Inc v Parker, 190 Ga App 68, 73, 378 SE2d 323, 327 (1989) (recasting Weldon's mend the hold rule as one of estoppel, and thus requiring detrimental reliance); Blunt v Wentland, 250 Iowa 607, 615, 93 NW2d 735, 739 (1959) ("Having elected to repudiate, the appellant was not entitled afterwards to mend his hold by insisting that, if he had not repudiated the contract, the purchaser would not instantly have been able to produce the required cash payment. That a party who has elected one

ground of objection cannot afterwards mend his hold and select another, which might have been obviated, had it been insisted upon, is well settled."), quoting Crow v Casady, 191 Iowa 1357, 182 NW 884 (1921); Russell v Ferrell, 181 Kan 259, 269, 311 P2d 347, 354 (1957) (explaining that, because "(t)ender of payment was refused on the sole ground that the Russells were too late," the refusing party "may not 'mend his hold'" by raising another ground); Tackels, Inc v Fantin, 341 Mich 119, 124, 67 NW2d 71, 73-74 (1954) ("At that time defendant's expressed reluctance to proceed with the work resulted from his belief that the bid price was too low to cover the cost of labor and materials. He did not indicate by his statements that refusal to do the work contemplated was, or would be, predicated on the theory that acceptance of the offer was precluded because of delay on the plaintiff's part. The failure to assign such reason is significant."), citing McCarthy, 96 US at 267-68; Design Data Corp v Maryland Casualty Co, 243 Neb 945, 956-57, 503 NW2d 552, 559-60 (1993) (refusing to apply the otherwise alive "rule as to 'mending one's hold'" in disputes involving insurance coverage); Schanerman v Everett & Carbin, Inc, 10 NJ 215, 220-21, 89 A2d 689, 692 (1952) (disallowing an argument based on the buyer's financial ability because the "prospective seller in refusing to execute the contract asserted simply that it was withdrawing the property from the market and did not question the buyer's financial ability"); Corporacion De Mercadeo Agricola v Mellon Bank International, 608 F2d 43, 48-49 (2d Cir 1979) (explaining that, under New York law, "when a bank offers one reason for refusing a draft on a letter of credit, and that reason is later refuted, it cannot at trial point to an entirely different reason for sustaining the refusal"); Wyoming Sawmills, Inc v Transportation Insurance Co, 282 Or 401, 408-10, 578 P2d 1253, 1257-58 (1978) (In Banc) (limiting the rule, "which is securely rooted in common justice," in insurance cases so as not to create "an original grant of coverage where no such contract previously existed") (internal citations and quotation marks omitted); Nashville Marketplace Co, 1990 Tenn App LEXIS 212 at *16 ("Admittedly, the contract documents did not specifically require the First Capital defendants to set out the grounds for their rejection of a lease. However, once a contracting party has given reasons for its actions, it cannot attempt to justify its conduct on new and different grounds after suit is filed."); Measday v Kwik-Kopy Corp, 713 F2d 118, 125-26 (5th Cir 1983) ("In Texas when an employer assigns grounds for discharge of an employee, it cannot later justify the termination on grounds that were not made the basis of the termination at the time of the discharge."); Hamlin v Mutual Life Insurance Co, 145 Vt 264, 267-70 & n 2, 487 A2d 159, 161-63 & n 2 (1984) (discussing the "insurance defense waiver rule").

[FN59]. See, for example, Nashville Marketplace Co, 1990 Tenn App LEXIS 212 at *16 ("(O)nce a contracting party has given reasons for its actions, it cannot attempt to justify its conduct on new and different grounds after suit is filed.").

[FN60]. See, for example, Hamlin, 487 A2d at 161-63 & n 2 (discussing the "insurance defense waiver rule").

[FN61]. See 12 Am Jur 2d Brokers § 251 (1997) ("As a general rule, where a landowner who has listed property for sale with a real estate broker refuses to accept an offer which is substantially in accordance with the listing, the owner cannot afterwards defend the broker's action for compensation on a ground not specified when rejecting the offer.").

[FN62]. For examples of courts that have limited mend the hold's application in the insurance and real estate contexts, see Parts I.C.1 and I.C.2.

[FN63]. See text accompanying note 89. Compare Polson Logging Co v Neumeyer, 229 F 705, 707 (9th Cir 1916) (affirming a judgment for the seller because "the purchaser refused to receive the steel . . . solely upon" two specific

grounds different from the "objections now relied upon to defeat the action").

[FN64]. Hamlin v Mutual Life Insurance Co, 145 Vt 264, 267-70, 487 A2d 159, 161-63 (1984).

[FN65]. Cummings v Connecticut General Life Insurance Co, 102 Vt 351, 148 A 484, 487 (1930).

[FN66]. Id.

[FN67]. Id (discussing the unfairness of allowing the insurance company to mend its hold "after the insured has taken him at his word and is attempting to enforce his liability").

[FN68]. See, for example, In re Aberdeen 100, Inc, 1995 Bankr LEXIS 1032, *11 (Bankr D Vt) (holding that the defendant insurance company "waived nothing" because it had "specifically 'reserve(d) its rights to disclaim coverage"' under any other grounds). Compare note 81 and accompanying text.

[FN69]. See id at *9-11 (recognizing the rule as the law of Vermont); Village of Morrisville Water & Light Department v United States Fidelity & Guaranty Co, 775 F Supp 718, 724 n 7 (D Vt 1991) (same).

[FN70]. For Nebraska examples, see O'Neil v Union National Life Insurance Co, 162 Neb 284, 291, 75 NW2d 739, 744 (1956) (refusing to bar an amendment because the "amended answer as to this subject did not" represent a change in "its defensive position"); Pickens v Maryland Casualty Co, 141 Neb 105, 110, 2 NW2d 593, 596 (1942) (allowing the insurance company to mend its hold because the declination letter "inadvertently" misstated the company's rationale and the "error was so patent that it can in no way prejudice the rights of defendant"). For Oregon examples, see Ward v Queen City Fire Insurance Co of Sioux Falls, 69 Or 347, 352, 138 P 1067, 1068 (1914) (suggesting that mend the hold applies only to the extent that the party in breach was in full possession of "all the facts and circumstances"); Eaid v National Casualty Co, 122 Or 547, 557-59, 259 P 902, 906 (1927) (following Ward, and thus applying mend the hold because "the company had made a careful examination and investigation of the (plaintiff's) claim").

[FN71]. Design Data Corp v Maryland Casualty Co, 243 Neb 945, 957, 503 NW2d 552, 560 (1993) ("While the rule as to 'mending one's hold' may be alive and well as to conditions of forfeiture, generally it has no application to matters relating to coverage, and estoppel cannot be invoked to expand the scope of coverage of an insurance contract absent a showing of detrimental good faith reliance upon statements or conduct of the party against whom estoppel is invoked which reasonably led an insured to believe coverage was present."); ABCD . . . Vision, Inc v Fireman's Fund Insurance Co, 304 Or 301, 306, 744 P2d 998, 1001 (1987) ("Estoppel cannot be invoked to expand insurance coverage or the scope of an insurance contract."); Wyoming Sawmills, Inc v Transportation Insurance Co, 282 Or 401, 578 P2d 1253, 1258 (1978) (In Banc) (limiting the mend the hold rule so as not to create a "grant of coverage where no such contract previously existed").

[FN72]. Wyoming Sawmills, 578 P2d at 1257-58. See also DeJonge v Mutual of Enumclaw, 315 Or 237, 843 P2d 914, 916-17 (1993) (In Banc), citing Wyoming Sawmills, 578 P2d at 1278 and ABCD . . . Vision, 744 P2d at 1001, for the proposition that estoppel cannot be used to expand a policy's coverage. On this subject generally, see Peter Nash

Swisher, Judicial Interpretations of Insurance Contract Disputes: Toward a Realistic Middle Ground Approach, 57 Ohio St L J 543, 592-94, 618-21 (1996) (discussing expansion of coverage through waiver and estoppel); W.C. Crais III, Annotation, Doctrine of Estoppel or Waiver as Available to Bring Within Coverage of Insurance Policy Risks not Covered by its Terms or Expressly Excluded Therefrom, 1 ALR3d 1139 (1965), cited with approval in DeJonge, 843 P2d at 916 n 3. See also Employers Insurance of Wausau v Ehlco Liquidating Trust, 292 Ill App 3d 1036, 687 NE2d 82, 90-93 (1997) (refusing to apply a similar Illinois insurance estoppel rule when the insurer can show the breach of a condition precedent to coverage).

[FN73]. ABCD . . . Vision, 744 P2d at 1002. See also George J. Couch, Ronald A. Anderson, and Mark S. Rhodes, 14 Couch on Insurance § 49B:1 (Law Co-op 2d rev ed 1982) ("Provisions in contracts of insurance requiring notice and proofs of loss, injury, death, claim against the insured, etc., may, like all other provisions or conditions which are inserted by the insurers for their benefit or protection, be waived by them . . . .").

[FN74]. ABCD . . . Vision, 744 P2d at 1001.

[FN75]. Wyoming Sawmills, 578 P2d at 1258.

[FN76]. ABCD . . . Vision, 744 P2d at 1002.

[FN77]. See Design Data, 503 NW2d at 559-60, quoting ABCD . . . Vision, 744 P2d at 1001-02, with approval.

[FN78]. Design Data, 503 NW2d at 560 ("While the rule as to 'mending one's hold' may be alive and well as to conditions of forfeiture, generally it has no application to matters relating to coverage, and estoppel cannot be invoked to expand the scope of coverage of an insurance contract absent a showing of detrimental good faith reliance upon statements or conduct of the party against whom estoppel is invoked which reasonably led an insured to believe coverage was present."). See also Erickson v Carhart, 1996 Neb App LEXIS 234, *16 (explaining that Design Data "limits the estoppel doctrine of 'mending one's hold' to prevent expansion of coverage beyond the policy terms absent detrimental reliance").

[FN79]. See, for example, Sherwood v Rosenstein, 179 Minn 42, 228 NW 339, 339 (1929) ("The theory is that, if (the principal) would speak in season, the (broker) might remove the alleged obstacle . . . ."); Duclos, 6 NE at 790 ("No such objection was taken at the time by the defendants, and, had it been, the difficulty, no doubt, would have been obviated at once by the (broker) . . . ."). See also Lathrop v Gauger, 127 Cal App 2d 754, 767, 274 P2d 730, 738 (1954) ("The general rule, in this state and elsewhere, is that where a broker has produced a purchaser in substantial compliance with the terms of a listing, and the owner does not object to the terms of the proposed purchase or the details of performance but states as the reason for his refusal his unwillingness to sell, he may not shift his position, when sued for a commission, and defend upon objections to details that the broker might have supplied or corrected if they had been pointed out by the owner.").

[FN80]. Horton-Cavey Realty Co v Reese, 34 Colo App 323, 328, 527 P2d 914, 917 (1974).

[FN81]. Hawkland's critique of mend the hold in the context of contracts for the sale of goods is equally applicable to real estate brokerage contracts. See William D. Hawkland, Uniform Commercial Code Series § 2-605:01 (Clark Boardman Callaghan 1984) ("This rule led sophisticated buyers to object to the seller's tender in a general nonspecific fashion and to base rejection on all available grounds.").

[FN82]. Compare note 79.

[FN83]. See Mutchnick v Davis, 130 AD 417, 114 NYS 997, 999 (NY App Div 1909) (explaining that "failure to object on the ground of the party wall cannot be deemed a waiver of that defect, because it could not have been cured").

[FN84]. See Record Realty, Inc v Hull, 15 Wash App 826, 552 P2d 191, 195 (1976) (recognizing the majority rule requires that the seller "show that the ground for rejection of an offer tendered to the seller by the broker was specified to the broker at that time").

[FN85]. See Horton-Cavey Realty, 527 P2d at 917; Lathrop, 274 P2d at 738; Libowitz v Lake Nursing Home, Inc, 35 Wis 2d 74, 81-82, 150 NW2d 439, 443 (1967). See also 12 Am Jur 2d Brokers § 251 (1997) ("As a general rule, where a landowner who has listed property for sale with a real estate broker refuses to accept an offer which is substantially in accordance with the listing, the owner cannot afterwards defend the broker's action for compensation on a ground not specified when rejecting the offer."); Annotation, Failure, when refusing offer to purchase land, to state ground therefor as affecting right to assert such ground in defense of broker's action for compensation, 156 ALR 602 (1945). For an example of the explicit fusion of these rules, see Orange City Hills, Inc v Florida Realty Bureau, Inc, 119 S2d 43, 48-49 (Fla Dist Ct App 1960) (Wigginton dissenting), which cites both an earlier edition of the relevant Am Jur section and McCarthy's mend the hold language.

