June 30, 2023

Federal Trade Commission
600 Pennsylvania Avenue NW,
Washington, DC 20580
Via: regulations.gov

Re: *FTC-2023-0035-0001, Petition for Rulemaking of National Association of Consumer Advocates, Consumer Federation of America, Center for Responsible Lending, Consumers for Auto Reliability and Safety, National Consumer Law Center, and U.S. PIRG*

Additional Examples of Unscrupulous Tactics Used on Car Buyers to Misrepresent the Finality of Car Deals

The National Association of Consumer Advocates joined with other organizations on the filing of this petition before the Federal Trade Commission to end the use of abusive yo-yo financing practices. To support the petition's analysis and its ultimate request to ensure the finality of credit contracts, the petition included allegations from filed complaints of consumers across the country. These complaints asserted factual claims of car dealers' misrepresentations, threats, and fraudulent conduct to force changes of signed credit contracts (or retail installment sales contracts) between car buyers and dealers for the sale/purchase of vehicles. Generally, the allegations demonstrate that dishonest dealers renege on signed credit contracts that third-party financial institutions ultimately were not willing to purchase on the assignment terms demanded by the dealers.

Similarly, this document shares additional examples from filed legal complaints and one filed arbitration award of dealers' alleged conduct to avoid complying with signed contracts and force different contract terms using tactics on car buyers that harmed and humiliated them. In these examples, consumers allege violations of federal laws, including the Truth in Lending Act and the Equal Credit Opportunity Act, the Fair Credit Reporting Act, and state consumer laws for unfair and deceptive practices, breach of contract, wrongful debt collection, among other legal claims.

We appreciate the Federal Trade Commission's serious consideration of this systemic and harmful practice among dishonest car dealers, and the need to impose federal protections to shield vulnerable consumers from similar predatory behavior in the car market.

I. Dealer Seeking to Change Contract Terms, Threatens Arrest of U.S. Army Servicemember

Arland v. JMPDJ Manhattan, LLC, d/b/a Kia Of Manhattan[1]

In June 2021, Private First Class (PFC) Kaitlyn Arland, a 19-year-old Kansas resident, expectant mother, and active-duty U.S. Army servicemember signed a retail installment sales contract (RISC or credit contract) with a Kansas dealer to buy a car. PFC Arland alleged that after the RISC was already

[1] Complaint, *Arland v. JMPDJ Manhattan, LLC,) d/b/a Kia Of Manhattan,* Dist. Ct Kansas (filed Oct. 21, 2021).

signed, the dealer submitted her credit application to multiple third-party lenders, all of whom rejected the application.[2] PFC Arland's filed complaint states that the dealer called the servicemember back to the dealer demanding a change of the signed contract terms, including a higher down payment or co-signer. According to the complaint, despite receiving inquiries from PFC Arland's senior military officers and a military lawyer about the change in contract terms, the dealer threatened to arrest her if she did not return the car, and ultimately retrieved the car without her consent.

In the filed complaint against the dealer, PFC Arland alleges a yo-yo scheme. "A dealership's entering into financing contracts before finalizing credit-application acceptance by external creditors is a hallmark of "yo-yo" schemes," the complaint said. "[D]ealerships mislead consumers into believing that external financing is final while *knowing* that financing is *not* final…then, the dealerships take advantage of consumer naiveté to threaten the borrower with new terms, frequently using their down payments and/or trade-in vehicles as ransom."[3]

According to the facts alleged, PFC Arland visited a car dealership in June 2021 to purchase a car. She became interested in a red 2021 Kia Rio.[4] The salesperson viewed her leave-and-earnings statement – a monthly report of earnings, deductions and leave balance for active-duty servicemembers.[5] PFC Arland and the dealer signed the retail installment sales contract (RISC or "credit contract"), which contained the credit terms (truth-in-lending disclosures) including the "amount financed," the "annual percentage rate," the "total of payments," the "finance charge," the amount of monthly payments, and the cash down payment.[6] PFC Arland signed the credit contract, paid a $500 down payment, and left the dealership lot in the Rio she purchased.[7]

PFC Arland asserts that after she and the dealer had already signed the credit contract with agreed-upon terms, the dealer submitted PFC Arland's credit application for sale to multiple financial institutions. Her credit application was checked and denied five times by four third-party financing companies.

The complaint states that about eight days after PFC Arland had purchased the Rio, a dealer representative contacted her and told her to return to the dealership. The dealer called again and told her to increase her down payment from $500 to $2,000 or find a co-signer.[8] PFC Arland informed her senior military officers about the dealer's demand. One of the officers made multiple calls to the dealer on her behalf, and asked the dealer to explain how the signed credit contract permitted the dealer to increase the down payment to $2,000. Despite this outreach, the dealer told PFC Arland that if she did not produce the increased down payment or present a co-signer, it would report the Rio stolen and repossess the car.[9]

PFC Arland received support from several of her superior officers. Two of them visited the dealer on her behalf in an unsuccessful attempt to come to a resolution. They then recommended that PFC Arland seek assistance from a Judge Advocate General (JAG) lawyer who called the dealer, seeking more information and clarity. Receiving none, the JAG lawyer recommended that PFC Arland submit

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[2] Id., at 4.
[3] Id., at 6.
[4] Id., at 3.
[5] Id.
[6] Id., at 18.
[7] Id., at 4.
[8] Id., at 7.
[9] Id.

a dispute to the Kansas Attorney General, file a Better Business Bureau complaint, and seek advice from a non-military attorney. She submitted a dispute to the AG's office, a complaint to the BBB, and sought additional legal help.[10] She later received news that the car had been reported stolen and she may be arrested.[11] Her superior officers sought information from local officials on her behalf.[12] PFC Arland states in her complaint that days later, she returned home and discovered that her car was missing. The dealer had taken back the car before PFC Arland's first payment was due under the credit contract. It also did not return PFC Arland's $500 down payment.[13]

According to the allegations in the complaint, the experience greatly harmed PFC Arland. First, the dealer did not provide financing for the car at the terms promised in the contract.[14] Second, the multiple third-party financial institutions that reviewed her credit application (after the RISC was already signed) each pulled her credit report, and each denial likely harmed her credit score and prospects to receive credit in the future. She also alleges the car dealer wasted the time and resources of multiple Army officers at the military base where she works.[15] This, along with the dealer demands to change the contract terms, the threats of repossession and arrest caused her embarrassment and emotional distress.[16] In all, she asserts that the dealer's actions violated the Equal Credit Opportunity Act, the Truth in Lending Act, the Kansas Consumer Protection Act, as well as unlawful repossession and breach of contract laws.[17]

The parties settled the claims in this case.

II. Dealer's hostile tactics to force contract changes distress car buyer and her family

Girlie Sanchez v. Oremor off Temecula, LLC d/b/a Temecula Valley Toyota[18]

In October 2017, California resident Girlie Sanchez contacted a car dealer to purchase a vehicle. In November 2017, She, her mother, as cosigner, and the dealer eventually signed a retail installment sales contract for a Toyota C-HR, which included the total sales price, the cash price and the monthly payments, which would start on December 19, 2017.[19] The contract contained a provision that gave the dealer 10 days to cancel the contract if it could not obtain a third-party assignee for the contract. In her complaint, Ms. Sanchez alleged that the dealer did not exercise the cancellation option within 10 days.[20] It was not until about a month after signing the contract that Ms. Sanchez learned that the dealer wished to "redo the paperwork or contract."[21]

At around the same time, Ms. Sanchez said she had not received a bill on how to make the first payment that was due by December 19 under the contract. She went to the dealer to make a payment.[22] Once there, the dealer told her that they had "to redo the contract" to name her mother as the sole

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[10] Id., at 8.
[11] Id., at 9.
[12] Id.
[13] Id., at 10.
[14] Id., at 18.
[15] Id., at 10.
[16] Id., at 13.
[17] Id., at 14, 17, 19.
[18] Complaint, *Sanchez v. Oremor off Temecula, LLC d/b/a Temecula Valley Toyota*, Superior Ct. of Calif. (Oct. 14, 2018) and Final Arbitration Award, *Sanchez v. Oremor of Temecula, LLC d/b/a, Temecula Valley Toyota*, 2021 WL 2631962 (Cal.Super.) (Arbitration Award) (Feb. 24, 2021).
[19] Id. at 4.
[20] Id. at 2.
[21] Id. at 6.
[22] Id.

owner of the car. They had identified a previous repossession in Ms. Sanchez' credit history. Her mother was unavailable and the dealer insisted on going to the mother's workplace to present her with a new contract. Ms. Sanchez declined but offered to return to the dealer with her mother the next morning.[23] The dealer's manager then confronted Ms. Sanchez, telling her loudly in front of others that her credit history was bad and demanded she return the car.[24] Ms. Sanchez left the dealer and sent the first month's car payment to the dealer via certified mail.[25]

Ms. Sanchez' complaint alleges that the dealer took a number of actions to force cancellation of the contract, although it did not have a right to do so. First, the complaint asserted that the dealer did not cancel the contract within the 10 days required under the contract."[26] However, the arbitrator who heard this dispute determined that "a certified letter was sent out on 11/14/17, requesting the vehicle be returned. This was 10 days after the contract was signed, which is on the contract Sanchez signed." [27]