[FN86]. See, for example, Littlejohn v Shaw, 159 NY 188, 191, 53 NE 810, 811 (1899) ("But in this case the defendants placed their rejection of the gambier upon two specific grounds, viz. that it was not of good merchantable quality, and that it was not in good merchantable condition. By thus formally stating their objections, they must be held to have waived all other objections. The principle is plain, and needs no argument in support of it, that, if a particular objection is taken to the performance, and the party is silent as to all others, they are deemed to be waived."). See also text accompanying notes 42-47.

[FN87]. Hawkland, Uniform Commercial Code Series at § 2-605:01 (cited in note 81) ("This rule led sophisticated buyers to object to the seller's tender in a general nonspecific fashion and to base rejection on all available grounds. The case law supported this approach, generally holding that if the buyer rejected without specifying any reason other than the general allegation that the goods did not conform to the contract, he had the right thereafter to rely on any defects or noncomformities to support his action.").

[FN88]. Id.

[FN89]. UCC § 2-605(1)(a). See also UCC § 2A-514 (revising Section 2-605 to reflect leasing practices and terminology).

[FN90]. UCC § 2-605 comment 1.

[FN91]. See, for example, Texpor Traders, Inc v Trust Co Bank, 720 F Supp 1100, 1111-12 (S D NY 1989) (applying UCC § 2-605).

[FN92]. The court in Phillips Puerto Rico Core, Inc v Tradax Petroleum Ltd, 782 F2d 314, 321 (2d Cir 1985), after citing UCC § 2-605(1) to explain why a party "waived its right to rely on (a) belatedly alleged defect as justification for its nonpayment," string cited two earlier decisions. The first, Uchitel v F.R. Tripler & Co, 434 NYS2d 77, 81 (NY § Ct 1980), is an unimportant Section 2-605 case. But the second, Corporacion de Mercadeo Agricola v Mellon Bank International, 608 F2d 43 (2d Cir 1979), did not involve the UCC at all. Rather, in a classic application of the mend the hold principle, it explained that "when a bank offers one reason for refusing a draft on a letter of credit, and that reason is later refuted, it cannot at trial point to an entirely different reason for sustaining the refusal." Id at 48-49. See also Otto Seidenberg v Tautfest, 155 Or 420, 64 P2d 534, 535 (1937) (incorporating the mend the hold rule into a 1930 Oregon statute that resembles modern day UCC § 2-605).

[FN93]. See UCC § 2-605 comment 2 (explaining that "a buyer who merely rejects the delivery without stating his objections to it is probably acting in commercial bad faith"); UCC § 1-203 ("Every contract or duty within (the UCC) imposes an obligation of good faith in its performance or enforcement."). See also Restatement (Second) of Contracts § 248 comment b (ALI 1979) ("(T)he giving of an insufficient reason may, however, so mislead the other party as to induce his failure to cure the defective performance or offer of performance . . . . If it does so, the non-occurrence of the condition is excused . . . . This is a specific application of the general rule that requires good faith and fair dealing . . . .").

[FN94]. New England Structures, Inc v Ronald R. Loranger, 354 Mass 62, 65-66, 234 NE2d 888, 891-92 (1968) (characterizing McCarthy and its progeny as relying on estoppel or waiver); American Sulphur, 276 SW at 459 (rejecting McCarthy's mend the hold rule in favor of equitable estoppel and its reliance requirement). Somewhat inconsistently, Texas enforces the mend the hold principle in employment disputes, see Measday v Kwik-Kopy Corp, 713 F2d 118, 125-26 (5th Cir 1983) ("In Texas when an employer assigns grounds for discharge of an employee, it cannot later justify the termination on grounds that were not made the basis of the termination at the time of the discharge."), in conflict with the Restatement. See Restatement (Second) of Contracts § 237 illustration 8 (ALI 1979) ("B is not aware of (legitimate grounds for discharging A, so B) discharges A for an inadequate reason. A has no claim against B for discharging him.").

[FN95]. Accent Builders Company, Inc v Southwest Concrete Systems, Inc, 679 SW2d 106, 110 (Tex App 1984) (holding that "absent a bad faith effort or a change of position a party is 'not prevented from relying upon one good defense among others urged simply because he has not always put it forward'"), quoting New England Structures, 234 NE2d at 892; Commonwealth Mortgage Corp v First Nationwide Bank, 873 F2d 859, 866 (5th Cir 1989), quoting Accent Builders, 679 SW2d at 110. Accent Builders also cites a section of the Restatement, which relied upon the facts of New England Structures, in support of the good faith amendment rule. Accent Builders, 679 SW2d at 110, citing Restatement (Second) of Contracts § 248. Section 248 comment b explicitly connects the proposition to "the general rule that requires good faith and fair dealing in the enforcement of contracts."

[FN96]. Accent Builders, 679 SW2d at 110 ("Thus under our holding the question for the jury was not whether Accent intended to terminate for convenience, but instead whether it acted in bad faith or whether Southwest changed its position in reliance."); New England Structures, 234 NE2d at 891-92 ("While of course one cannot fail in good faith in presenting his reasons as to his conduct touching a controversy he is not prevented from relying upon one good defense among others urged simply because he has not always put it forward, when it does not appear that he has acted dishonestly or that the other party has been misled to his harm, or that he is estopped on any other ground.").

[FN97]. Gibson v Brown, 214 Ill 330, 341, 73 NE 578, 582 (1905). See also Schuyler County v Missouri Bridge and Iron Co, 256 Ill 348, 352-53, 100 NE 239, 240 (1912).

[FN98]. See, for example, Israel v National Canada Corp, 276 Ill App 3d 454, 462, 658 NE2d 1184, 1191 (1996) ("Illinois law requires a defendant in a breach of contract claim to stand by the first defense raised after the litigation has begun. However, the law does not require that the defense be asserted at the time the contract is terminated.").

[FN99]. 1 Ill App 2d 36, 116 NE2d 187 (1953).

[FN100]. 116 NE2d at 191 ("We have concluded from our examination of the cases that so far as the Illinois doctrine is concerned, it is not limited to equitable estoppel. The reviewing courts . . . were familiar with the doctrine of equitable estoppel and there was no occasion for dressing it up with a subtitle.").

[FN101]. Id at 192. In this respect Larson anticipated the UCC. See text accompanying notes 88-8988.

[FN102]. Id at 191.

[FN103]. Id at 191-92 (explaining that the rule stems from "the common practice among . . . contracting parties . . . to state a reason for repudiation," and thus "there are limitations upon its application"). See also Harbor Insurance, 922 F2d at 363 (explaining that "the doctrine . . . can be seen as a corollary of the duty of good faith that the law of Illinois as of other states imposes on the parties to contracts"), citing Larson, 116 NE2d at 191-92. Compare Smith, County Treasurer v German Insurance Co, 107 Mich 270, 279, 65 NW 236, 239 (1895) ("It is apparent that the ground, and the only ground, upon which all liability was denied, was the storage of gasoline . . . . Good faith required that the (insurance) company should apprise the plaintiff fully of its position; and, failing to do this, it estops itself from asserting any defense other than that brought to the notice of plaintiff.").

[FN104]. See, for example, IK Corp v One Financial Place Partnership, 200 Ill App 3d 802, 815, 558 NE2d 161, 170 (1990) ("IK contends that raising a new condition violates long established Illinois law. However, this is not a case where a party has switched his position at trial.") (emphasis added).

[FN105]. Israel, 658 NE2d at 1191.

[FN106]. Delaney v Marchon, Inc, 254 Ill App 3d 933, 940-41, 627 NE2d 244, 249 (1993). But compare note 110.

[FN107]. See Horwitz-Matthews, Inc v City of Chicago, 78 F3d 1248, 1252 (7th Cir 1996).

[FN108]. See Cleveland Hair Clinic, Inc v Puig, 949 F Supp 595, 600-01 (N D Ill 1996).

[FN109]. The Delaney court relied on Judge Posner's opinion in Harbor Insurance as an authoritative exposition of the limits of mend the hold. Delaney, 627 NE2d at 249. In fact, the Harbor Insurance court was operating with a concession by the party seeking to employ the doctrine that sharply limited the doctrine's scope to avoid a head-on collision between the doctrine and the Federal Rules of Civil Procedure. 922 F2d at 364 ("It concedes that if pretrial discovery or other sources of new information justify a change in a contract party's litigating position as a matter of fair procedure under the federal rules, that change should not be deemed a forbidden attempt to 'mend the hold.'"). Moreover, to the extent that the Delaney court justified its limitation of the doctrine to postpleading stage amendments because "no case law . . . clearly holds that the doctrine applies at the pleading stage," 627 NE2d at 239, the court was in error. In the Illinois Supreme Court's decision in Schuyler County, for example, the defendant won a county construction bid, but then announced by letter that it could not perform at the bid price, that the bid was a mistake. In the subsequent breach of contract action, the court limited the defendant to that explanation, which was made well before the litigation commenced. 100 NE at 240.

[FN110]. Thus, in Horwitz-Matthews, an appeal from a dismissal below before the defendants had filed an answer, the Seventh Circuit opined that, even though the pleadings were not yet complete, "the 'mend the hold' doctrine" would not permit the defendant to change its position because it had "emphatically asserted(ed) its position" on appeal. 78 F3d at 1252. See also Cleveland Hair Clinic, 949 F Supp at 601 (citing mend the hold as an alternative ground for refusing to allow a defense that the defendant had been aware of since the first pleadings).

[FN111]. See note 96 and accompanying text.

[FN112]. 304 US 64, 79-80 (1938) (holding that federal courts were bound by state common law in all cases in which they would be bound by state statutory law). See also S.A. Healy, 60 F3d at 309 (characterizing the promulgation of the Federal Rules of Civil Procedure and the Supreme Court's Erie decision as "the revolution in federalism of 1938").

[FN113]. Hanna, 380 US at 465. Choosing the appropriate state, however, is sometimes no easy task. See generally Wright, Miller, and Cooper, 19 Federal Practice and Procedure § 4506 (cited in note 13).

[FN114]. Hanna, 380 US at 471 ("When a situation is covered by one of the Federal Rules, the question facing the court is a far cry from the typical, relatively unguided Erie choice: the court has been instructed to apply the Federal Rule, and can refuse to do so only if the Advisory Committee, this Court, and Congress erred in their prima facie judgment that the Rule in question transgresses neither the terms of the Enabling Act nor constitutional restrictions."); Trierweiler v Croxton and Trench Holding Corp, 90 F3d 1523, 1539 (10th Cir 1996) ("The Supreme Court has continued to eschew the application of simple litmus tests in distinguishing between substantive and procedural law, except in one case: where a federal rule of procedure is directly on point, that rule applies."); Wright, Miller, and Cooper, 19 Federal Practice and Procedure § 4511 at 311-12 (cited in note 13) (explaining that there is no longer any significant Erie problem with regard to matters covered by the Federal Rules).

If the Federal Rule is not "a valid exercise of Congress' rulemaking authority," then of course it will not control. Burlington Northern Railroad Co v Woods, 480 US 1, 5 (1987). But the Federal Rules enjoy "presumptive validity under both . . . constitutional and statutory constraints." Id at 6. Thus, there is no real question about the validity of either of the Rules that could preempt mend the hold (8 and 15). The analysis below, therefore, focuses only on whether either Rule conflicts with the mend the hold doctrine.
[FN115]. Burlington Northern, 480 US at 4-5; Hiatt v Mazda Motor Corp, 75 F3d 1252, 1259 (8th Cir 1996).

[FN116]. Hanna, 380 US at 468; Fragoso v Lopez, 991 F2d 878, 881 (1st Cir 1993).

[FN117]. Harbor Insurance, 922 F2d at 364.

[FN118]. Id.

[FN119]. Burlington Northern, 480 US at 4-5 (1987) (citations omitted). See also Wright, Miller, and Cooper, 19 Federal Practice and Procedure § 4510 at 293 (cited in note 13) (explaining that "a precondition to the applicability of a Civil Rule in the face of contrary state law" is that "it must first be determined that the Rule, properly construed, truly comprehends the disputed issue and, therefore, is in conflict with state law").

[FN120]. FRCP 8(e)(2). See also FRCP 11 (requiring parties to certify that their contentions are not baseless).

[FN121]. Stewart Organization, Inc v Ricoh Corp, 487 US 22, 31 (1988), quoting Walker v Armco Steel Corp, 446 US 740, 752 (1980).

[FN122]. See Nathan v Boeing Co, 116 F3d 422, 424 (9th Cir 1997) (explaining that "we interpret federal law broadly when deciding if it conflicts with state law in an Erie situation"), citing Stewart Organization, 487 US at 31. But compare Eades v Clark Distribution Co, Inc, 70 F3d 441, 443 (6th Cir 1995) (rejecting an argument that Stewart Organization compels a broad reading of the Federal Rules).

[FN123]. Gasperini v Center for Humanities, Inc, 518 US 415, 421 n 7 (1996). See J. Benjamin Jing, Note, Clarification and Disruption: The Effects of Gasperini v. Center for the Humanities, Inc. on the Erie Doctrine, 83 Cornell L Rev 161, 188-89, 193 (1997) ("If Gasperini indicates a turn in the Court's approach to the Erie doctrine, a Federal rule will apply in the face of a contrary state rule only when the Federal Rule sets an explicit standard leaving the courts little room for interpretation . . . ."). See also S.A. Healy Co, 60 F3d at 310-12 (holding that a state rule regarding settlement offers by plaintiffs is compatible with Rule 68's control over settlement offers by defendant), cited with approval in Gasperini, 518 US at 421 n 7; Richard H. Fallon, Daniel J. Meltzer, and David L. Shapiro, Hart and Wechsler's The Federal Courts and the Federal System 729-30 (Foundation 4th ed 1996) (noting that the Court continues to interpret the Federal Rules to avoid conflict with important state interests), cited with approval in Gasperini, 518 US at 437-38 n 22. Compare Stewart Organization, 487 US at 37-38 (Scalia dissenting) ("Thus, in deciding whether a federal procedural statute or Rule of Procedure encompasses a particular issue, a broad reading that would create significant disuniformity between state and federal courts should be avoided if the text permits.").

[FN124]. Compare Trierweiler, 90 F3d at 1540 (interpreting Rule 11 so as to avoid a direct collision with a Colorado statute).

[FN125]. 480 US 1, 7 (1987) ("Thus, the Rule's discretionary mode of operation unmistakably conflicts with the mandatory provision of Alabama's affirmance penalty statute. Moreover, the purposes underlying the Rule are sufficiently coextensive with the asserted purposes of the Alabama statue to indicate that the Rule occupies the statute's field of operation so as to preclude its application in federal diversity actions."). Compare Exxon Corp v Burglin, 42 F3d 948, 950 (5th Cir 1995) ("By allowing even minimal recovery of attorneys' fees in every civil appeal, Alaska Rule 508 directly collides with FRAP 38, which allows the recovery of attorneys' fees only in the case of a frivolous appeal.").

[FN126]. Henry v Daytop Village Inc, 42 F3d 89, 95 (2d Cir 1994), quoting Charles Alan Wright and Arthur R. Miller, 5 Federal Practice and Procedure: Civil 2d § 1282 at 533 (West 2d ed 1990).

[FN127]. See, for example, Nashville Marketplace Co, 1990 Tenn App LEXIS 212 at *16 ("Nashville Marketplace could have attempted to cure these problems before the expiration of the earn-out period had they been mentioned in the rejection notice.").

[FN128]. See notes 119, 123 and accompanying text.

[FN129]. FRCP 8.

[FN130]. See Delaney v Marchon, Inc, 254 Ill App 3d 933, 940-41, 627 NE2d 244, 249 (1993). The court in In re Apex Automotive Warehouse LP, avoided a conflict between Illinois mend the hold and the Federal Rules by refusing to apply the doctrine "at the pleading stage of a litigation." 205 Bankr 547, 554 (Bankr N D Ill 1997). The court's analysis has it backwards--Illinois's version of mend the hold does not apply at the pleadings stage and for that reason does not conflict with the Federal Rules--but the result is just the same.

[FN131]. See, for example, Horwitz-Matthews v City of Chicago, 78 F3d 1248, 1251-52 (7th Cir 1996) (explaining that, even though the pleadings were not yet complete, "the 'mend the hold' doctrine" would not permit the defendant to change its position because it had "emphatically assert(ed) its position" on appeal).

[FN132]. IK Corp, 558 NE2d at 170.

[FN133]. FRCP 15(a).

[FN134]. See Wyoming Sawmills, Inc v Transportation Insurance Co, 282 Or 401, 578 P2d 1253, 1257-58 (1978) (In Banc) (describing mend the hold as "securely rooted in common justice").

[FN135]. See Foman v Davis, 371 US 178, 182 (1962) (holding that leave to amend should be "freely given" absent bad faith, undue prejudice, and certain other reasons); In re Southmark Corp, 88 F3d 311, 314-15 (5th Cir 1996) ("In

deciding whether to grant . . . leave (to amend), the court may consider such factors as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party, and futility of amendment."), citing Foman, 371 US at 182; Executive Leasing Corp v Banco Popular De Puerto Rico, 48 F3d 66, 71 (1st Cir 1995) ("Absent factors such as undue delay, bad faith, or dilatory motive, repeated failure to cure deficiencies by previous amendments, (or) undue prejudice to the opposing party, . . . the leave (to amend) sought should be granted."), citing Foman, 371 US at 182; Garner v Kinnerar Manufacturing Co, 37 F3d 263, 269 (7th Cir 1994) ("While leave to amend should be freely given when justice requires, district courts have broad discretion to deny motions to amend in cases of undue delay, bad faith or dilatory motives, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice or futility."); Fuller v Secretary of Defense, 30 F3d 86, 88 (8th Cir 1994) (explaining that "(l)eave to amend should be granted absent a good reason for the denial, such as undue delay, bad faith, undue prejudice to the nonmoving party, or futility"). If justice excludes amendments in cases of bad faith, prejudice, dilatory motives, and so forth, why not add mend the hold to the list? Compare note 143 and accompanying text.

[FN136]. Life Care Centers of America v Charles Town Associates Limited Partnership, LPIMC, Inc, 79 F3d 496, 508-09 (6th Cir 1996).

[FN137]. Id.

[FN138]. Id at 508.

[FN139]. Id at 508-09. Although characterizing the rule as resting on "estoppel grounds," the court noted that the Tennessee rule represents an adoption of the McCarthy rule. Id at 508 & n 9. This confusion stems from the use of the word estoppel in the McCarthy opinion: "He is not permitted thus to mend his hold. He is estopped from doing it by a settled principle of law." McCarthy, 96 US at 267-68 (emphasis added). Compare notes 18-22, 33-34 and accompanying text. Notwithstanding this confusion, the rule that "once a contracting party has given reasons for its actions, it cannot attempt to justify its conduct on new and different grounds after suit is filed," Life Care Centers, 79 F3d at 508, quoting Nashville Marketplace, 1990 Tenn App LEXIS 212 at *16, is a manifestation of the mend the hold principle outlined in Part I.

[FN140]. See generally Stewart Organization, Inc v Ricoh Corp, 487 US 22, 31 (1988) (declining to apply Alabama law regarding forum selection clauses because 28 USC § 1404(a) controlled the field); Burlington Northern, 480 US at 4-5 (holding that FRCP 38 preempted an Alabama statute).

[FN141]. See note 135.

[FN142]. Although the Illinois amendment rule is similar to Rule 15, see 735 ILCS 5/2-616 (1996) ("At any time before final judgment amendments may be allowed on just and reasonable terms . . . ."), no Illinois court has raised it as a bar to mend the hold. This further supports the approach suggested above.

[FN143]. See Mellon Bank, N.A. v Miglin, 1994 US Dist LEXIS 15439, *11-18 (N D Ill) (Adopted Magistrate's Opinion). See also Cleveland Hair Clinic, Inc v Puig, 949 F Supp 595, 601 (N D Ill 1996) (citing mend the hold as an

alternative ground for refusing to allow a defense that the defendant had been aware of since the first pleadings).

[FN144]. Harbor Insurance, 922 F2d at 364.

[FN145]. See Hanna, 380 US at 470 ("It is true that there have been cases where this Court has held applicable a state rule in the face of an argument that the situation was governed by one of the Federal Rules. But the holding of each such case was not that Erie commanded displacement of a Federal Rule by an inconsistent state rule, but rather that the scope of the Federal Rule was not as broad as the losing party urged, and therefore, there being no Federal Rule which covered the point in dispute, Erie commanded the enforcement of state law.").

[FN146]. See Erie, 304 US at 79-80; Trierweiler, 90 F3d at 1540 ("Because a Federal Rule is not directly on point, we move to the next step-- 'the typical, relatively unguided Erie choice.'").

[FN147]. See, for example, Gasperini, 518 US at 426-31 (concluding that Erie commanded enforcement of a New York law limiting "excessive damages"); Stewart Organization, 487 US at 31 (concluding that 28 USC § 1404 occupies the field of forum selection clauses); Burlington Northern, 480 US at 4-5 (refining the rule of Hanna in cases where the Federal Rules conflict with state law); Walker v Armco Steel Corp, 446 US 740, 752 (1980) (concluding that Rule 3 and Oklahoma's statute of limitations "can exist side by side"); Hanna, 380 US at 468 (tying the "outcome determination" test to "the twin aims of the Erie rule"); Byrd v Blue Ridge Rural Electric Cooperative, Inc, 356 US 525, 537-38 (1958) (employing a test balancing state and federal interests); Guaranty Trust Co v York, 326 US 99, 109 (1945) (characterizing the Erie question as whether the state rule will "significantly affect the result of a litigation for a federal court to disregard a law of a State that would be controlling in an action upon the same claim by the same parties in a State court?"). But see Wright, Miller, and Cooper, 19 Federal Practice and Procedure § 4504 at 50 (cited in note 13) (explaining that "the Hanna opinion is the Supreme Court's last doctrinally significant contribution to the Erie doctrine").

[FN148]. Gasperini, 518 US at 427.

[FN149]. See Rissetto, 94 F3d at 602-04 (describing the disagreement among federal courts over whether judicial estoppel is substantive or procedural under Erie); Barron v Ford Motor Co of Canada, Ltd, 965 F2d 195, 199 (7th Cir 1992) (collecting doctrines, including mend the hold, that "mix procedural or evidentiary with substantive policy concerns"); Ashley S. Deeks, Comment, Raising the Cost of Lying: Rethinking Erie for Judicial Estoppel, 64 U Chi L Rev 873, 884 (1997) (explaining that judicial estoppel "resists easy classification as either substantive or procedural").

[FN150]. See Barron, 965 F2d at 199 (explaining that "a substantive rule is concerned with the channeling of behavior outside the courtroom").

[FN151]. 518 US 415, 428 (1996) ("Informed by these decisions, we address the question whether (the state law in question) is outcome-affective in this sense: Would 'application of the (standard) . . . have so important an effect upon the fortunes of one or both of the litigants that failure to (apply) it would (unfairly discriminate against citizens of the forum State, or) be likely to cause a plaintiff to choose the federal court'?"), citing Hanna, 380 US at 468 (tying Guaranty Trust's "outcome determination" test to "the twin aims of the Erie rule"). See also Fragoso, 991 F2d at

881-82 (holding that a Puerto Rico rule was procedural because refusing to apply it in federal court would not "influence a litigant's choice of forum"; would not "advantage (federal plaintiffs) as compared with similarly situated, non-diverse plaintiffs"; and would not "bear in the slightest on the substantive outcome of the appeal"). Although Gasperini also considered whether the New York rule in question impinged on an "essential characteristic" of the federal courts, see 518 US at 431, quoting Byrd, 356 US at 537, this Comment ignores that question because the only potential conflicting federal interest, the Federal Rules, does not conflict with the doctrine, see Part II.A, whereas the state rule under consideration in Gasperini raised Seventh Amendment concerns, see 518 US at 432-36.

[FN152]. See Part I.C.

[FN153]. Gasperini, 518 US at 429, citing with approval S.A. Healy Co, 60 F3d at 310. In the words of the S.A. Healy court: "The second class of pretty easy cases is where the state procedural rule, though undeniably 'procedural' in the ordinary sense of the term, is limited to a particular substantive area, such as contract law . . . . For then the state's intention to influence substantive outcomes is manifest and would be defeated by allowing parties to shift their litigation into federal court unless the state's rule was applied there as well." Id at 310 (internal citations omitted).

[FN154]. See Mangold v California Public Utilities Commission, 67 F3d 1470, 1479 (9th Cir 1995) (explaining that "the availability of a multiplier for fees in state court, but not in federal court, would likely lead to forum-shopping"). Compare Fragoso, 991 F2d at 881 ("For one thing, it is inconceivable that a defendant's differential ability, depending upon whether the suit is brought in a federal or in a commonwealth court, to invoke Puerto Rico's procedural law anent insolvent insurers after trial and entry of judgment will influence a litigant's choice of forum.").

[FN155]. See, for example, Nashville Marketplace Co, 1990 Tenn App LEXIS 212 at *16 ("Nashville Marketplace could have attempted to cure these problems before the expiration of the earn-out period had they been mentioned in the rejection notice."); Duclos, 6 NE at 790 ("No such objection was taken at the time by the defendants, and, had it been, the difficulty, no doubt, would have been obviated at once by the (broker).").

[FN156]. See Mangold, 67 F3d at 1479 ("As this case illustrates, if a multiplier is procedural, a significant difference in fees would be available in state court but not in federal court--an 'inequitable administration of the law.'"). Compare Fragoso, 991 F2d at 881 ("For another thing, declining to apply the Commonwealth's procedural laws here will not advantage Fragoso as compared with similarly situated, nondiverse plaintiffs.").