Second, Ms. Sanchez alleged the dealer spoke with Ms. Sanchez' father and threatened to take his house, where Ms. Sanchez, her husband, and son also lived, if the vehicle was not returned.[28] Her scared father argued with Ms. Sanchez and then forced her and her family out of the home, leaving them homeless.[29] Third, the complaint asserts that the dealer called Ms. Sanchez' employer in an attempt to take back the vehicle.[30] Finally, Ms. Sanchez alleged that the dealer filed "a false police report," where it said it had timely canceled the contract and had a right to repossess the car.[31] The police appeared at Ms. Sanchez' workplace to repossess the car and threatened to arrest her. She then immediately agreed to return the vehicle.[32]

Among other things, Ms. Sanchez's filed complaint alleges that the dealer's conduct violated both California statutory and common law, including the Rosenthal Fair Debt Collection Practices Act (RFDCPA), intrusion upon seclusion, civil extortion, the California commercial code, breach of contract, breach of implied covenant of good faith and fair dealing, California business and professions code, and negligence. She suffered damages from mental and emotional distress, pain and anguish, humiliation, embarrassment, headaches, difficulty sleeping, stomach problems, nervousness, anxiety, hopelessness, fear, and a feeling that she is no longer safe. Her 8-year-old son, who lost his home, also suffered severe emotional distress as well, resulting in physical sickness, causing further anxiety in the family.[33]

An arbitrator determined that Ms. Sanchez had established causes of action for her claims under 42 U.S.C. § 1983, RFDCPA, the Fair Credit Reporting Act, as well as her claims for civil extortion, intrusion upon seclusion, negligence and negligent infliction of emotion distress against the dealer. The arbitrator awarded $75,000 in actual damages, $2,000 in statutory damages and $150,000 in punitive damages for these claims, totaling $227,000, to be paid by the dealer.[34]

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[23] Id.
[24] Id.
[25] Id., at 7.
[26] Id., at 2 and 9.
[27] Final Arbitration Award, at 5.
[28] Complaint, at 2, 7, 9, 12.
[29] Id., at 2 and 7.
[30] Id., at 7.
[31] Id., at 2, 9, 11-13.
[32] Id., at 2, 7.
[33] Id., at 8-15.
[34] Final Arbitration Award, at 3.

III. After final deal, car dealer demands changes while refusing to return customers' trade-in vehicle

William and Staci Bell, v. City Chevrolet LLC d/b/a Cable-Dahmer Of Kansas City[35]

William and Staci Bell, a married Kansas couple, visited a car dealership in late December 2021, where they decided to buy a 2021 Chevy Suburban and trade in their 2018 Ford Expedition.[36] They entered into a retail installment sales contract (RISC or credit contract) with the dealer to buy the Suburban, an SUV, to transport their large family.[37] The credit contract, which listed the dealer as "seller-creditor," included financing disclosures such as the finance and total sale price, the annual percentage rate, and the monthly payment.[38] Their trade-in car had an outstanding lien which increased the financed amount of the new vehicle.[39] The RISC stated that it was the "complete and exclusive statement of the agreement" between the Bells and the dealer.[40]

According to the complaint, the Bells departed the dealer's lot with their new car after the RISC signing, and the dealer took ownership of the trade-in vehicle. The Bells at that time believed the financing had been finalized at the terms stated in the RISC. They learned that the financing was not finalized after receiving requests for more information from the named lienholder in the contract.[41] The Bells allege they soon discovered on their own that the dealer had made multiple unsuccessful efforts to sell the credit contract to third-party lenders, and multiple inquiries were made on their credit reports.[42] The Bells assert that the dealer then repeatedly contacted them urging them to change the financing terms in the signed RISC.[43] The Bells considered but refused any other deal terms because they would have been more costly than the terms agreed to in the RISC.[44]

Ultimately, due to the ongoing pressure to change the terms, the Bells returned their new vehicle to the dealer, and sought return of their trade-in vehicle. The dealer refused to return the trade-in vehicle to the Bells. The dealer apparently had already paid off the remaining amount due on the trade-in and took ownership of it. As the complaint alleged, "(The dealer) improperly took ownership of the Expedition and offered it for sale, while refusing to honor the terms of its financing contract with (the Bells)."[45] Meanwhile, the Bells were left with no vehicle and no transportation, as well as their credit record further damaged from financial institutions' multiple inquiries. The Bells had to turn to Kati Bells' mother, who co-signed a contract to help them finance their own comparable vehicle.[46]

According to the complaint, at the time the transaction was made, the Bells and the car dealer signed a document called the "Financial Terms Agreement," which stated that the purchase of the vehicle was conditioned on the Bells obtaining financing required under the sales contract and the RISC. The document required return of the purchased vehicle and the dealer's return of the down payment (cash or trade-in) if the financing terms were not "approved."[47] The parties also signed a document stating that the Bells would be responsible for continuing payments for an open loan to the lienholder of their

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[35] Complaint, *William and Staci Bell, v. City Chevrolet LLC d/b/a Cable-Dahmer Of Kansas City, Dist. Ct. W. Mo., (April 28, 2022).*
[36] Id., at 3.
[37] Id., at 11.
[38] Id., at 3-4.
[39] Id., at 3.
[40] Id.
[41] Id., at 4 and 20.
[42] Id., at 5.
[43] Id., at 8.
[44] Id..
[45] Id. at 1.
[46] Id., at 11.
[47] Id., at 5-6.

trade-in vehicle until the new vehicle was funded. Under the terms, the dealer agreed that it would not pay off the trade-in vehicle until it received funds from a third-party financing company for the new vehicle purchase.[48] The Bells alleged that they returned the new vehicle according to the terms, but the dealer did not return the trade-in vehicle.[49] In fact they asserted that the dealer retained it, paid off the existing loan, and took ownership of it– all before receiving any funds from a third-party lender for the Bells' new vehicle purchase.[50]

The Bells' alleged that the dealer carried out a yo-yo scheme against them. According to the Bells' filed complaint against the dealer: "…"yo-yo" schemes are inherently predatory as all risk generated by such schemes is borne by consumers. That is, in the case of credit denial by external lenders, subsequent loan terms will be worse, not better, than those for which they *already contracted.* Further, in many cases, the dealership is in possession of the consumer's down payment and/or trade in, such that they may hold them as ransom...Such schemes, as described, are illegal because they inherently entail breach of contract."[51]

The Bells also alleged that the dealer violated the Truth in Lending Act, contending that the dealer ultimately treated the financing terms in the credit contract as estimates, rather than as the actual terms as the Bells were led to believe.[52] They also claimed violations of the Equal Credit Opportunity Act due to the dealer's alleged failure to send "ECOA-compliant adverse-action notices" to the Bells when it did not comply with the terms of the credit contract.[53]

In their complaint, the Bells requested an award of damages for their harmed credit, including increased loss of financing; loss of a vehicle; and emotional distress. They also requested injunctive relief to stop the dealer from paying off liens of trade-in vehicles before acquiring external financing for new car purchases, as required in its own customer contracts; and to stop the dealer from entering into credit contracts without a proper state license as a creditor/lender, which they said the dealer lacked.[54]

The parties settled the claims in this case.

[48] Id.
[49] Id., 8-10.
[50] Id., at 7.
[51] Id., at 11-12.
[52] Id., at 12.
[53] Id.
[54] Id., at 11-12.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

KAITLYN ARLAND,	)	
	)	
Plaintiff,	)	**JURY TRIAL DEMANDED**
	)	
v.	)	**Case No. 2:21-cv-02449-JAR-ADM**
	)	
JMPDJ MANHATTAN, LLC,	)	
d/b/a KIA OF MANHATTAN,	)	
	)	
Defendant.	)	

FIRST AMENDED COMPLAINT

Plaintiff Kaitlyn Arland alleges against Defendant stating as follows:

AMENDMENT

1. Plaintiff filed her Complaint with this Court on October 4, 2021 (ECF No. 1).

2. Defendant was served with the Complaint on October 7, 2021.

3. Pursuant to Fed. R. Civ. P. 15(a)(1)(A), Plaintiff hereby amends the Complaint as a matter of course.

NATURE OF THE CASE

4. This is a case of a car dealership attempting to exploit a nineteen-year-old, pregnant Army servicemember via a "yo-yo" financing scheme. When Defendant's own illegal scheme failed, it became desperate and continued to violate laws, as well as basic norms of civilized conduct.

PARTIES

5. Plaintiff Kaitlyn Arland is a Kansas resident. She is enlisted in the U.S. Army and stationed at Fort Riley.

6. Defendant JMPDJ Manhattan, LLC, d/b/a Kia of Manhattan, is a Kansas limited liability corporation.

JURISDICTION AND VENUE

7. This Court has subject-matter jurisdiction over this lawsuit pursuant to 28 U.S.C. § 1331 because it is an action under the federal Equal Credit Opportunity Act.

8. This Court has subject-matter jurisdiction over this lawsuit pursuant to 28 U.S.C. § 1331 because it is an action under the federal Truth in Lending Act.

9. This Court has (general) personal jurisdiction over Defendant because it is a Kansas corporation whose business is largely, or exclusively, undertaken in Kansas. Per Defendant's 2020 annual report, all of its members—John Wentling, Derrick Harding, Mark Fischer, Patrick George, and Jeffery Winter—also happen to be located in Kansas.