[FN157]. Israel, 658 NE2d at 1191.

[FN158]. Compare Cole Taylor Bank, 1994 US Dist LEXIS 3705 at *14-15 ("As pre-trial discovery revealed an alleged basis for the defenses of waiver and estoppel, this Court holds that application of the doctrine of 'mend the hold' to bar the Defendant's assertion of waiver and estoppel is not appropriate."), and Kafka v Truck Insurance Exchange, 1992 US Dist LEXIS 9440, *8 (N D Ill) (explaining that mend the hold should not "bar meritorious contract defenses where the failure to raise those defenses early-on in litigation was merely inadvertent"), referring to Larson, 116 NE2d at 192, with Cleveland Hair Clinic, Inc v Puig, 949 F Supp 595, 601 (N D Ill 1996) (citing mend the hold as an alternative ground for refusing to allow a defense that the defendant had been aware of since the first pleadings), and Mellon Bank, 1994 US Dist LEXIS 15439 at *17-18 (Adopted Magistrate's Opinion) (denying a party leave to

amend to add a defense that it had been aware of since its original pleading but had failed to raise).

[FN159]. See S.A. Healy, 60 F3d at 310 ("The second class of pretty easy cases is where the state procedural rule, though undeniably 'procedural' in the ordinary sense of the term, is limited to a particular substantive area, such as contract law . . . . For then the state's intention to influence outcomes is manifest and would be defeated by allowing parties to shift their litigation into federal court unless the state's rule was applied there as well.").

[FN160]. Larson, 116 NE2d at 191. See also text accompanying notes 99-103.

[FN161]. Wright, Miller, and Cooper, 19 Federal Practice and Procedure § 4511 at 313 (cited in note 13). See also Byrd v Blue Ridge Rural Electric Cooperative, Inc, 356 US 525, 537-40 (1958) (balancing state and federal interests); Mayer v Gary Partners and Co, Ltd, 29 F3d 330, 333 (7th Cir 1994) ("The burden of persuasion is tied to the definition of the right, so state law determines whether the plaintiff must prove the case by a preponderance, by clear and convincing evidence, or by some other standard.").

[FN162]. Compare Fragoso, 991 F2d at 881 ("For one thing, it is inconceivable that a defendant's differential ability, depending upon whether the suit is brought in a federal or in a commonwealth court, to invoke Puerto Rico's procedural law anent insolvent insurers after trial and entry of judgment will influence a litigant's choice of forum."), with Trierweiler, 90 F3d at 1541 ("A plaintiff alleging professional negligence is likely to seek a forum without the certificate of review hurdle either to avoid extra cost (or) to give himself more time to build a meritorious case . . . ."), and Mangold, 67 F3d at 1479 (explaining that "the availability of a multiplier for fees in state court, but not in federal court, would likely lead to forum-shopping"). See also S.A. Healy, 60 F3d at 312 ("The power of the state to jigger procedural rules to favor plaintiffs or defendants in federal diversity suits is limited (only) by the Rules Enabling Act and the Supremacy Clause . . . .").

[FN163]. See Trierweiler, 90 F3d at 1541 ("If the certificate of review requirement applies in state but not federal court, the inequitable result would be a penalty conferred on state plaintiffs but not on those in federal court under diversity jurisdiction."). But compare Wright, Miller, and Cooper, 19 Federal Practice and Procedure § 4511 at 8-9 (cited in note 13) (criticizing the reasoning, but not the result, of Trierweiler).

[FN164]. See text accompanying note 160.

65 U. Chi. L. Rev. 1059

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R. APP. F

C

West's Annotated Code of Maryland Currentness
Maryland Rules (Refs & Annos)
Title 1. General Provisions
Chapter 100. Applicability and Citation
➡ **RULE 1-104. UNREPORTED OPINIONS**

(a) Not Authority. An unreported opinion of the Court of Appeals or Court of Special Appeals is neither precedent within the rule of stare decisis nor persuasive authority.

(b) Citation. An unreported opinion of either Court may be cited in either Court for any purpose other than as precedent within the rule of stare decisis or as persuasive authority. In any other court, an unreported opinion of either Court may be cited only (1) when relevant under the doctrine of the law of the case, res judicata, or collateral estoppel, (2) in a criminal action or related proceeding involving the same defendant, or (3) in a disciplinary action involving the same respondent. A party who cites an unreported opinion shall attach a copy of it to the pleading, brief, or paper in which it is cited.

Committee note: A request that an unreported opinion be designated for reporting is governed by Rule 8-605.1 (b).

Source: This Rule is derived from former Rule 8-114, which was derived from former Rules 1092 c and 891 a 2.

CREDIT(S)

Adopted as Rule 8-114, Nov. 19, 1987, eff. July 1, 1988. Renumbered as Rule **1-104**, Nov. 12, 2003, eff. Jan. 1, 2004. Amended May 8, eff. July 1, 2007.

HISTORICAL NOTES

2003 Orders

The November 12, 2003, order amended the source note.

2007 Orders

The May 8, 2007, order added the committee note and amended the source note.

RESEARCH REFERENCES

Encyclopedias

Maryland Law Encyclopedia Actions § 1, Definitions.

Maryland Law Encyclopedia Courts § 49, Use of Unreported or Unpublished Cases.

NOTES OF DECISIONS

1. In general

Unreported opinion did not constitute controlling authority in action seeking review of county planning board's approval of preliminary subdivision plan. Colao v. Maryland-National Capital Park and Planning Com'n, 2005, 892 A.2d 579, 167 Md.App. 194, reconsideration denied, certiorari denied 900 A.2d 749, 393 Md. 243. Courts 107

Unpublished opinion could not be cited as precedent or as persuasive authority. Md.Rule 8-114. Montgomery County v. Buckman, 1993, 624 A.2d 1274, 96 Md.App. 206, certiorari granted 626 A.2d 967, 331 Md. 178, reversed 636 A.2d 448, 333 Md. 516. Courts 107

Unreported per curiam opinion that did not appear in official Maryland Appellate Reports would not be considered by Court of Special Appeals, although opinion was published by commercial publisher. Md.Rule 8-114. Nicholson v. Yamaha Motor Co., Ltd., 1989, 566 A.2d 135, 80 Md.App. 695, certiorari denied 569 A.2d 1242, 318 Md. 683. Courts 107

2. Citation of unreported case

Trial court's citation of unreported case of Court of Special Appeals violated rule governing use of unreported opinions, where unreported case was not relevant under doctrine of law of case, res judicata, or collateral estoppel, and where trial court initially referred to opinion to rebut pedestrian's assertion that cases relied upon by driver were rather old. Md.Rule 1092, subd. c. Smith v. Warbasse, 1987, 526 A.2d 991, 71 Md.App. 625. Courts 107

MD Rules, Rule **1-104**, MD R GEN Rule **1-104**

Current with amendments received through 2/1/2013

END OF DOCUMENT

R. EX. 78

William J. Wheeler, Esq. & Associates, P.C.
LAW PRACTICE LIMITED TO REPRESENTATION OF NEW & USED AUTOMOBILE DEALERS
The Wheeler Building
1800 Callowhill Street
Philadelphia, PA 19130
Office (215) 988-9320; Fax (215) 569-4166

December 15, 2008

Sent via fax and U.S. Express Mail
972-649-2218

Mr. Keith Constantine,
Vice President, Western Region
GMAC Financial Services
5208 Tennyson Parkway, Suite 120
Plano, TX 75024

And

Mr. Joe McCarthy
Director, Commercial Lending
GMAC Financial Services
5208 Tennyson Parkway, Suite 120
Plano, TX 75024

And

Ms. R. Michele Smith
Operations Manager
GMAC Financial Services
5208 Tennyson Parkway, Suite 120
Plano, TX 75024

RE: Everett Chevrolet, Inc.

Dear Sir/Madame:

My law office represents Everett Chevrolet and the dealer principal John Reggans. The dealership has a floorplan line of credit with your institution. The dealership's account has been placed on finance hold as of December 8, 2008 regardless of the fact that the dealership is not past due on its obligations to GMAC.

GMAC has implemented the finance hold status by the following:

1. Demanding that the dealer pay for all payoffs with certified funds immediately upon the sale occurring. As you know there is a three day release period whereby the dealer is permitted to collect the sales proceeds from retail contracts prior to the payment being submitted to GMAC;

2. A keeper has been assigned to the dealership and his mere presence has the effect of intimidating the dealership staff and has resulted in the keeper interfering in the selling process.

3. GMAC has placed a hold on the dealer's parts account thereby interfering in the dealership obtaining rebates, warranty payments and other factory receivables.

The actions taken by GMAC are construed as bad faith conduct and in breach of Everett Chevrolet's Floorplan Contract.

The dealership requests GMAC to cease and desist its conduct which has interfered in the operation of the dealership. In the event said conduct continues you are advised that Everett Chevrolet will be compelled to pursue legal action against GMAC and any of its employees that have wrongfully interfered in the operation of the dealership.

Very truly yours,

William J. Wheeler, Esq.

cc: Jerry Vick, Branch Manager and
Pedram Davoudpour, Account Manager

R. EX. 83

GMAC FINANCIAL SERVICES

5208 Tennyson Parkway, Suite 120
Plano, TX 75024
800-343-4541 Ext. 2050

SENT VIA FEDERAL EXPRESS AND EMAIL TO JOHNR@EVCHEV.COM

December 19, 2008

Everett Chevrolet, Inc.
Mr. John Reggans
7300 Evergreen Way
Everett, WA 98203

Re: Everett Chevrolet, Inc.
NOTICE OF DEFAULT
DEMAND FOR PAYMENT

Dear Mr. Reggans:

You are hereby notified that Everett Chevrolet, Inc. ("Dealership") is in default under its wholesale financing agreements with GMAC for failure to pay GMAC $206,806.18 for vehicles upon their sale or lease.

As a result, GMAC hereby demands that the Dealership immediately remit payment of all amounts owed to GMAC under its wholesale credit line, currently in the following amounts:

(A)	Principal Amount of Vehicles Financed by GMAC (Includes the $206,806.18)	$ 5,602,460.32
(B)	Interest Charges through November 30, 2008	$ 26,834.57
(C)	Revolving Line of Credit Principal Balance	$ 738,000.00
	TOTAL AMOUNT DEMANDED	$ 6,367,294.89

This demand for payment is made without prejudice to any other amounts now or hereafter owing by the Dealership to GMAC, including, without limitation, interest accruing from and after the date of this letter, and obligations arising under the GMAC Wholesale Plan.

If the Dealership fails to make payment as demanded, GMAC may take possession of all Dealership property in which it has a security interest, including, without limitation, all of the motor vehicles financed by GMAC for the Dealership. In this respect, the Dealership may be asked to assemble and present for retaking by GMAC such collateral. GMAC reserves the right to exercise any other remedy it may have pursuant to law or contract.

Sincerely,

Joseph P. McCarthy
Director Commercial Lending

R. EX. 87

3510-3b Assignment of Open Account (U.S.)

(4/08)

- In the US, the *Assignment of Accounts Due or to Become Due (PC Form G-ASGN)* is used to obtain an assignment of a manufacturer's open account.

- In order to invoke an assignment (i.e., obtain direct payment) on a GM open account [i.e., for Buick, Cadillac, Chevrolet, GMC Truck, Hummer (H2/H3), Pontiac Saturn and Saab franchises], the assignment executed by the dealership and the related UCC filing must include all GM franchises held by the dealership.

  Open account funds for Buick, Cadillac, Chevrolet, GMC Trucks, Hummer (H2/H3), Pontiac, Saturn and Saab are combined into a single account and cannot be segregated by franchise. [Addition of Saturn effective 4/06 (D. L. Jones #2041); addition of Saab effective 2/07 (D. L. Jones #2256)]

  - To notify GM of the assignment, the *Joint Notice of Assignment and Demand for Payment (PC Form GM-OANOT)* is executed by both GMAC and the dealership and sent to **GM Dealer Network Planning and Investment** as follows:

    General Motors Corporation
    Dealer Network Planning & Investments *Fax: 313-665-2019*
    100 Renaissance Center
    Mail Code: 482-A07-C66
    PO Box 100
    Detroit, MI 48265-1000

    - Open account monies are paid directly to the dealership, unless otherwise indicated in the agreement (see Sections 5 and 6 of the *Joint Notice*).

      NOTE: In order for GM to transfer funds electronically to the dealership's bank, the Dealer Authorization Agreement for Automatic Withdrawals/Deposits must be on file with GM, as outlined in D. L. Jones #1403 (3/25/02).

    - The payment authorization (i.e., pay the dealer directly or GMAC and the dealer jointly) may be modified at any time by GMAC. To do so, the *Demand for Payment Change (PC Form GM-OACHG)* is executed by GMAC and sent to GM. Acknowledgement of GM's receipt of change requests must be maintained in the account file.

  - When an assignment of the GM open account is no longer held as security, the *Release of Assignment (PC Form GM-OAREL)* is completed by GMAC and sent to GM. Acknowledgement of GM's receipt of the assignment release must be maintained in the account file.

  Since the dissolution of GM Isuzu Commercial Truck, open accounts assignments for Isuzu Medium Duty Truck dealers are now handled directly with Isuzu Commercial Truck of America, Inc. (ICTA).

- For Kia dealers in the US, changes in open account assignments must be reported to Kia Motors of America, Inc. using the *Kia Change Notification* letter *(PC Form W-KIACHG)*, as outlined in Section 3420-3b.

R. EX. 91

DEFENDANT'S EXHIBIT NO. 91

PENGAD 800-631-6989

Wholesale Audit Checklist

Dealership: EVERETT CHEVROLET, INC. Dealer #'s: 0585 / Release Period: 3

Date Issued: 10/24/08 Issued To: CSI-WAYNE FINK Classification: L

Type of Audit: FLOOR

Date and Time Information Retrieved: 10/24/2008 9:50:19 AM Issued By: A MANN

	Yes	N/A
Add vehicles being floor planned for which documentation has not been processed (e.g., non-GM cash drafts, auction billings, etc.)	☑	☐
Delete and initial vehicles paid prior to issuance (checks received but not processed, suspense list, etc.)	☑	☐
Delete and initial vehicles (individually or collectively) which do not require inspection: - DPP vehicles under primary and secondary account numbers, provided vehicles have been identified as - DPP transaction and appropriate documentation has been received	☐	☑
Add/delete vehicles involved in dealership exchanges for which paperwork has not been processed	☐	☑
Record vehicle code when status of vehicle has changed and paperwork has not been processed (e.g., demonstrators placed into or removed from service, etc.)	☑	☐
Designate used vehicle for which the vehicle ownership documentation must be inspected	☐	☑
Attach to (or note on) the audit a list of vehicles not inspected during the previous audit (when required)	☐	☑

Instructions for Employee Completing Audit (See also reverse of 576 Supp)

Type of Audit	Yes	No
Standard Physical Audit:		
- Wholesale Floor Plan	☑	☐
- Shop Rental	☐	☑
- Mfr. Finance Plan	☐	☑
- Major Body Mfr	☐	☑
Alternative Audit:	☐	☑
- MCO/Title Audit	☐	☑
- Inspection Paid Records	☐	☑
- Partial Inventory Audit	☐	☑
- Other (Describe Below)	☐	☑

Special Instructions	Yes	No
Collect funds/documentation if within release period	☐	☑
Note name/address of purchaser (all sold units)	☐	☑
Note name/address of purchaser (irregularities only)	☐	☑
Check all MCOs/titles	☐	☑
Examine all used vehicle titles	☑	☐
Examine only used vehicle titles designated	☐	☑
Inspect dealership records for new vehicles added	☑	☐
Inspect Mileage	☐	☑
Inspect recourse repossessions	☐	☑
If MFP audit, record status of upfit	☐	☑

Other Instructions

No SmartCash, SVA, BARS or Registered Vehicles. VTIMS attached.

(This form outlines the procedures for updating a wholesale audit and includes instructions for field completion; the form may be issued by the employee updating the audit and attached to the audit prior to issuance.)

10/24/2008 9:50:22 AM

AUDIT ACTION ITEMS FOR DEALERSHIP

Dealership Name: EVERETT CHEV Contact at Dealer: TERRI / [illegible]

Date of the Audit: 10/27/08 Release Period: 3 Primary Dealer #: 0585

OPEN WHOLESALE:

	VIN		Customer Name	Date Sold	Due Date	SC Date	# of Days Delay	Comments
1	135387	N	A. TYLER	10/25	10/30			
2	150387	K	S SAYSON	10/18	10/23	10/22	2	
3	154772	K	S ARNOLL	10/19	10/23	10/22	2	
4	164989	N	D CALDWELL	10/26	10/30			
5	162297	N	BRAKE	10/26	10/30			
6	165781	K	S HARELACE	10/18	10/23	10/22	2	
7	198146	N	NAT'L FOOD	10/24	10/29			
8	261369	N	NAT'L FOOD	10/24	10/29			
9	269856	N	A. KENT	10/24	10/29			
10	298449	N	N. FOLEY	10/21	10/24	10/22	1	
11	298535	N	M. ROGERS	10/17	10/22	10/22	2	
12	320639	N	R. FROST	10/23	10/28			
13	A52650	K	L. YOUNT	10/24	10/29			
14								
15								

OPEN DEMO:

	VIN	Comments
1	136639	BROOKMYER DEMO
2	145643	DEMO PORT
3	241445	DEMO PARTS
4	265639	PARTS DEMO
5	306037	NOAH DEMO

OPEN DLR TRADE:

	VIN	Comments
1	169772	To Jerry Cramer Chev for 238294 - Entry Reseted
2		
3		
4		
5		

MISCELLANEOUS (e.g. auction units, titles, insurance claims, etc...)

	VIN	Comments
1	172616	Auction Title Sent to Auction 11/2
2	122636	Auction Title Sent to Auction
3	166175	Auction Title Sent to Auction
4		
5		
6	30384	Walker Demo
7	222350	J Regan Demo
8		
9		
10		

Auditor: W.D. Fox Received by Dealer: [signature] Date: 10-27-08

GMAC 003282
CONFIDENTIAL

WHOLESALE AUDIT

578

Branch Number: 086
Dealer Number: 0585
Dealership: EVERETT CHEVROLET, INC.
Address: 7360 EVERGREEN WAY EVERETT,WA 98203
Release Period: 3

*A - ✓ If Inspected & Condition OK
*A - D If Vehicle Inspected But Damaged
*A - X If Vehicle Missing

*B - ✓ If MCO Inspected
*B - T If Title Inspected
*B - X If Title/MCO Missing

Issued To: CSI-WAYNE FINK
Date Issued: 10/24/08

	Note Date	Interest Date	Current OSB	Original OSB	Year	Model	Vehicle IdentificationNo.		Code	Mileage If Req.	* A	* B	Date Of Delivery	Remit. Date	Blocking Date	Irreg. ✓	Comments
1	08-May	08-May-08	20625	20,625.00	2006	SOLSTICE	1G2MB33B36Y	000129	U		✓	✓					CAR HAS MCO
2	05-Aug	05-Aug-08	8756.25	8,756.25	2005	SANTA FE	KM8SC73D55U	011949	U		✓	T					
3	06-May	06-May-08	14200	14,200.00	2008	EQUINOX	2CNDL13FX86	015652	FA U LT		✓	T					
4	02-Jun	02-Jun-08	9375	9,375.00	2007	LANCER	JA3AJ26E67U	017614	U		✓	T					
5	18-Sep	18-Sep-08	12768.75	12,768.75	2004	ES330	JTHBA30GX45	025614	U		✓	T					
6	20-Oct	20-Oct-08	10095	10,095.00	2006	EQUINOX	2CNDL73F266	026676	FA U LT		✓	T					
7	25-Oct	25-Oct-07	28410.51	28,410.51	2008	EQUINOX	2CNDL537186	037037	LT		✓						
8	18-Sep	18-Sep-08	9895	9,895.00	2006	TORRENT	2CKDL63FX66	044494	FA U LT		✓	T					
9	21-Jul	21-Jul-08	8250	8,250.00	2008	ACCENT	KMHCM36C28U	062097	U		✓	T					
10	11-Apr	11-Apr-08	12243.75	12,243.75	2007	ENDEAVOR	4A4MN21S07E	077276	U		✓	T					
11	05-Aug	06-Aug-07	42281.33	42,281.33	2008	SILVERADO	1GCHK236X8F	100765	LT		✓						
12	22-Aug	22-Aug-08	46557.18	46,557.18	2009	TAHOE K1500	1GNFK23089J	101734	LT		✓						
13	25-Mar	25-Mar-08	10400	10,400.00	2006	PT CRUISER	3A8FY48B88T	104114	FA U		✓	T					
14	12-Oct	14-Oct-08	39603.08	39,603.08	2009	TRAVERSE	1GNEV23D89S	104570	LT		✓						
15	13-Oct	14-Oct-08	41000.13	41,000.13	2009	TRAVERSE	1GNER33D69S	104710	LT		✓						
16	23-Sep	23-Sep-08	30089.35	30,089.35	2009	TRAILBLAZER	1GNDT33S792	104954	LT		✓						
17	30-Jul	30-Jul-08	15000	15,000.00	2004	SSR	1GCES14P04B	106939	DE U LT		X	✓					J. KELLEHAN'S DEMO
18	11-Apr	11-Apr-08	11193.75	11,193.75	2007	SEDONA	KNDMB233576	107467	U LT TD		X	T					OUT ON O/S DEMO AWAITING TITLE FROM NJ TITLE ORD
19	22-Sep	22-Sep-08	14895	14,895.00	2008	SILVERADO	1GCEK19B58Z	107642	FA U LT		✓	T					
20	09-Oct	09-Oct-08	51341.63	51,341.63	2009	K1500	1GNFK26389J	108009	LT		✓						

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WHOLESALE AUDIT

576

Branch Number: 088
Dealer Number: 0686
Dealership: EVERETT CHEVROLET, INC.
Address: 7300 EVERGREEN WAY EVERETT,WA 98203
Release Period: 3

*A - ✓ If Inspected & Condition OK
*A - D If Vehicle Inspected But Damaged
*A - X If Vehicle Missing

*B - ✓ If MCO Inspected
*B - T If Title Inspected
*B - X If Title/MCO Missing

Issued To: CSI-WAYNE FINK
Date Issued: 10/24/08

	Note Date	Interest Date	Current OSB	Original OSB	Year	Model	Vehicle Identification No.		Code	Mileage If Req.	* A	* B	Date Of Delivery	Remitt. Date	Blocking Date	Irreg. ✓	Comments
21	24-Oct	24-Oct-08	39182.33	39,182.33	2009	TRAVERSE	1GNEV23D79S	108562	#LT		✓						
22	29-Feb	29-Feb-08	17126.25	17,126.25	2008	K1500	1GNFK16Z58J	109063	U LT		✓	T					
23	31-Oct	31-Oct-08	29692.28	29,692.28	2009	TRAVERSE	1GNEV13D29S	109418	#LT		X	✓					IT 42
24	14-Mar	14-Mar-05	35394.08	35,394.08	2003	CORVETTE	1G1YY32G435	109620	DE		✓						
25	10-Aug	10-Aug-07	35443.93	35,443.93	2008	SILVERADO	1GCEK19Y48Z	110314	LT		✓						
26	28-Oct	28-Oct-08	44240.38	44,240.38	2009	TRAVERSE	1GNEV33D49S	110453	#LT		X	✓					IT 42
27	19-Jun	19-Jun-08	12500	12,500.00	2008	MALIBU	1G1ZT58N58F	111091	FA U		✓	T					
28	02-Oct	02-Oct-08	18764.78	18,764.78	2009	SILVERADO	1GCEC14X29Z	111233	LT		✓						
29	28-Apr	28-Apr-08	8531.25	8,531.25	2004	DURANGO	1D4HB38N34F	111694	U		✓	T					
30	16-Oct	16-Oct-08	30089.35	30,089.35	2009	TRAILBLAZER	1GNDT33S492	111876	LT		✓						
31	30-Jun	30-Jun-08	12600	12,600.00	2008	SEBRING	1C3LC46K18N	113589	FA U		✓	T					
32	03-Nov	03-Nov-08	44950.6	44,950.60	2009	SILVERADO	1GCHK53609F	114097	#LT		X	✓					IT 42
33	03-Nov	03-Nov-08	36461.65	36,461.65	2009	SILVERADO	1GCHK59K29E	114256	#LT		X	✓					IT 42
34	30-Oct	30-Oct-08	30728.9	30,728.90	2009	TRAILBLAZER	1GNDT33S992	114711	#LT		X	✓					IT 42
35	12-Sep	12-Sep-08	27695	27,695.00	2007	TAHOE K1500	1GNFK13037R	114805	FA U LT		X	T					Lacey White Sore be off
36	04-Nov	04-Nov-08	35853.1	35,853.10	2009	TRAILBLAZER	1GNDT33S692	115458	#LT		X	✓					IT 42
37	03-Nov	03-Nov-08	40383.4	40,383.40	2009	TRAILBLAZER	1GNET53H792	115599	#LT		X	✓					IT 42
38	19-Jun	19-Jun-08	14200	14,200.00	2008	AURA	1G8ZS57N88F	116632	FA U		✓	T					
39	18-Nov	18-Nov-04	42172.55	48,858.55	2005	SSR	1GCES14HX5B	116906	LT		✓						
40	20-Oct	20-Oct-08	13895	13,895.00	2008	ENVOY	1GKDT13S282	117580	FA U LT		✓	T					