10. Venue in this Court is proper pursuant to 28 U.S.C. § 1391(b)(2) because a substantial portion of the events or omissions giving rise to the claims contained herein occurred in Kansas.

11. Venue in this Court is also proper pursuant to 15 U.S.C. § 1691e(f).

FACTS COMMON TO ALL COUNTS

12. On or about June 14, 2021, Plaintiff entered Defendant's dealership at approximately 3:30 PM to survey new cars.

13. Plaintiff was approached by Joe Toles, one of Defendant's salespeople. With

Mr. Toles accompanying her, Plaintiff became interested in a red 2021 Kia Rio, whose sticker price was approximately $21,000.

14. Defendant, having run Plaintiff's leave-and-earnings statement, informed her that she could purchase a/the new Rio for $379 per month.

15. However, Plaintiff informed Defendant that she was not willing to pay more than $340 per month.

16. Plaintiff also informed Mr. Toles that she could make a $500 down payment that day towards a/the Rio.

17. Not long thereafter, Plaintiff executed with Defendant a retail installment contract (the "RISC") for the purchase of the 2021 Kia Rio with VIN: 3KPA24AD4ME381520 (the "Rio"):

RETAIL INSTALLMENT SALE CONTRACT
SIMPLE FINANCE CHARGE

Buyer Name and Address (Including County and Zip Code)	Co-Buyer Name and Address (Including County and Zip Code)	Seller-Creditor (Name and Address)
[redacted]	NA	KIA OF MANHATTAN 8223 SOUTH PORT DRIVE MANHATTAN, KS 66502

You, the Buyer (and Co-Buyer, if any), may buy the vehicle below for cash or on credit. By signing this contract, you choose to buy the vehicle on credit under the agreements in this contract. You agree to pay the Seller - Creditor (sometimes "we" or "us" in this contract) the Amount Financed and Finance Charge in U.S. funds according to the payment schedule below. We will figure your finance charge on a daily basis. The Truth-In-Lending Disclosures below are part of this contract.

New/Used	Year	Make and Model	Odometer	Vehicle Identification Number	Primary Use For Which Purchased
NEW	2021	KIA RIO LX/S	10	3KPA24AD4ME381520	Personal, family, or household unless otherwise indicated below ☐ business ☐ agricultural ☒ PERSONAL

FEDERAL TRUTH-IN-LENDING DISCLOSURES

ANNUAL PERCENTAGE RATE The cost of your credit as a yearly rate.	FINANCE CHARGE The dollar amount the credit will cost you.	Amount Financed The amount of credit provided to you or on your behalf.	Total of Payments The amount you will have paid after you have made all payments as scheduled.	Total Sale Price The total cost of your purchase on credit, including your down payment of $ 1650.00 is
3.890 %	$ 2801.79	$ 21569.46	$ 24371.25	$ 26021.25

(e) means an estimate

Your Payment Schedule Will Be:

Number of Payments	Amount of Payments	When Payments Are Due
75	$ 324.95	MONTHLY beginning 07/29/2021

Returned Check Charge: If any check you give us is dishonored, you will pay a charge of $ 30 if we demand that you do so.

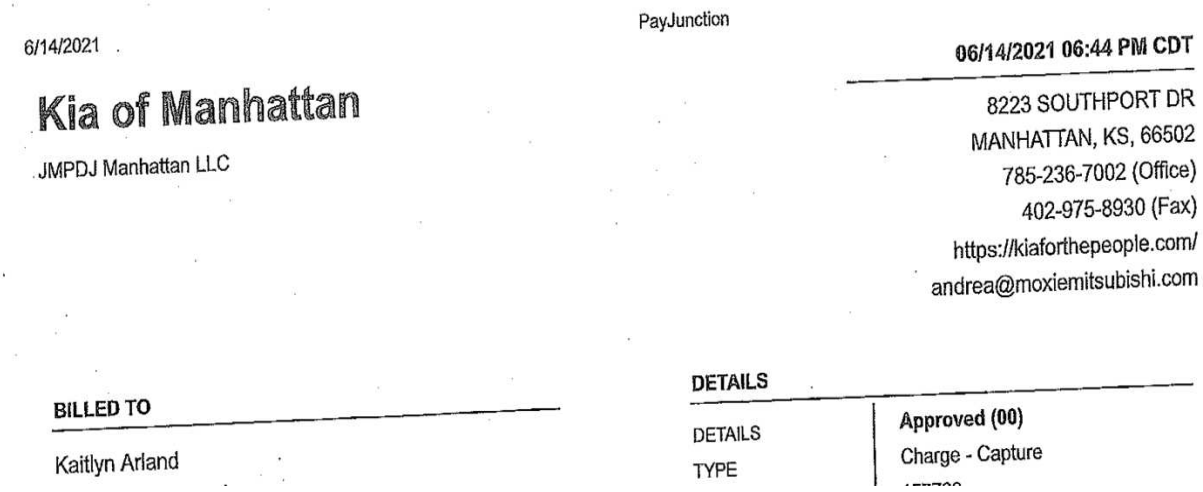
☐ VENDOR'S SINGLE INTEREST INSURANCE (VSI insurance): If the preceding box is checked, the Creditor requires VSI insurance for the initial term of the contract to protect the Creditor for loss or damage to the vehicle (collision, fire, theft, concealment, skip). VSI insurance is for the Creditor's sole protection. This insurance does not protect your interest in the vehicle. **You may choose the insurance company through which the VSI insurance is obtained.** If you elect to purchase VSI insurance through the Creditor, **the cost of this insurance is** $ NA and is also shown in Item 4B of the Itemization of Amount

18. As the RISC depicts, the primary terms for the Rio's purchase entailed seventy-five monthly payments of $324.95, which amortization schedule was the function of a 3.89% annual percentage rate.

19. Defendant was the "**seller-creditor**" in this transaction.

20. Plaintiff reviewed the contract's terms/language numerous times because she is a circumspect person.

21. **Defendant processed Plaintiff's $500 down payment at 6:44 PM:**



6/14/2021

Kia of Manhattan

JMPDJ Manhattan LLC

PayJunction

06/14/2021 06:44 PM CDT

8223 SOUTHPORT DR
MANHATTAN, KS, 66502
785-236-7002 (Office)
402-975-8930 (Fax)
https://kiaforthepeople.com/
andrea@moxiemitsubishi.com

BILLED TO

Kaitlyn Arland

DETAILS

DETAILS	Approved (00)
TYPE	Charge - Capture

22. **After executing the RISC, Plaintiff left Defendant's lot in the Rio, which she had lawfully purchased.**

PLAINTIFF'S CREDIT APPLICATION WAS REPEATEDLY DECLINED BY OTHER CREDITORS

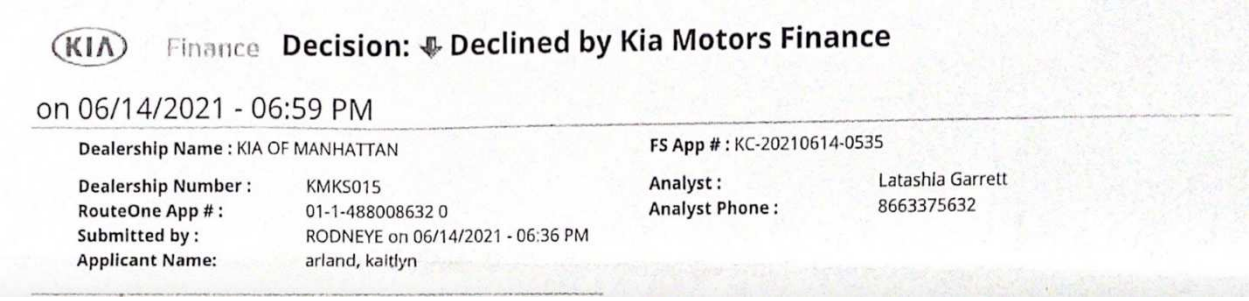
23. Not at all evident from the relatively seamless transaction just described was the fact that Plaintiff's credit application was denied at least five times, by four different depository institutions.

24. These lenders included Kia Motors Finance (at least twice), US Bank, Fifth

Third Bank, and Credit Union Loan Source.

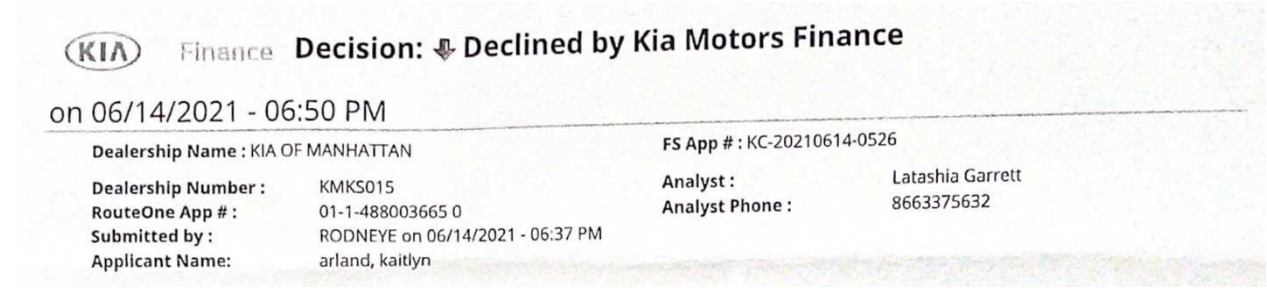
25. Notably, the Kia Motors Finance denials were generated at, respectively, 6:50 PM and 6:59 PM on June 14, 2021—i.e., *after* Plaintiff had consummated the purchase of the Rio.