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WHOLESALE AUDIT

576

Branch Number: 085
Dealer Number: 0585
Dealership: EVERETT CHEVROLET, INC.
Address: 7500 EVERGREEN WAY EVERETT,WA 98203
Release Period: 3

*A - ✓ If Inspected & Condition OK
*A - D If Vehicle Inspected But Damaged
*A - X If Vehicle Missing

*B - ✓ If MCO Inspected
*B - T If Title Inspected
*B - X If Title/MCO Missing

Issued To: CSI-WAYNE FINK
Date Issued: 10/24/08

	Note Date	Interest Date	Current OSB	Original OSB	Year	Model	Vehicle Identification No.		Code	Mileage If Req.	*A	*B	Date Of Delivery	Remitt. Date	Blocking Date	Irreg. ✓	Comments
41	07-Sep	07-Sep-07	43832.15	43,832.15	2008	SILVERADO	1GCHK23668F	119219	LT		✓						
42	04-Jun	04-Jun-08	16500	16,500.00	2008	AND CHEROK	1J8GR48K98C	119542	FA U		✓	T					
43	01-Oct	01-Oct-08	15617.9	15,617.90	2008	COLORADO	1GCCS149188	119758	LT		✓						
44	24-Oct	24-Oct-08	24343.93	24,343.93	2009	XPRESS VAN	1GCGG25C091	120266	#LT		✓						
45	02-Jul	02-Jul-08	23895	23,895.00	2005	SSR	1GCES14H X5B	120468	FA U LT		✓	T					
46	01-Oct	01-Oct-08	34551.28	34,551.28	2009	SILVERADO	3GCEK23MX9G	120696	LT		✓						
47	11-Jan	11-Jan-07	64995.25	64,995.25	2006	CORVETTE	1G1YY26E365	120874	DE		X	T					J. REGAN DEMO
48	23-Oct	23-Oct-08	8595	8,595.00	2004	ENVOY	1GKDT13S042	122352	FA U LT		✓	X					ARBITRAL REPO TITLE FROM GMAC - SHORT AUCT
49	13-Apr	13-Apr-05	50025.28	55,583.28	2005	CORVETTE	1G1YY34U455	122440			✓						
50	23-Oct	23-Oct-08	12795	12,795.00	2006	EQUINOX	2CNDL73FX66	122636	FA U LT		✓	X					ARBITRAL REPO TITLE FROM GMAC - SHORT AUCT.
51	11-Jun	11-Jun-08	16040	16,040.00	2005	STS	1G6DW677950	122677	FA U		✓	T					
52	28-Oct	28-Oct-08	24343.93	24,343.93	2009	XPRESS VAN	1GCGG25C891	122718	#LT		✓						
53	18-Aug	18-Aug-08	15621.65	15,621.65	2009	COBALT	1G1AK18H897	124464			✓						
54	06-Nov	06-Nov-08	31061.18	31,061.18	2009	SILVERADO	1GCEK29J49Z	124708	#LT		✓						
55	23-Oct	23-Oct-07	22075	22,075.00	2005	AVALANCHE	3GNEK12Z25G	124749	FA U LT		✓	T					
56	17-Aug	20-Aug-07	54328.6	54,328.60	2007	CORVETTE	1G1YY36U975	125527			✓						
57	20-Aug	20-Aug-08	23470.38	23,470.38	2009	COBALT	1G1AP18X197	125867			✓						
58	07-May	07-May-08	70435.38	70,435.38	2007	CORVETTE	1G1YY26E575	126189	DE		X	T					J. REGAN - DEMO
59	06-Nov	06-Nov-03	11319	16,170.00	1998	CORVETTE	1G1YY32G1W5	127318	U		✓	T					OK'D MUD
60	20-Oct	20-Oct-08	13895	13,895.00	2006	HUMMER	5GTDN136968	127552	FA U LT		✓	T					

WHOLESALE AUDIT

576

Branch Number: 085
Dealer Number: 0585
Dealership: EVERETT CHEVROLET, INC.
Address: 7300 EVERGREEN WAY EVERETT,WA 98203
Release Period: 3

*A - ✓ If Inspected & Condition OK
*A - D If Vehicle Inspected But Damaged
*A - X If Vehicle Missing

*B - ✓ If MCO Inspected
*B - T If Title Inspected
*B - X If Title/MCO Missing

Issued To: CSI-WAYNE FINK
Date Issued: 10/24/08

	Note Date	Interest Date	Current OSB	Original OSB	Year	Model	Vehicle IdentificationNo.		Code	Mileage If Req.	* A	* B	Date Of Delivery	Remit. Date	Blocking Date	Irreg. ✓	Comments
61	19-Sep	19-Sep-08	17925	17,925.00	2006	SILVERADO	1GCHK23296F	129852	U LT		✓	T					
62	22-Aug	22-Aug-08	15621.65	15,621.65	2009	COBALT	1G1AK18H097	130243			✓						
63	15-Aug	18-Aug-08	54433.88	54,433.88	2008	CORVETTE	1G1YY36W685	131658			✓						
64	30-May	30-May-08	73927.48	73,927.48	2008	CORVETTE	1G1YY26E885	132179			✓						
65	28-Aug	28-Aug-08	27056.25	27,056.25	2008	CORVETTE	1G1YY25U565	133991	U		✓	T					
66	19-Jun	19-Jun-08	5695	5,695.00	2005	CLASSIC	1G1ND52F15M	135537	FA U	sold	X	X	10/9/25		10/30		A. TYLER
67	29-Aug	29-Aug-08	15621.65	15,621.65	2009	COBALT	1G1AK18H597	135700			✓						
68	08-Aug	08-Aug-08	12275	12,275.00	2006	ENVOY	1GKET16S066	136571	FA U LT		✓	T					
69	22-Sep	22-Sep-08	15995	15,995.00	2008	IMPALA	2G1WD58CX89	136639	FA U	DE	X	T			11/10	DE	✓ BROOKMYER - SALES OF BODY (W)
70	14-Nov	14-Nov-07	17840	17,840.00	2007	UPLANDER	1GNDV33107D	136681	DE U LT		✓	✓					
71	29-Aug	29-Aug-08	15621.65	15,621.65	2009	COBALT	1G1AK18H597	137107			✓						
72	11-Oct	11-Oct-07	22800.8	22,800.80	2008	COLORADO	1GCDT199X88	140588	LT		✓						
73	25-Apr	25-Apr-08	13740	13,740.00	2008	TRAILBLAZER	1GNDS13S982	140635	FA U LT		✓	T					
74	20-Oct	20-Oct-08	9695	9,695.00	2008	IMPALA	2G1WT58N689	140658	FA U		✓	T					
75	20-Oct	20-Oct-08	13695	13,695.00	2006	93.00	YS3FD59Y461	143730	FA U		X	X					T/TITLE ✓ EKB AFFIDAVIT OF LOST TITLE
76	30-Jul	30-Jul-08	7875	7,875.00	2002	PRESS CUTA	1GBJG31R821	145643	U LT	OE	✓	T					✓ PARTS DEMO (OVER)
77	11-Jun	11-Jun-08	7895	7,895.00	2005	ONTE CARLO	2G1WW12E759	147364	FA U		✓	T					
78	30-Sep	01-Oct-07	35443.93	35,443.93	2008	SILVERADO	1GCEK19Y48Z	150905	LT		✓						
79	08-Oct	08-Oct-08	5831.25	5,831.25	2004	BLAZER	1GNDT13X74K	150387	U LT	sold	X	T	10/18		10/28	3/S	SAYSON
80	05-Sep	05-Sep-08	12095	12,095.00	2008	UPLANDER	1GNDV23108D	154772	FA U LT	sold	X	T	10/19		10/28	3/S	AMAAL

WHOLESALE AUDIT

576

Branch Number: 085
Dealer Number: 0586
Dealership: EVERETT CHEVROLET, INC.
Address: 7300 EVERGREEN WAY EVERETT,WA. 98203
Release Period: 3

*A - ✓ If Inspected & Condition OK
*A - D If Vehicle Inspected But Damaged
*A - X If Vehicle Missing

*B - ✓ If MCO Inspected
*B - T If Title Inspected
*B - X If Title/MCO Missing

Issued To: CSI-WAYNE FINK
Date Issued: 10/24/08

	Note Date	Interest Date	Current OSB	Original OSB	Year	Model	Vehicle Identification No.		Code	Mileage If Req.	* A	* B	Date Of Delivery	Remitt. Date	Blocking Date	Irreg. ✓	Comments
81	11-Sep	11-Sep-08	32778.83	32,778.83	2008	TAHOE C1500	1GNFC13C28J	154929	LT	Sold	X	X	10/24		10/30		D. CONNELL
82	08-Oct	08-Oct-08	8325	8,325.00	2004	TRAILBLAZER	1GNET16S746	155134	U LT		✓	T					
83	10-Sep	10-Sep-08	19695	20,695.00	2006	ESCALADE	3GYEK62N96G	158878	FA U LT		✓	T					
84	17-Jan	17-Jan-08	10612.5	10,612.50	2007	SILVERADO	1GCEC14X87Z	161552	U LT		✓	T					
85	23-Oct	23-Oct-08	13795	13,795.00	2008	MALIBU	1G1ZH57B68F	162057	FA U		✓	T					
86	12-Sep	12-Sep-08	16195	16,195.00	2006	HUMMER	5GTDN136468	162287	FA U LT	Sold	X	X	10/24		10/30		BRAKE
87	15-Oct	15-Oct-08	21714.33	21,714.33	2009	MALIBU	1G1ZG57BX9F	165404			✓						
88	03-Sep	03-Sep-08	15581.25	15,581.25	2008	MUSTANG	1ZVHT82H085	165781	U	Sold	X	X	10/18	10/27	10/27	✓	S HARLAGE
89	23-Oct	23-Oct-08	11495	11,495.00	2006	MUSTANG	1ZVFT84N965	166175	FA U		✓	X					AWAITING TITLE FROM BMAC RENO - SHORT AMOT
90	08-Jul	08-Jul-08	15206.25	15,206.25	2006	SILVERADO	2GCEC19N061	167912	U LT		✓	T					
91	20-Dec	20-Dec-07	42379.5	42,379.50	2008	SILVERADO	1GCHK23608F	169341	LT		✓						
92	19-Oct	20-Oct-08	21714.33	21,714.33	2009	MALIBU	1G1ZG57B49F	169772		DT	✓	X	10/24		10/24		FLOORPLAN TRADE TO
93	01-Apr	01-Apr-08	24853.33	24,853.33	2008	COLORADO	1GCDT13E688	171189	LT		✓						
94	22-Oct	22-Oct-08	6595	6,595.00	2006	UPLANDER	1GNDV23L16D	172516	FA U LT		✓	X					AWAITING TITLE FROM BMAC ARLETON
95	23-Oct	23-Oct-08	21714.33	21,714.33	2009	MALIBU	1G1ZG57B69F	172897			✓						
96	05-May	05-May-08	24891.53	24,891.53	2008	COLORADO	1GCDT13E288	174361	LT		✓						
97	06-Oct	06-Oct-08	23179.68	23,179.68	2009	IMPALA	2G1WB57N991	174601			✓						
98	29-Oct	29-Oct-08	25317.83	25,317.83	2009	MALIBU	1G1ZJ57B79F	175423	#		✓						
99	28-Feb	28-Feb-08	44267	44,267.00	2008	TAHOE K1500	1GNFK13048J	175631	LT		✓						
100	30-Oct	30-Oct-08	25555.83	25,555.83	2009	MALIBU	1G1ZJ57B99F	177044	#		✓						

WHOLESALE AUDIT

576

Branch Number: 095
Dealer Number: 0565
Dealership: EVERETT CHEVROLET, INC.
Address: 7300 EVERGREEN WAY EVERETT,WA 98203
Release Period: 3

*A - ✓ If Inspected & Condition OK
*A - D If Vehicle Inspected But Damaged
*A - X If Vehicle Missing