26. On information and belief, these credit-application submissions were made by Rodney Ewing, one of Defendant's managers:


KIA Finance **Decision: Declined by Kia Motors Finance**

on 06/14/2021 - 06:59 PM

Dealership Name : KIA OF MANHATTAN		**FS App # :** KC-20210614-0535	
Dealership Number :	KMKS015	**Analyst :**	Latashia Garrett
RouteOne App # :	01-1-488008632 0	**Analyst Phone :**	8663375632
Submitted by :	RODNEYE on 06/14/2021 - 06:36 PM		
Applicant Name:	arland, kaitlyn		


KIA Finance **Decision: Declined by Kia Motors Finance**

on 06/14/2021 - 06:50 PM

Dealership Name : KIA OF MANHATTAN		**FS App # :** KC-20210614-0526	
Dealership Number :	KMKS015	**Analyst :**	Latashia Garrett
RouteOne App # :	01-1-488003665 0	**Analyst Phone :**	8663375632
Submitted by :	RODNEYE on 06/14/2021 - 06:37 PM		
Applicant Name:	arland, kaitlyn		

27. Because these were hard credit pulls, each denial likely had an adverse impact on Plaintiff's credit score and thereby harmed her credit expectancy.

28. The applications to Kia Motors Finance also stated a "customer" annual percentage rate of 2.99%.

29. It was frivolous for Defendant to submit duplicate applications, with no information having changed, to Kia Motors Finance within a minute of each other.

30. However, more essential to this lawsuit is the fact that these denials came ***after*** Defendant had executed the RISC with Plaintiff.

DEFENDANT ATTEMPTS A "YO-YO" FINANCING SCAM

31. "Yo-yo" financing schemes are a well-established method of deceit whereby car dealers enter into retail installment contracts with purchasers and then, usually after a few days or so, inform those same purchasers that their credit application was declined such that they must return and contract for less favorable financing terms.

32. Here, as detailed, Defendant, as the "seller-creditor," entered into a retail installment contract with Plaintiff.

33. Even though the parties had agreed to the RISC's terms, Defendant, as described, actively sought out other lenders—the aforementioned depository institutions—presumably for the purpose of assignment.

34. A dealership's entering into financing contracts before finalizing credit-application acceptance by external creditors is a hallmark of "yo-yo" schemes, which generally involve selling an individual a new car under reasonably favorable terms even while knowing that external financing has not actually been finalized at those terms.

35. In so doing, dealerships mislead consumers into believing that external financing is final while *knowing* that financing is *not* final. Then, the dealerships take advantage of consumer naiveté to threaten the borrower with new terms, frequently using their down payments and/or trade-in vehicles as ransom.

36. In keeping with such a scheme, Mr. Toles, Defendant's salesperson, called Plaintiff approximately eight days after she had purchased the Rio.

37. Mr. Toles informed Plaintiff that she needed to return to the dealership; Plaintiff informed him that she could not return that day.

38. Mr. Toles called again the next day, telling Plaintiff that she needed to increase her down payment to $2,000 or find a co-signer. This demand had no basis in the RISC.

DEFENDANT BECOMES INCREASINGLY MALICIOUS

39. After Mr. Toles called Plaintiff in an illicit attempt to increase her down payment, Plaintiff informed a senior officer, or officers, of this occurrence.

40. One of these senior officers thereafter called Mr. Toles to discuss the issue(s); Mr. Toles hung up on them.

41. That officer, a sergeant first-class, called Mr. Toles back to note the overt lack of professionalism in his response and that he was seeking information on behalf of Plaintiff. That is, everyone wanted to know what term in the RISC allowed Defendant to demand a $2,000 down payment.

42. Mr. Toles informed the sergeant that he would need to speak to some sort of manager; that manager ended up being Rodney Ewing—i.e., the manager who had submitted Plaintiff's credit applications. Mr. Ewing provided no clarity as to what enabled Defendant to demand a larger down payment from Plaintiff.

43. Plaintiff also spoke with Mr. Ewing. At this time, **Mr. Ewing threatened Plaintiff, telling her that if she did not produce the increased down payment or a co-signer by that Friday, that he would report the Rio *stolen*, issue *a warrant for her arrest*, and repossess the Rio.**

44. Obviously, Mr. Ewing could not lawfully implement any of these measures. However, these threats were telling given what occurred later, as described below. Defendant's threatening of Plaintiff in this regard was also unconscionable.

45. Some of Plaintiff's superior officers—Sergeant First-Class Royster and Staff Sergeant Cugini—drove to Defendant's business after this call as they had received no clarity and thought that perhaps some sort of accord could be reached in person; Plaintiff did not join in that visit to Defendant.

46. However, Plaintiff's superior officers were unable to attain any clarity from Defendant despite the in-person visit; they thereafter recommended that Plaintiff seek help from a Judge Advocate General ("JAG") lawyer.

PLAINTIFF CONSULTS A JAG ATTORNEY AND FILES A COMPLAINT WITH THE KANSAS ATTORNEY GENERAL

47. Because she is in the Army, Plaintiff was able to obtain some relatively informal but helpful guidance from the JAG office as she attempted to navigate Defendant's threats.

48. The JAG attorney, Captain Jack Rozema, interacted with agents of Defendant. More specifically, approximately two days after Mr. Ewing had threatened Plaintiff with arrest and repossession, the JAG lawyer called Defendant and informed it that, while he was not representing Plaintiff, he, too, wanted to understand what contractual language Defendant was relying upon given its demand to Plaintiff.

49. Again, Mr. Ewing was overtly rude and unhelpful in this regard. As a result, the JAG lawyer recommended that Plaintiff submit a dispute to the Kansas Attorney General (the "AG"), file a Better Business Bureau ("BBB") complaint, and seek

guidance from external counsel.

50. On information and belief, another manager—Don Glaspie—also interacted with Captain Rozema and/or some of Plaintiff's other superior officers with regard to the RISC.

51. On June 25, 2021, Plaintiff submitted a detailed and highly coherent dispute to the AG's office. She also submitted a complaint to the BBB.

DEFENDANT INVOLVES THE POLICE
WHILE AGAIN THREATENING PLAINTIFF

52. Also on June 25, 2021, Plaintiff received word that her *battalion commander* had relayed that the "chief of police" had contacted Plaintiff's *brigade commander* and told the commander that there was a warrant out for Plaintiff's arrest, the Rio had been reported stolen, and that entry points to Fort Riley were being surveilled so as to arrest Plaintiff while she was arriving at or leaving the base.

53. On information and belief, Defendant had reported to a/the local police department that Plaintiff had *stolen* the Rio.

54. The brigade commander first received word of this complaint via email and then followed up that email with a phone call to the germane police department.

55. In so threatening Plaintiff, Defendant slandered her, was *at least* recklessly indifferent to the harm such lies might have on her military career, and unlawfully involved the police (because Defendant willfully and knowingly alleged a crime that had no basis in fact) and/or pretended to *be* the police.

56. In this regard, Plaintiff and/or some of her superior officers called area police departments in an attempt to further follow up but none of the police contacts they

reached knew of Plaintiff and/or the complaint of the Rio's theft.

57. By willfully and knowingly reporting a non-crime as a crime to the police, Defendant wasted the time and resources of whichever departments it contacted in this regard.

58. Defendant also wasted the time and resources of multiple Army officers as they continued to harass Plaintiff's *place of employment, a military base*. This, too, constituted an unconscionable practice and was facially violative of federal debt-collection norms—it is only because Defendant is not a third-party debt collector that it escapes liability under the Fair Debt Collection Practices Act.

59. Given his prior threats regarding issuing a warrant for Plaintiff's arrest, as well as the apparent fact that he personally mishandled Plaintiff's credit submissions, it is most likely that Rodney Ewing, or someone acting at his direction, called the police and/or impersonated the police.

DEFENDANT ILLEGALLY REPOSSESSES/STEALS THE RIO

60. On June 28, 2021, Plaintiff was released from her detail at 3:00 PM.

61. Mr. Ewing had called Plaintiff at least once that afternoon; she presumed that he wanted to again discuss the down payment demand.

62. **Plaintiff returned home at around 3:50 PM and discovered that the Rio was gone.**

63. Defendant had repossessed, quite unlawfully, the vehicle, to which Plaintiff still has the keys. Indeed, Defendant *stole* the Rio from Plaintiff.

64. Plaintiff obtained insurance for the Rio but then cancelled it after Defendant

wrongfully seized the vehicle.

65. **This repossession took place before Plaintiff's first payment was due.**

66. **Defendant also did not refund Plaintiff's $500 down payment.**

67. Pursuant to the RISC, Defendant "may take the vehicle" from Plaintiff ***if*** she defaulted:

> **d. We may take the vehicle from you.** If you default, we may take (repossess) the vehicle from you after we give you any notice the law requires. We may only take the vehicle if we do so peacefully and the law allows it. If your vehicle has an

68. Plaintiff did not default, so there was no contractual (or statutory) basis for "repossession," as described herein.

69. Defendant did not provide "any notice the law requires," as described below, such that it breached the contract (and statutes) in this regard as well.

70. Defendant did not take the vehicle "peacefully" because it stole the vehicle, as described herein, such that it breached the contract (and statutes) in this regard as well.

71. Defendant's actions compelled Plaintiff to seek legal representation.

DEFENDANT'S RESPONSE TO PLAINTIFF'S ATTORNEY GENERAL COMPLAINT

72. After illegally repossessing Plaintiff's vehicle, Defendant submitted the following to the AG:

Jul 13, 2021

Re Kaitlyn Arland
File No.: CP-21-002161

Dear Mr. Smith,

I would first like to introduce myself, my name is Ceirra Ripley and I am the Office Manager here at Kia of Manhattan. My email address is Ceirra@kiamhk.com. I can also be reached at the phone number 785-236-7002.

Ms. Arland came into the dealership on June 14, 2021, and was met by our salesman Joe. She had gone through the process of picking out a vehicle and ended up settling on a new 2021 Kia Rio. Everything was sent over to the bank to be approved and bought, unfortunately Kia Motors Finance required either more money down or a co-signer. When Don, our sales manager, let her know what was needed her Chain of Command arrived here at the dealership to tell Don that they were gonna take it to legal. Legal called and spoke with Don, the outcome was that we were still the owner of the vehicle and the car needed to come back because every bank had denied her credit and Kia Motors Finance was the only one that would pick her up upon their stipulations that they required, which was either more money down or a cosigner, both she refused to do.

73. Of course, this version of events completely ignores the RISC, as described above.

74. Notably, this response states, "**Legal called and spoke with Don, the outcome was that we were still the owner of the vehicle and the car needed to come back . . .**".

75. Thus, Defendant admitted to taking the Rio—"the car needed to come back," a euphemism for theft.

76. It is also, of course, not at all evident how "the outcome" of a call with "legal" comprised the conclusion that Defendant was "still the owner of the vehicle."

Indeed, Defendant was very much *not* the owner of the Rio.

DEFENDANT HAS INFLICTED EMOTIONAL DISTRESS ON PLAINTIFF

77. As mentioned above, Plaintiff is pregnant, only nineteen years old, and enlisted in the U.S. Army.

78. As such, Plaintiff was focused on purchasing a reliable, safe car for her growing family.

79. Instead, because of Defendant's actions, she has experienced significant anxiety, stress, frustration, fear, humiliation, and other related, negative emotions and detriments. Plaintiff went from excitement at purchasing a new car to having to retain legal counsel because of Defendant.

80. As stated, Defendant clearly showed reckless indifference, if not outright malice, relative to Plaintiff's military career. It besmirched her and involved numerous superior officers—e.g., Captains Rozema and Tuckness; Sergeants First-Class Wagner and Royster; Staff Sergeant Cugini; and Sergeant Fulton—in accusations that Plaintiff had "stolen" the Rio. In fact, Plaintiff felt so overwhelmed that she broke into tears before various superior officers, causing her significant embarrassment.

81. Plaintiff has also suffered insomnia because of Defendant's actions, as described herein.

82. Defendant's behavior, as described throughout, has also caused Plaintiff worry about the effects of enhanced stress during the first trimester of pregnancy and her vehicular situation during the upcoming winter.

THE EQUAL CREDIT OPPORTUNITY ACT

83. Generally, the Equal Credit Opportunity Act ("ECOA"), 15 U.S.C. § 1691 *et seq.*, protects against discrimination and opacity in the extension of consumer credit.

84. Pursuant to the ECOA, 15 U.S.C. § 1691(d)(6), an "adverse action" is a "**denial or revocation of credit, a change in the terms of an existing credit arrangement, or a refusal to grant credit in substantially the amount or on substantially the same terms requested**." (emphasis added).

85. As described herein, Defendant's actions as to Plaintiff entailed an "adverse action" for the purposes of the ECOA, in multiple ways. Defendant demanded "a change in the terms of an existing credit arrangement" by, after the RISC had been executed, insisting on an increase (from $500 to $2000) in the down-payment amount and/or a cosigner. Further, despite having entered into the RISC at the stated terms, Defendant also implemented an "adverse action" against Plaintiff via revocation of credit at those terms. As described, Defendant simply stole the Rio from Plaintiff and kept her down payment.

86. When a creditor, as in a "yo-yo" scheme, revokes credit, such action entails a termination of an account—which requires notice under ECOA—rather than a counteroffer.

87. Pursuant to the ECOA, 15 U.S.C. § 1691(d)(2), applicants against whom a creditor takes "adverse action" "**shall** be entitled to a statement of such reasons" for the adverse action **in writing**. (emphasis added).

88. Pursuant to 15 U.S.C. § 1691(d)(1), the creditor must provide such written

notice **within thirty (30) days of the receipt of an applicant's completed application for credit.**

89. This requisite written notice of "adverse action," pursuant to 15 U.S.C. § 1691(d)(3), must contain the "specific reasons" for that action being taken.

90. As described above, Plaintiff's credit application was completed on or about June 14, 2021.

91. Plaintiff did not receive an ECOA-compliant written statement within thirty (30) days from Defendant despite the adverse action taken against her

92. Pursuant to the ECOA, 15 U.S.C. § 1691e(a), "**Any creditor who fails to comply with any requirement imposed under this subchapter *shall* be liable to the aggrieved applicant for any actual damages sustained by such applicant acting either in an individual capacity or as a member of a class.**" (emphasis added).

93. Pursuant to 15 U.S.C. § 1691e(b), Defendant "**shall be liable** to the aggrieved applicant for punitive damages in an amount not greater than $10,000." (emphasis added).

94. Pursuant to 15 U.S.C. § 1691e(c), the Court may grant Plaintiff equitable and declaratory relief as to Defendant's violations of the ECOA, as described herein.

95. Pursuant to 15 U.S.C. § 1691e(d), Defendant, should this action be successful, "shall" be liable for reasonable attorneys' fees and litigation expenses.

COUNT I:
VIOLATIONS OF THE EQUAL CREDIT OPPORTUNITY ACT
15 U.S.C. § 1691 *et seq.*

96. Plaintiff, for this Count I of her First Amended Complaint, incorporates the

previous paragraphs as if wholly set forth herein.

97. Plaintiff and Defendant are a "person" for the purposes of the ECOA. *See* 15 U.S.C. § 1691a(f).

98. Defendant is a "creditor" for the purposes of the ECOA because it "regularly extends, renews, or continues credit" and/or "regularly arranges for the extension, renewal, or continuation of credit." *See* 15 U.S.C. § 1691a(e).

99. Plaintiff was an "applicant" for "credit" for the purposes of the ECOA. *See* 15 U.S.C. § 1691a(b), (d).

100. Plaintiff had Defendant take an "adverse action" against her, as described above. *See* 15 U.S.C. § 1691(d)(6).

101. Plaintiff did not receive from Defendant an ECOA-compliant notice as to that "adverse action," as described above. *See* 15 U.S.C. § 1691(d)(1)-(2).

102. Defendant deprived Plaintiff of the benefit of her bargain, as enshrined in the RISCs into which she entered with Defendant.

103. Plaintiff has suffered actual damages because of Defendant's violations of the ECOA. *See* 15 U.S.C. § 1691e(a).

104. More specifically, Plaintiff suffered actual damages in the form of increased cost of subsequent financing; damage to her credit expectancy; and loss of vehicular use.

105. Defendant "shall" be liable to Plaintiff for actual damages and punitive damages. *See* 15 U.S.C. § 1691e(b).

106. Should Plaintiff be successful in this action, Defendant "shall" be liable for her reasonable attorneys' fees and litigation costs. *See* 15 U.S.C. § 1691e(d).

107. Plaintiff hereby prays for judgment against Defendant in such amount as is allowable by law and to be determined at trial, for actual damages, pre- and post-judgment interest at the greatest rate allowed by statute, punitive damages, and for such other and further relief as may be just and proper under the circumstances.

COUNT II:
VIOLATIONS OF THE TRUTH IN LENDING ACT
15 U.S.C. § 1601 *et seq.*

108. Plaintiff, for this Count II of her First Amended Complaint, incorporates the previous paragraphs as if wholly set forth herein.

109. Defendant is a "creditor" as defined by the federal Truth in Lending Act ("TILA") because it regularly extends credit via installment contracts and is the person to whom Plaintiff's debt was payable from the face of the RISC. *See* 15 U.S.C. § 1602(g). Indeed, the RISC lists Kia of Manhattan as the "**seller-creditor**." (emphasis added).

110. Plaintiff is and was a "consumer" during all germane periods. *See* 15 U.S.C. § 1602(i).

111. Per the RISC, Defendant extended "credit" to Plaintiff. *See* 15 U.S.C. § 1602(f).

112. Defendant's sale of the Rio to Plaintiff was a "credit sale." *See* 15 U.S.C. § 1602(h).

113. Plaintiff's purchase of the subject vehicle was primarily for personal, household, and/or family purposes.

114. Per the RISC, the "amount financed" was $ 21,569.

115. Per the RISC, the "annual percentage rate" was 3.89%.

116. Per the RISC, the "total of payments" was $24,371.

117. Per the RISC, the "finance charge" was $2,801.

118. Per the RISC, the cash down payment was $500.

119. Per the RISC, the rebate component of the down payment was $1,150.

120. The RISC's "finance charge" was materially incorrect, in violation of 15 U.S.C. § 1638(a)(3), and Regulation Z, 12 C.F.R. §§ 226.18(d), 226.4.