*B - ✓ If MCO Inspected
*B - T If Title Inspected
*B - X If Title/MCO Missing

Issued To: CSI-WAYNE FINK
Date Issued: 10/24/08

	Note Date	Interest Date	Current OSB	Original OSB	Year	Model	Vehicle IdentificationNo.		Code	Mileage If Req.	* A	* B	Date Of Delivery	Remit: Date	Blocking Date	Irreg: ✓	Comments
101	05-Sep	05-Sep-08	14118.75	14,118.75	2007	COLORADO	1GCDT13E278	177330	U LT		✓	T					
102	31-Oct	31-Oct-08	25317.83	25,317.83	2009	MALIBU	1G1ZJ57B29F	178438	#		X	-					IT 42
103	03-Jan	03-Jan-08	41228.25	41,228.25	2008	TAHOE K1500	1GNFK13098J	181005	LT		✓						
104	04-Sep	04-Sep-08	26752.93	26,752.93	2008	MALIBU	1G1ZK57718F	181287	DE		✓						
105	25-Jan	25-Jan-08	37508.43	37,508.43	2008	TRAILBLAZER	1GNET13HX82	181295	EI LT		✓						
106	25-Sep	25-Sep-08	10237.5	10,237.50	2003	SILVERADO	2GCEK19T431	182006	U LT		✓	X					COPY ATTACHED CK'D AFFIDAVIT LESS TITLE
107	04-Sep	04-Sep-08	11240	11,240.00	2007	GRAND PRIX	2G2WP552671	183808	DE U		✓	T					
108	07-May	07-May-08	51751.25	51,751.25	2008	TAHOE K1500	1GNFK13098R	183855	DE LT		✓						
109	10-Dec	10-Dec-07	35598.28	35,598.28	2008	AVALANCHE	3GNFK12388G	186810	LT		✓						
110	04-Feb	04-Feb-08	23278.3	23,278.30	2008	COLORADO	1GCDT399588	188071	LT		✓						
111	17-Oct	17-Oct-08	29053.15	29,053.15	2009	IMPALA	2G1WC57M591	188452			✓						
112	06-Feb	06-Feb-08	47895.55	47,895.55	2008	SILVERADO	1GBHK23698F	188989	LT		✓						
113	31-Oct	31-Oct-08	27468.33	27,468.33	2009	MALIBU	1G1ZJ577894	189063	#		X	-					IT 42
114	13-Feb	13-Feb-08	44227.4	44,227.40	2008	SILVERADO	1GCHK23698F	191791	LT		✓						
115	04-Sep	04-Sep-08	35542.1	35,542.10	2008	SILVERADO	1GCEK19Y08Z	192526	DE LT		X	-					JR DEMO - OFF TOOR
116	06-Nov	06-Nov-08	23275.58	23,275.58	2009	MALIBU	1G1ZH57B184	193276	#		X	X					IT NOT IN VTSMS
117	19-Feb	19-Feb-08	27187.18	27,187.18	2008	MALIBU	1G1ZK577284	194383	EI		✓						
118	02-Mar	03-Mar-08	22008.95	22,008.95	2008	COLORADO	1GCCS339388	197097	LT		✓						
119	29-Feb	29-Feb-08	37091.65	37,091.65	2008	SILVERADO	1GCHK23K88F	198148	LT	Sold	X	X	10/24		10/29		NAT'L FOOD CORP
120	29-Feb	29-Feb-08	23887.5	23,887.50	2005	YUKON	1GKEK63U35J	200958	U LT		✓	T					

10/24/2008 9:50:21 AM

WHOLESALE AUDIT

576

Branch Number: 085
Dealer Number: 0585
Dealership: EVERETT CHEVROLET, INC.
Address: 7300 EVERGREEN WAY EVERETT,WA 98203
Release Period: 3

*A - ✓ If Inspected & Condition OK
*A - D If Vehicle Inspected But Damaged
*A - X If Vehicle Missing

*B - ✓ If MCO Inspected
*B - T If Title Inspected
*B - X If Title/MCO Missing

Issued To: CSI-WAYNE FINK
Date Issued: 10/24/08

	Note Date	Interest Date	Current OSB	Original OSB	Year	Model	Vehicle Identification No.		Code	Mileage If Req.	*A	*B	Date Of Delivery	Remitt. Date	Blocking Date	Irreg. ✓	Comments
121	31-Dec	31-Dec-07	38184.33	38,184.33	2008	SILVERADO	3GCEK13M58G	201131	LT		✓						
122	18-Jun	18-Jun-08	27399.68	27,399.68	2008	MALIBU	1G1ZK577184	204675	DE		✓						
123	03-Apr	03-Apr-08	25812.5	25,812.50	2008	COLORADO	1GCDT33E388	204676	LT		✓						
124	31-Jul	31-Jul-08	7781.25	7,781.25	2007	COLORADO	1GCCS149678	204965	U LT		✓	T					
125	11-Apr	11-Apr-08	16423.53	16,423.53	2008	COLORADO	1GCCS149088	207412	LT		✓						
126	18-Apr	18-Apr-08	16423.53	16,423.53	2008	COLORADO	1GCCS149X88	208406	LT		✓						
127	19-Jun	19-Jun-08	6695	6,695.00	2004	IMPALA	2G1WF52E449	210880	FA U		✓	T					
128	28-Aug	28-Aug-08	24863.38	24,863.38	2009	EQUINOX	2CNDL33F795	211593	LT		✓						
129	04-Dec	04-Dec-07	34157.03	34,157.03	2008	SILVERADO	2GCEK13M881	212665	LT		✓						
130	16-Jun	16-Jun-08	15725	15,725.00	2006	SIERRA	1GTEK19ZX6Z	213260	FA U LT		✓	T					
131	04-Sep	04-Sep-08	10840	10,840.00	2006	SEBRING	1C3EL56R26N	213547	DE U		✓	T					
132	20-Mar	20-Mar-08	40384.2	40,384.20	2008	K1500	1GNFK16328J	218126	LT		✓						
133	29-Sep	29-Sep-08	9468.75	9,468.75	2004	IMPALA	2G1WP551949	220150	U		✓	T					
134	05-Jun	05-Jun-08	25209	25,209.00	2008	COLORADO	1GCDT33E388	221283	LT		✓						
135	26-Sep	26-Sep-08	49384.43	49,384.43	2008	AVALANCHE	3GNFK12Y18G	222350	EI LT	DE	X	✓					V. J. Regan Demo (over) WW
136	18-Jun	18-Jun-08	25751.55	25,751.55	2008	COLORADO	1GCDT49E688	222523	LT		✓						
137	18-Jun	18-Jun-08	37038.43	37,038.43	2008	TRAILBLAZER	1GNET13H382	223208	LT		✓						
138	04-Apr	04-Apr-08	53142.7	53,142.70	2008	K1500	1GNFK16328J	225657	LT		✓						
139	12-Sep	12-Sep-08	12095	12,095.00	2007	TRAILBLAZER	1GNDT13S172	226372	FA U LT		✓	T					
140	19-Feb	19-Feb-08	31641.45	31,641.45	2008	SILVERADO	1GCEK19J58Z	227340	LT		✓						

WHOLESALE AUDIT

576

Branch Number: 086
Dealer Number: 0586
Dealership: EVERETT CHEVROLET, INC.
Address: 7300 EVERGREEN WAY EVERETT,WA 98203
Release Period: 3

* A - ✓ If Inspected & Condition OK
* A - D If Vehicle Inspected But Damaged
* A - X If Vehicle Missing

* B - ✓ If MCO Inspected
* B - T If Title Inspected
* B - X If Title/MCO Missing

Issued To: CSI-WAYNE FINK
Date Issued: 10/24/08

	Note Date	Interest Date	Current OSB	Original OSB	Year	Model	Vehicle Identification No.		Code	Mileage If Req.	* A	* B	Date Of Delivery	Remit. Date	Blocking Date	Irreg. ✓	Comments
141	14-Oct	14-Oct-08	25129.25	25,129.25	2009	EQUINOX	2CNDL23F096	228150	LT		X	✓					IT 4B
142	03-Nov	03-Nov-08	29813.2	29,813.20	2009	EQUINOX	2CNDL63F396	229221	LT		X	✓					IT 4B
143	24-Feb	25-Feb-08	27145.38	27,145.38	2008	SILVERADO	1GCEK19CX8Z	230946	LT		✓						
144	01-Jul	01-Jul-08	31095.15	31,095.15	2008	TRAILBLAZER	1GNDT13S882	233157	LT		✓						
145	03-Mar	03-Mar-08	24224.85	24,224.85	2008	SILVERADO	1GCEK14C38Z	237132	LT		✓						
146	11-Apr	11-Apr-08	11062.5	11,062.50	2004	RAM TRUCK	1D7HU18D44J	237309	U		✓	T					
147	04-Mar	04-Mar-08	24224.85	24,224.85	2008	SILVERADO	1GCEK14C28Z	237896	LT		✓						
148	04-Mar	04-Mar-08	24224.85	24,224.85	2008	SILVERADO	1GCEK14C68Z	238033	LT		✓						
149	04-Mar	04-Mar-08	24224.85	24,224.85	2008	SILVERADO	1GCEK14C28Z	238420	LT		✓						
150	04-Mar	04-Mar-08	24224.85	24,224.85	2008	SILVERADO	1GCEK14C48Z	238659	LT		✓						
151	05-Mar	05-Mar-08	24224.85	24,224.85	2008	SILVERADO	1GCEK14C78Z	239255	LT		✓						
152	05-Mar	05-Mar-08	24224.85	24,224.85	2008	SILVERADO	1GCEK14C88Z	239426	LT		✓						
153	05-Mar	05-Mar-08	24224.85	24,224.85	2008	SILVERADO	1GCEK14C38Z	239513	LT		✓						
154	07-Mar	07-Mar-08	24224.85	24,224.85	2008	SILVERADO	1GCEK14C98Z	239757	LT		✓						
155	23-Nov	23-Nov-07	18187.5	18,187.50	2005	TAHOE K1500	1GNEK13T05R	240090	U LT		✓	✓					ELECTRONIC TITLE
156	06-Apr	06-Apr-08	18924.98	18,924.98	2008	SILVERADO	3GCEC14Z28G	241445	LT	BE	✓						✓ PARTS TRUCK OVER
157	10-Mar	10-Mar-08	27175.98	27,175.98	2008	SILVERADO	1GCEK19C98Z	241677	LT		✓						
158	17-Sep	19-Sep-08	36021.78	36,021.78	2008	TRAILBLAZER	1GNET13H882	243132	LT		✓						
159	11-Mar	11-Mar-08	27175.98	27,175.98	2008	SILVERADO	1GCEK19C18Z	243374	LT		✓						
160	14-Mar	14-Mar-08	26619.23	26,619.23	2008	SILVERADO	1GCEC19C28Z	245065	LT		✓						

WHOLESALE AUDIT

576

Branch Number: 065
Dealer Number: 0565
Dealership: EVERETT CHEVROLET, INC.
Address: 7300 EVERGREEN WAY EVERETT,WA 98203
Release Period: 3

*A - ✓ If Inspected & Condition OK
*A - D If Vehicle Inspected But Damaged
*A - X If Vehicle Missing

*B - ✓ If MCO Inspected
*B - T If Title Inspected
*B - X If Title/MCO Missing

Issued To: CSI-WAYNE FINK
Date Issued: 10/24/08

	Note Date	Interest Date	Current OSB	Original OSB	Year	Model	Vehicle IdentificationNo.		Code	Mileage If Req.	*A	*B	Date Of Delivery	Remit. Date	Blocking Date	Irreg. ✓	Comments
161	18-Mar	18-Mar-08	32412.48	32,412.48	2008	AVALANCHE	3GNEC12J08G	245696	LT		✓						
162	18-Mar	18-Mar-08	22558.78	22,558.78	2008	SILVERADO	1GCEC19X08Z	247402	LT		✓						
163	03-Sep	03-Sep-08	10484.43	10,484.43	2008	AVEO	KL1TD666X8B	250871			✓						
164	28-Aug	28-Aug-08	10484.43	10,484.43	2008	AVEO	KL1TD66668B	251807			✓						
165	08-May	08-May-08	26779.88	26,779.88	2008	SILVERADO	1GCEK19C28Z	256554	LT		✓						
166	15-Aug	15-Aug-08	40781.9	40,781.90	2008	TAHOE K1500	1GNFK13038R	260087	LT		✓						
167	22-Oct	22-Oct-08	29280.4	29,280.40	2008	TRAILBLAZER	1GNDT13S982	261369	EI LT	Sold	X	X	10/24		10/29		WAT'L Foods Corp
168	25-Mar	25-Mar-08	21708.65	21,708.65	2008	COBALT	1G1AM18B187	261623			✓						
169	30-Jul	30-Jul-08	6506.25	6,506.25	2003	SILVERADO	1GCEC14V23Z	265639	U LT	DE	✓	T				✓	PARTS
170	12-Jun	12-Jun-08	26033.28	26,033.28	2008	MALIBU	1G1ZJ577X8F	266938			✓						
171	22-Sep	22-Sep-08	17195	17,195.00	2004	ESCALADE	3GYFK66N14G	267072	FA U LT		✓	T					
172	10-Sep	10-Sep-08	18595	18,595.00	2006	TRAILBLAZER	1GNET13H262	268217	FA U LT		✓	T					
173	03-Jul	03-Jul-08	14097.63	14,097.63	2008	COBALT	1G1AK18F887	269856	EI	Sold	X	X	10/24		10/29		C KENJ
174	14-Oct	14-Oct-08	23618.43	23,618.43	2008	MALIBU	1G1ZJ57748F	279328	DE		✓						
175	27-May	27-May-08	38529.85	38,529.85	2008	SILVERADO	2GCEK13J581	286003	LT		✓						
176	10-Jul	10-Jul-08	24184.1	24,184.10	2008	MALIBU	1G1ZJ57BX8F	294212			✓						
177	28-Aug	28-Aug-08	21816.03	21,816.03	2008	MALIBU	1G1ZH57BX8F	294710			✓						
178	15-Jul	15-Jul-08	26402.6	26,402.60	2008	MALIBU	1G1ZJ57748F	296064			✓						
179	20-Oct	20-Oct-08	10895	10,895.00	2005	TRAILBLAZER	1GNDT13S652	296513	FA U LT		X	T					LAST PURCHASED BY SAMS AUTO SON - OWNER WP
180	08-Aug	08-Aug-08	15075	15,075.00	2006	NVOYDENALI	1GKET63M762	296649	FA U LT	Sold	X	T	10/21		10/26	2	W FOLEY