121. The RISC's "annual percentage rate" was materially incorrect, in violation of 15 U.S.C. § 1638(a)(4) and Regulation Z, 12 C.F.R. § 226.18(e).

122. The RISC's "amount financed" was materially incorrect, in violation of 15 U.S.C. § 1638(a)(2A) and Regulation Z, 12 C.F.R. § 226.18(b).

123. Defendant further violated TILA because it treated the disclosures on the RISC as estimates about the terms of the credit that it might provide Plaintiff and, pursuant to Regulation Z, 12 C.F.R. § 226.17(c)(2), the disclosures should have been marked as estimates.

124. As described above, Plaintiff made, per the RISC, a $500 down payment but Defendant, after entering the RISC, began to demand $2,000, which had no contractual basis.

125. As described above, Defendant entered the RISC with Plaintiff but did not provide financing on those terms.

126. Pursuant to 15 U.S.C. § 1640(a), Plaintiff is entitled to recover actual and statutory damages because of Defendant's TILA violations.

127. In the case of successful enforcement of such TILA liability, Plaintiff is, per

15 U.S.C. § 1640(a)(3), also entitled to her reasonable attorney's fees and expenses in litigating this action.

128. Plaintiff hereby prays for judgment against Defendant for her actual damages, pre- and post-judgment interest in the greatest amount allowable by statute, reasonable attorneys' fees, statutory penalties, costs in bringing this action, and such other and further relief the Court finds just and proper under the circumstances.

COUNT III:
VIOLATIONS OF THE KANSAS CONSUMER PROTECTION ACT
K.S.A. § 50-623 *et seq*.

129. Plaintiff, for this Count III of her First Amended Complaint, incorporates the previous paragraphs as if wholly set forth herein.

130. The Kansas Consumer Protection Act ("KCPA"), K.S.A. § 50-623 *et seq*., prohibits deceptive and unconscionable acts and practices in connection with consumer transactions.

131. Plaintiff is a member of the military and thus a "protected consumer" per K.S.A. § 50-676(g).

132. Plaintiff has been damaged and is "aggrieved" pursuant to the KCPA as a result of Defendant's conduct, as described above, relative to a consumer transaction—i.e., her purchase of the Rio from Kia of Manhattan.

133. Plaintiff has been damaged and is "aggrieved" pursuant to the KCPA as a result of Defendant's conduct in that her credit expectancy has been detrimentally impacted by Defendant's conduct.

134. Plaintiff has been damaged and is "aggrieved" pursuant to the KCPA as a

result of Defendant's conduct in that Defendant retained her down payment despite stealing the Rio back.

135. Plaintiff has been damaged and is "aggrieved" pursuant to the KCPA as a result of Defendant's conduct in that Defendant did not provide financing at the terms it had contractually promised.

136. Plaintiff has been damaged and is "aggrieved" pursuant to the KCPA as a result of Defendant's conduct in that Defendant stole, converted, and/or illegally repossessed the Rio.

137. Plaintiff has been damaged and is "aggrieved" pursuant to the KCPA as a result of Defendant's conduct in that she paid for auto insurance that necessarily became worthless when Defendant seized the Rio.

138. Plaintiff has been damaged and is "aggrieved" pursuant to the KCPA as a result of Defendant's conduct in that Defendant harassed her while she was at work.

139. Plaintiff has been damaged and is "aggrieved" pursuant to the KCPA as a result of Defendant's conduct in, and to the extent, that she must seek alternative sources of financing.

140. Plaintiff has been damaged and is "aggrieved" pursuant to the KCPA as a result of Defendant's conduct because she was forced to retain counsel and litigate.

141. The KCPA should be liberally construed to promote its policies of protecting consumers against suppliers that commit deceptive and unconscionable acts and/or practices. K.S.A. § 50-623; *Williamson v. Amrani*, 283 Kan. 277, 234, 152 P.3d 60, 67 (2007).

142. For the purposes of calculating any applicable statute(s) of limitation, each KCPA violation, described herein, entailed a separate and distinct violation.

143. Plaintiff is a "consumer," as defined by K.S.A. § 50-624(b).

144. As a "consumer" under the KCPA, Plaintiff, by definition, had, and has, less bargaining power than Defendant.

145. Kia of Manhattan is a "supplier" as defined by K.S.A. § 50-624(l).

146. The purchase of the Rio was a "consumer transaction" as defined by K.S.A. § 50-624(c).

147. Defendant's violations of § 50-626, Deceptive Acts and Practices, include, but are not limited to, the following:

a. Willfully failing to state, concealing, suppressing, and/or omitting the material fact that no lender had accepted Plaintiff's credit application, in violation of K.S.A. § 50-626(b)(3);

b. Willfully failing to state, concealing, suppressing, and/or omitting the material fact that Kia Motors Finance had (at least) *twice* denied Plaintiff's credit application, in violation of K.S.A. § 50-626(b)(3);

c. Willfully implementing a "yo-yo" scheme, an inherently deceptive act or practice, in violation of K.S.A. § 50-626(a);

d. Willfully attempting to collect a larger down payment despite there being no contractual basis to do so, in violation of K.S.A. §§ 50-626(a);

e. Willfully stating the material falsehood that a larger down payment was due, in violation of K.S.A. § 50-626(b)(2);

f. Falsely stating that a larger down payment was due, in violation of K.S.A. §§ 50-626(b)(8), (b)(10);

g. Falsely stating that Plaintiff received a rebate of $1,150, in violation of K.S.A. § 50-626(b)(10);

h. Falsely stating that Plaintiff had stolen the Rio, in violation of K.S.A. § 50-626(b)(8);

i. Falsely claiming that a warrant would be issued for Plaintiff's arrest, in violation of K.S.A. § 50-626(b)(8);

j. Contacting the police in bad faith and/or impersonating the police, in violation of K.S.A. § 50-626(b);

k. Willfully using the falsehood that Plaintiff had violated some provision(s) of the RISC such that Defendant had a right to take the Rio, in violation of K.S.A. § 50-626(b); and

l. Stealing, converting, and/or illegally repossessing the Rio, in violation of K.S.A. § 50-626(b).

148. Defendant's violations of K.S.A. § 50-627, Unconscionable Acts and Practices, include, but are not limited to, the following:

a. Implementing and/or attempting to implement a "yo-yo" scheme, in violation of K.S.A. § 50-627(a);

b. Submitting multiple applications to Kia Motors Finance within minutes of each other, thereby demonstrating unconscionable indifference towards Plaintiff's credit expectancy given the reality of hard pulls, in violation of K.S.A. § 50-627(a);

c. Entering a contract with Plaintiff under false pretenses, in violation of K.S.A. § 50-627(a);

d. Slandering Plaintiff by claiming she had stolen the subject vehicle, in violation of K.S.A. § 50-627(a);

e. Involving the police in bad faith and/or impersonating a law-enforcement officer, in violation of K.S.A. § 50-627(a);

f. Generally harassing Plaintiff, a military servicemember, including while at work and during the workday, in violation of K.S.A. § 50-627(a);

g. Attempting to extract a larger down payment from Plaintiff despite having no legal basis to do so, in violation of K.S.A. § 50-627(a);

h. Keeping Plaintiff's down payment despite having no legal basis to do so, in violation of K.S.A. § 50-627(a);

i. Wrongfully repossessing, converting, and/or stealing Plaintiff's vehicle, in violation of K.S.A. § 50-627(a); and

j. Failing to provide Plaintiff with a material benefit from the consumer transaction, in violation of K.S.A. § 50-627(b)(3).

149. Pursuant to K.S.A. § 50-634(d)(1), Plaintiff is entitled to recover damages for violations that are "specifically proscribed in K.S.A. §§ 50-626, 50-627 and 50-640."

150. Pursuant to K.S.A. § 50-636(a), Plaintiff may recover a civil penalty of up to $10,000 for each KCPA violation by Defendant.

151. Pursuant to K.S.A. § 50-636(b), Plaintiff may recover a civil penalty of up to $20,000 for each willful KCPA violation by Defendant.

152. Pursuant to K.S.A. § 50-677, the Court may impose an enhanced penalty of an additional $10,000 per violation because Plaintiff is a protected consumer.

153. Plaintiff is entitled to recover her costs and reasonable attorneys' fees per K.S.A. § 50-634(e).

154. Plaintiff hereby prays for judgment against Kia of Manhattan in such amount as is allowable by law and to be determined at trial, for her actual damages, pre- and post-judgment interest at the greatest rate allowed by statute, statutory penalties, reasonable attorneys' fees, and for such other and further relief the Court finds just and proper under the circumstances.

COUNT IV:
UNLAWFUL REPOSSESSION

155. Plaintiff, for this Count IV of her First Amended Complaint against Kia of

Manhattan, incorporates the previous paragraphs as if wholly set forth herein.

156. As described above, Plaintiff is and was a "consumer" at all relevant times.

157. As described above, Defendant is and was a "seller" at all relevant times.

158. Plaintiff's purchase of the Rio entailed a financed amount of $21,569.

159. As described above, Plaintiff's purchase of the Rio was primarily for personal, family, and/or household purposes.

160. Kia of Manhattan routinely sells automobiles on credit.

161. As such, Plaintiff's purchase of the Rio constituted a "consumer credit sale."

162. Pursuant to K.S.A. § 16a-5-109, any RISC terms or conditions with regard to default were and are only unenforceable under two conditions: Plaintiff's failure to make a payment or "significant impairment" in the "prospect" of payment, performance, or realization of the collateral.

163. Neither of those conditions applied at the time of Defendant's repossession of the Rio such that any RISC provisions related to default were unenforceable.

164. As described above, the Rio was Plaintiff's property and parked at her home when it was taken by Defendant. Defendant's action in this regard was in no manner authorized by Plaintiff and thereby constituted trespass and theft. Laws against trespass and theft exist to preserve peace and order. Further, and quite obviously, allowing self-help "repossessions" where there has been *no default* would contravene basic public policy objectives and standards. As such, Kia of Manhattan necessarily breached the peace by stealing Plaintiff's vehicle.

KANSAS NOTICE OF SECURITY INTEREST

For Original Purchase Lien,
CANNOT BE USED FOR A SECURED/MORTGAGED VEHICLE LIEN

default. *See* K.S.A. § 84-9-601(a).

170. Because there was no default, Kia of Manhattan had no such rights, including remedies, relative to the collateral—i.e., the Rio.

171. As described herein, Defendant had no lawful basis for its repossession of the Rio. Indeed, it trespassed, misrepresented, converted, and stole in order to take the vehicle from Plaintiff. As such, Kia of Manhattan's enforcement of the RISC via repossession of the Rio was ***not*** commercially reasonable. *See* K.S.A. §§ 84-9-607(a),(c).

172. Defendant also had/has no right to dispose of the Rio.

173. If Defendant has sold the Rio, such sale was definitionally not commercially reasonable—again, Kia of Manhattan *stole* the Rio from Plaintiff—given that the Rio was not Defendant's property to sell.

174. As such, Defendant is, pursuant to K.S.A. § 16a-5-103(1), barred from collecting any alleged deficiency balance against Plaintiff as a result of the vehicle's sale.

175. The Rio is and was a "consumer good" at all relevant times.

176. Defendant definitionally knew Plaintiff's identity, that she was a debtor or obligor pursuant to the RISC, and how to communicate with her.

177. Pursuant to K.S.A. § 84-9-625(b), Plaintiff's damages for Defendant's non-compliance "may include loss resulting from the debtor's inability to obtain, or increased costs of, alternative financing."

178. Pursuant to K.S.A. § 84-9-625(a), the Court "may order or restrain collection, enforcement, or disposition of collateral on appropriate terms and conditions" if it determines that Defendant has not complied with the "appropriate terms and

conditions."

179. Pursuant to K.S.A. § 84-9-625, Plaintiff is entitled to recover damages, including statutory damages, from Kia of Manhattan.

180. Pursuant to K.S.A. § 84-9-625(c)(2), because Plaintiff was the debtor or obligor at the time Defendant failed to comply with regard to Article 9's default provisions, she shall recover statutory damages in an amount not less than the credit-service charge plus 10% of the principal amount of the obligation or the time-price differential plus 10% of the Rio's cash price.

181. Plaintiff hereby prays for judgment against Defendant for her actual damages, pre- and post-judgment interest in the greatest amount allowable by statute, reasonable attorneys' fees, statutory penalties, costs in bringing this action, and such other and further relief the Court finds just and proper under the circumstances.

COUNT V:
CONVERSION

182. Plaintiff, for this Count V of her First Amended Complaint against Kia of Manhattan, incorporates the previous paragraphs as if wholly set forth herein.

183. As described above, Plaintiff purchased the Rio. As such, the Rio was her property.

184. As described above, Defendant assumed or exercised control and ownership over the Rio, to the exclusion of Plaintiff and her right of ownership as to the Rio.

185. As described above, Kia of Manhattan's assumption or exercise of ownership of the Rio was without authorization. Indeed, Defendant simply stole the Rio from Plaintiff's home, before her first car payment was even due.

186. As such, Defendant committed conversion as to the Rio.

187. If Defendant has sold the Rio, Plaintiff did not give it authorization to do so.

188. As described above, Defendant also assumed or exercised control and ownership over Plaintiff's $500 down payment even after it had stolen the Rio back. This was necessarily to the exclusion of Plaintiff's ownership and control over that money.

189. As such, Defendant committed conversion as to the down payment.

190. Plaintiff was damaged by Defendant's conversion of the Rio and down payment.

191. In Kansas, conversion is a strict-liability tort.

192. Plaintiff hereby prays for judgment against Defendant in such amount as is allowable by law and to be determined at trial, for her actual damages, pre- and post-judgment interest at the greatest rate allowed by statute, and for such other and further relief as may be just and proper under the circumstances.

COUNT VI:
BREACH OF CONTRACT

193. Plaintiff, for this Count VI of her First Amended Complaint against Kia of Manhattan, incorporates the previous paragraphs as if wholly set forth herein.

194. As described, Plaintiff entered the RISC with Defendant for the purchase of the Rio.

195. Sufficient consideration supported that contract.

196. Plaintiff performed and/or was willing to perform in compliance with the RISC. As stated, she made a $500 down payment on the Rio on the date of purchase.

197. As described herein, Defendant thoroughly breached the RISC.

198. Defendant's breach of that contract was the direct and proximate cause of damages to Plaintiff, including but not limited to Defendant's retention of her down payment and unlawful seizure of the Rio.

199. Plaintiff hereby prays for judgment against Defendant in such amount as is allowable by law and to be determined at trial, for her actual damages, pre- and post-judgment interest at the greatest rate allowed by statute, punitive damages, and for such other and further relief as may be just and proper under the circumstances.

COUNT VII:
UNJUST ENRICHMENT

200. Plaintiff, for this Count VII of her First Amended Complaint, incorporates the previous paragraphs as if wholly set forth herein.

201. By the deceptive, misleading, bad-faith, and unlawful conduct alleged herein, Defendant unjustly received a benefit in the windfall it received in the form of Plaintiff's $500 down payment, which it retained despite converting, illegally repossessing, and/or stealing the Rio, as described.

202. It is unjust to allow Defendant to retain the funds from their deceptive, misleading, bad-faith, and unlawful conduct alleged herein without providing compensation to Plaintiff.

203. Defendant acted with conscious disregard for the rights of Plaintiff.

204. Defendant has acted in a wanton and willful manner with respect to the rights of Plaintiff.

205. Plaintiff is entitled to restitution, disgorgement, and/or the imposition of a constructive trust upon all profits, benefits, and other compensation obtained by Fifth Third and Van Wagenen from their deceptive, misleading, bad-faith, and unlawful conduct.

206. Plaintiff hereby prays for judgment against Defendant in such amount as is allowable by law and to be determined at trial, for her actual damages, pre- and post-judgment interest at the greatest rate allowed by statute, for her reasonable attorneys' fees, and for such other and further relief as may be just and proper under the circumstances.

COUNT VIII:
FRAUD

207. Plaintiff, for this Count VIII of her First Amended Complaint, incorporates the previous paragraphs as if wholly set forth herein.

208. As discussed above, "yo-yo" schemes are inherently fraudulent in that car dealerships mislead borrowers into believing that financing is finalized even while *knowing* that the financing is *not* finalized.

209. As described above—and as evidenced by the germane time-stamps—Defendant entered the RISC with Plaintiff before receiving the result(s) of the credit application it submitted on her behalf.

210. The RISC was not conditional and constituted a valid contract between Plaintiff and Defendant.

211. The relevant (mis)representations Defendant made in the RISC were material.

212. Defendant knew the representations in the RISC to be false and/or untrue. Defendant knew this because it had not received the result(s) of Plaintiff's credit application.

213. In the alternative to *knowing* that the representations in the RISC were false and/or untrue, Defendant was, as described, *reckless* in making the representations it made in the contract because it *knew* that Plaintiff's financing had not been finalized. Indeed, every lender ultimately denied Plaintiff's application.

214. Defendant made the (mis)representations in the RISC with the intent of inducing Plaintiff to purchase a/the Rio. As described, Plaintiff was only nineteen and expressly budget-constrained. Plaintiff informed Defendant that she could not and/or would not pay more than $340 per month for her car payment. Plaintiff informed Defendant that she could make a down payment of $500. Naturally, Defendant wanted to make a sale despite these constraints. In order to effect the objective of a sale, Defendant presented Plaintiff with the RISC, which she entered, and definitionally induced her to sign the RISC by making representations that complied with Plaintiff's stated budget constraints. As described repeatedly herein, Defendant had no idea whether a lender would make a loan at the RISC's terms—indeed, they ultimately would not—but nonetheless offered Plaintiff the contract so that she would act upon it.

215. Plaintiff acted reasonably in her reliance and acting upon Defendant's (mis)representations. In fact, Plaintiff was *eminently* reasonable given the circumstances.

216. As described throughout, Plaintiff's reliance on Defendant's (mis)representations injured her. These injuries include, but are not necessarily limited to, her down payment of $500; the amount she spent on futile auto insurance; diminished credit expectancy; loss of use of the Rio; and emotional distress.