WHOLESALE AUDIT

576

Branch Number: 085
Dealer Number: 0585
Dealership: EVERETT CHEVROLET, INC.
Address: 7300 EVERGREEN WAY EVERETT,WA 98203
Release Period: 3

*A - ✓ If Inspected & Condition OK
*A - D If Vehicle Inspected But Damaged
*A - X If Vehicle Missing

*B - ✓ If MCO Inspected
*B - T If Title Inspected
*B - X If Title/MCO Missing

Issued To: CSI-WAYNE FINK
Date Issued: 10/24/08

	Note Date	Interest Date	Current OSB	Original OSB	Year	Model	Vehicle Identification No.		Code	Mileage If Req.	*A	*B	Date Of Delivery	Remitt. Date	Blocking Date	Irreg. ✓	Comments
181	25-Sep	25-Sep-08	9806.25	9,806.25	2006	CHRYSLER 300	2C3KA43R26H	298535	U	2,000	X	T	10/17		10/28	Y	M ROSALES - S.A. FS
182	11-Jan	11-Jan-07	37715.38	37,715.38	2006	TRAILBLAZER	1GNET13H862	299228	DE LT		✓						
188	06-Jul	07-Jul-08	24396.7	24,396.70	2008	SILVERADO	1GCEK14C78Z	299259	LT		✓						
184	20-Oct	20-Oct-08	27295	27,295.00	2007	TAHOE K1500	1GNFK13007R	300916	FA U LT		X	T					3 YEARS INSPECTION PICKED UP CONSENT FROM GARDEN
185	20-Aug	20-Aug-08	8806.25	8,806.25	2003	DAKOTA	1D7HL48N13S	301201	U		✓	X					CSP) ATTACHED W/O AFFIDAVIT OF LOSS TITLE
186	29-Jul	29-Jul-08	15117.23	15,117.23	2009	AVEO	KL1TD66E19B	304082			✓						
187	18-Jul	18-Jul-08	15117.23	15,117.23	2009	AVEO	KL1TD66E29B	306035			✓						
188	18-Jul	18-Jul-08	15117.23	15,117.23	2009	AVEO	KL1TD66E69B	306037	DE		X	✓				DE 11/10	DEMO NOAH SALES - AVE SALES
189	18-Jul	18-Jul-08	16570.05	16,570.05	2009	AVEO	KL1TG66E99B	308209			✓						
190	21-Jul	21-Jul-08	16570.05	16,570.05	2009	AVEO	KL1TG66E59B	308322			✓						AK'D @ COSTCO
191	20-Jul	21-Jul-08	16570.05	16,570.05	2009	AVEO	KL1TG66E79B	308323			✓						
192	20-Jul	21-Jul-08	16570.05	16,570.05	2009	AVEO	KL1TG66E89B	308324			✓						
193	20-Jul	21-Jul-08	15201.78	15,201.78	2009	AVEO	KL1TD66E59B	308829			✓						
194	30-Mar	31-Mar-08	29240.73	29,240.73	2008	EQUINOX	2CNDL037186	309069	LT		✓						
195	20-Jul	21-Jul-08	15117.23	15,117.23	2009	AVEO	KL1TD66E89B	309862			✓						
196	14-Aug	14-Aug-08	16575	16,575.00	2006	350Z	JN1AZ34D66M	310022	U		✓	T					
197	21-Jul	21-Jul-08	16236.3	16,236.30	2009	AVEO	KL1TG66E49B	310384	DE		X	✓				DE 11/10	M WALKER-SALES MADE 8 PEEPS
198	20-Jul	21-Jul-08	16236.3	16,236.30	2009	AVEO	KL1TG66E19B	310455			✓						
199	21-Jul	21-Jul-08	16236.3	16,236.30	2009	AVEO	KL1TG66E39B	310456			✓						
200	21-Jul	21-Jul-08	16320.85	16,320.85	2009	AVEO	KL1TG66E19B	311203			✓						

WHOLESALE AUDIT

576

Branch Number: 086
Dealer Number: 0585
Dealership: EVERETT CHEVROLET, INC.
Address: 7300 EVERGREEN WAY EVERETT,WA 98203
Release Period: 3

*A - ✓ If Inspected & Condition OK
*A - D If Vehicle Inspected But Damaged
*A - X If Vehicle Missing

*B - ✓ If MCO Inspected
*B - T If Title Inspected
*B - X If Title/MCO Missing

Issued To: CSI-WAYNE FINK
Date Issued: 10/24/08

	Note Date	Interest Date	Current OSB	Original OSB	Year	Model	Vehicle Identification No.		Code	Mileage If Req.	*A	*B	Date Of Delivery	Remit. Date	Blocking Date	Irreg. ✓	Comments
221	29-Sep	29-Sep-08	5981.25	5,981.25	2002	ODYSSEY	2HKRL18602H	548101	U LT		✓	T					
222	11-Jun	11-Jun-08	7795	7,795.00	2006	COBALT	1G1AL55F567	602293	FA U		✓	T					
223	09-Apr	09-Apr-08	11700	11,700.00	2007	RAM TRUCK	1D7HA16K77J	604427	FA U		✓	T					
224	16-Jul	16-Jul-08	5643.75	5,643.75	2005	COBALT	1G1AK52F757	634782	U		✓	T					ENERTRONICS LETTER TO S. BRADLEY TO RETURN SR 10/29 RO. 159734
225	17-Sep	17-Sep-08	12318.75	12,318.75	2006	JETTA	3VWRF81K86M	640688	U		✓	T					
226	02-May	02-May-08	3581.25	3,581.25	2003	MALIBU	1G1ND52J03M	654435	U		X	T					
227	02-May	02-May-08	3581.25	3,581.25	2003	MALIBU	1G1ND52J83M	654537	U		X	T					TO K CARLSON OUT 10/24 SR TO RETURN 10/25 159774 R.O.
228	02-May	02-May-08	3581.25	3,581.25	2003	MALIBU	1G1ND52J53M	654575	U		✓	T					SR
229	02-May	02-May-08	3581.25	3,581.25	2003	MALIBU	1G1ND52J43M	654938	U		✓	T					SR
230	02-May	02-May-08	3581.25	3,581.25	2003	MALIBU	1G1ND52J13M	655058	U		✓	T					SR
231	02-May	02-May-08	3581.25	3,581.25	2003	MALIBU	1G1ND52J33M	655191	U		✓	T					SR
232	23-Oct	23-Oct-08	5795	5,795.00	2007	AVEO	KL1TD66637B	709043	FA U		✓	T					
233	01-Jul	01-Jul-08	12000	12,000.00	2008	FORESTER	JF1SG63668H	712006	U		✓	T					
234	19-Mar	19-Mar-08	10031.25	10,031.25	2005	VUE	5GZCZ63435S	801231	U LT		✓	T					
235	08-Aug	08-Aug-08	17975	17,975.00	2006	97X	5S3ET13M862	802742	FA U		✓	T					
236	08-Aug	08-Aug-08	15595	15,595.00	2006	97X	5S3ET13M462	803936	FA U		✓	T					
237	22-Sep	22-Sep-08	10695	10,695.00	2005	VUE	5GZCZ63485S	840901	FA U LT		✓	T					
238	15-Apr	15-Apr-08	9581.25	9,581.25	2005	RANGER	1FTZR15E45P	A02145	U LT		✓	T					
239	07-May	07-May-08	22650	22,650.00	2002	XK8	SAJDA42C72N	A26840	DE U		X	T					DENO J. REGGANS
240	16-Jul	16-Jul-08	5381.25	5,381.25	2003	EXPLORER	1FMYU60E23U	A37680	U LT	MX	✓	T					

10/24/2008 9:50:21 AM

WHOLESALE AUDIT

576

Branch Number: 088
Dealer Number: 0588
Dealership: EVERETT CHEVROLET, INC.
Address: 7300 EVERGREEN WAY EVERETT,WA 98203
Release Period: 3

*A - ✓ If Inspected & Condition OK
*A - D If Vehicle Inspected But Damaged
*A - X If Vehicle Missing

*B - ✓ If MCO Inspected
*B - T If Title Inspected
*B - X If Title/MCO Missing

Issued To: CSI-WAYNE PINK
Date Issued: 10/24/08

	Note Date	Interest Date	Current OSB	Original OSB	Year	Model	Vehicle Identification No.	Stock No.	Code	Mileage If Req.	* A	* B	Date Of Delivery	Reinfo. Date	Blocking Date	Irreg. ✓	Comments
241	18-Sep	18-Sep-08	5756.25	5,756.25	2003	WINDSTAR	2EMDA58453B	A47185	U LT		✓	T					
242	30-Jul	30-Jul-08	14008.25	14,008.25	2007	RANGER	1FTZR45E87P	A62650	U LT	sold	X	X	10/24		10/28		R. Yount
243	03-Sep	03-Sep-08	14887.5	14,887.50	2004	W SUPER DU	1FTSW31PX4E	A55133	U LT		✓	T					
244	04-Sep	04-Sep-08	10068.75	10,068.75	2006	RANGER	1FTYR14U76P	A62037	U LT		✓	T					
245	11-Apr	11-Apr-08	12881.25	12,881.25	2002	W SUPER DU	1FTNX21F72E	C38790	U LT		✓	T					

GMAC 003294
CONFIDENTIAL

COMMENTS:

I certify the information contained in this audit is accurate and that the audit has been conducted in accordance with CLPP Section 3700 and the instructions provided by the branch.

ASI 52462 10/27/08

SIGNATURE OF EMPLOYEE COMPLETING AUDIT TITLE DATE

2008 OCT 28 AM 8:58

QUESTIONS FOR PERSON CLEARING AUDIT

1. Any irregularities or other reasons for further investigation and special clearance..... Yes [ ] No [ ]
2. Potential Loss Report prepared (see CLPP 3810-2)..... Yes [ ] No [ ]
3. Summary of the irregularities with educational measures taken recorded on DTR..... Yes [ ] No [ ]
4. Wholesale Inventory Control updated..... Yes [ ] No [ ]
5. Explain under "Comments" what action, if any, was taken with the dealer.

I certify this audit has been cleared in accordance with CLPP Section 3700 & 3810-1b.

SIGNATURE OF EMPLOYEE CLEARING AUDIT Title Date

This audit is closed in accordance with CLPP Section 3700 and requires no further action or decisions.

11/17/8

SIGNATURE OF EMPLOYEE CLOSING AUDIT Title Date

MANAGEMENT REVIEW (where required) Title Date

10/24/2008 9:50:21 AM

GMAC 003295
CONFIDENTIAL

GMAC FINANCIAL SERVICES

GMAC Dallas Regional Business Center
5208 Tennyson Parkway, Suite 120
Plano, TX 75024
1-800-343-4541 Ext. 2063

November 19, 2008

EVERETT CHEVROLET, INC.
Attn: John Reggans
7300 EVERGREEN WAY
EVERETT, WA 98203

RE: Wholesale audit completed on 10/27/2008

Dear Mr. Reggans:

Thank you and your staff for the courtesies extended and assistance given during the wholesale inventory audit conducted at your dealership. The results of the inventory audit are provided for your information:

Audit Type	Total Deliveries	Payment Delays *	%
Wholesale Floor Plan	*13*	*5*	*38%*

The audit summary information above is provided to help you maintain efficiency, and to ensure unnecessary dealership expenses are minimized or eliminated.

Any delay in payment beyond your established release period is not in keeping with your floor plan agreement with GMAC and must be corrected. Payment delays also result in additional floor plan interest expense to your dealership.

We hope you will find this information beneficial and assume you will take all measures necessary to improve future audit results.

Sincerely,

Pedram Davoudpour
Portfolio Manager

cc: M.J. Vick