217. Plaintiff hereby prays for judgment against Defendant in such amount as is allowable by law and to be determined at trial, for her actual damages, pre- and post-judgment interest at the greatest rate allowed by statute, punitive damages, and for such other and further relief as may be just and proper under the circumstances.

COUNT IX:
FRAUD THROUGH SILENCE

218. Plaintiff, for this Count IX of her First Amended Complaint, incorporates the previous paragraphs as if wholly set forth herein.

219. As discussed above, "yo-yo" schemes are inherently fraudulent in that car dealerships mislead borrowers into believing that financing is finalized even while *knowing* that the financing is *not* finalized.

220. As described above—and as evidenced by the germane time-stamps—Defendant entered the RISC with Plaintiff before receiving the result(s) of the credit application it submitted on her behalf.

221. The RISC was not conditional and constituted a valid contract between Plaintiff and Defendant.

222. The relevant (mis)representations Defendant made in the RISC were material.

223. As described throughout, Defendant had knowledge of material fact(s)—

that the financing was not finalized—and Plaintiff did not have such knowledge.

224. Plaintiff could not have discovered such fact(s) through the exercise of reasonable diligence.

225. Defendant was under an obligation to communicate the material facts to Plaintiff.

226. As described, Plaintiff acted reasonably in her reliance and acting upon Defendant's (mis)representations. In fact, Plaintiff was *eminently* reasonable given the circumstances.

227. Plaintiff did not know, or have reason to know, of facts that made her reliance in this regard unreasonable.

228. As described, Plaintiff's reliance on Defendant's (mis)representations injured her. These injuries include, but are not necessarily limited to, her down payment of $500; the amount she spent on futile auto insurance; diminished credit expectancy; loss of use of the Rio; and emotional distress.

229. Plaintiff hereby prays for judgment against Defendant in such amount as is allowable by law and to be determined at trial, for her actual damages, pre- and post-judgment interest at the greatest rate allowed by statute, punitive damages, and for such other and further relief as may be just and proper under the circumstances.

COUNT X:
INJUNCTIVE RELIEF

230. Plaintiff, for this Count X of her First Amended Complaint, incorporates the previous paragraphs as if wholly set forth herein.

231. As described herein, Defendant acted with especial disregard for the law as

it sold Plaintiff a car and then stole it back.

232. As described herein, Defendant initiated an "adverse action" against Plaintiff with no written notice whatsoever, let alone one that was ECOA-compliant.

233. On information and belief, Defendant routinely implements "adverse actions" against consumers without providing ECOA-compliant notice statements.

234. Pursuant to 15 U.S.C. § 1691e(c), the Court may grant equitable and/or declaratory relief it deems necessary to enforce the ECOA's notice requirements.

235. Plaintiff hereby prays for equitable relief in the form of an order enjoining Defendant from taking "adverse actions" against consumers without providing ECOA-compliant notices of such.

DEMAND FOR JURY TRIAL

Plaintiff hereby demands a jury trial on all issues so triable.

DESIGNATION OF PLACE OF JURY TRIAL

Plaintiff designates Kansas City, Kansas as the place for this case to be tried to a jury.

Respectfully submitted,

/s/ Andrew Taylor
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Attorneys for Plaintiff GIRLIE SANCHEZ

SUPERIOR COURT OF CALIFORNIA
COUNTY OF RIVERSIDE

GIRLIE SANCHEZ, an individual; Plaintiff, v. OREMOR OF TEMECULA, LLC d/b/a TEMECULA VALLEY TOYOTA and DOES 1 through 10, inclusive, Defendants.	CASE NO: **MCC1801143** COMPLAINT AND DEMAND FOR JURY TRIAL

INTRODUCTION

1. Temecula Valley Toyota threatened to take Plaintiff's father's house, filed a false police report, and had Plaintiff wrongfully threatened with arrest. Defendant blackmailed and extorted Plaintiff into giving her car back, under a wrongful threat of being arrested and sent to prison, despite the fact Defendant had no right to possession of the car.

2. Girlie Sanchez signed a contract with Temecula Valley Toyota ("Defendant") for the purchase of a car, which she needed for her family and to get her to and from work. Pursuant to this contract, Defendant had 10-day option to cancel the contract. Defendant did not exercise the option within 10 days.

3. However, Defendant did want to cancel the contract about 30 days later because it could not find third-party financing. Unable to force Plaintiff to sign a new contract on demand, Defendant yelled at her in front of other customers, telling her that it was going to have her arrested. Around the same time, Defendant backdated a 10-day Notice of Cancellation and mailed it to Plaintiff, pretending that it tried to cancel the contract during the time it had a right to do so. When this didn't work, Defendant told Plaintiff's father that it was going to take his house if Plaintiff did not return the vehicle, causing Plaintiff to have an argument and physical altercation with her father. As a result, Plaintiff, her husband, and her 8-year-old son were kicked out of her father's house and were rendered homeless.

4. Defendant then called Plaintiff's boss to shame Plaintiff in an effort to regain possession of the vehicle. When Plaintiff would still not return the vehicle that she had a binding contract for, Defendant filed a false police report, telling the police that it timely cancelled the contract, and had a right to repossess, when it did not. When the police showed up at Plaintiff's place of work and threatened to arrest her, Plaintiff relented and returned the vehicle.

5. Defendant's conduct violates both California statutory and common law, including the Rosenthal Fair Debt Collection Practices Act, Intrusion Upon Seclusion, Civil Extortion, the California Commercial Code, Breach of Contract, Breach of Implied Covenant of Good Faith and Fair Dealing, California Business and Professions Code, and Negligence.

6. Plaintiff has suffered actual damages, including, but not limited to, mental and emotional distress, pain and anguish, humiliation, embarrassment, headaches, difficulty sleeping, stomach problems, nervousness, anxiety, hopelessness, fear, and a feeling that she is no longer safe. Moreover, as a result of being kicked out of their house due to Defendant's

threats, Plaintiff's 8-year old son has suffered severe emotional distress as well, which has resulted in physical sickness, and caused further anxiety in the family

ABUSIVE DEBT COLLECTION IS UNLAWFUL

7. The United States Congress has found abundant evidence of the use of abusive, deceptive, and unfair debt collection practices by many debt collectors, and has determined that abusive debt collection practices contribute to the number of personal bankruptcies, to marital instability, to the loss of jobs, and to invasions of individual privacy.

8. The California legislature has determined that the banking and credit system and grantors of credit to consumers are dependent upon the collection of just and owing debts and that unfair or deceptive collection practices undermine the public confidence that is essential to the continued functioning of the banking and credit system and sound extensions of credit to consumers. The Legislature has further determined that there is a need to ensure that debt collectors exercise this responsibility with fairness, honesty, and due regard for the debtor's rights and that debt collectors must be prohibited from engaging in unfair or deceptive acts or practices.[1]

9. GIRLIE SANCHEZ brings this action to challenge the actions of OREMOR OF TEMECULA LLC d/b/a TEMECULA VALLEY TOYOTA ("Defendant") and DOES 1 through 50, Inclusive, with regard to unlawful and abusive collection attempts, including its wrongful repossession of her vehicle.

10. Plaintiff makes these allegations on information and belief, with the exception of those allegations that pertain to a Plaintiff, or to a Plaintiff's counsel, which Plaintiff alleges on personal knowledge.

11. While many violations are described below with specificity, this Complaint alleges violations of the statute cited in its entirety.

12. Unless otherwise stated, all the conduct engaged in by Defendant took place in California.

13. Any violations by Defendants were knowing, willful, and intentional, and Defendant did not maintain procedures reasonably adapted to avoid any such violation.

[1] Cal. Civ. Code §§ 1788.1 (a)-(b)

14. Unless otherwise indicated, the use of Defendant's name in this Complaint includes all agents, employees, officers, members, directors, heirs, successors, assigns, principals, trustees, sureties, subrogees, representatives, and insurers of Defendant's named.

JURISDICTION AND VENUE

15. Defendants are authorized to do business in California.

16. Jurisdiction of this Court arises under § 395(b) of the California Code of Civil Procedure.

17. Venue is proper in that the conduct complained of occurred here and Defendants transact business here and have significant and substantial contacts with the State of California.

PARTIES

18. Plaintiff is a consumer that resides in the County of Riverside, State of California, from whom Defendants sought to collect a consumer debt which was due and owing or alleged to be due and owing from Plaintiff. In addition, Plaintiff is a "consumer" as that term is defined by Cal. Civ. Code § 1785.3(c).

19. Defendant is a company operating from the State of California.

20. Plaintiff is informed and believes, and thereon allege, that Defendant in the ordinary course of business, regularly, on behalf of themselves or others, engage in "debt collection" as that term is defined by California Civil Code § 1788.2(b), and is therefore a "debt collector" as that term is defined by California Civil Code § 1788.2(c).

21. This action arises out of a "debt" as that term is defined by Cal. Civ. Code § 1788.2(d) that was incurred as a result of a "consumer credit transaction" as defined by Cal. Civ. Code § 1788.2(e).

FACTUAL ALLEGATIONS

22. In October 2017, Plaintiff contacted Defendant about purchasing a car.

23. In response, on or about October 19, 2017, "Jonathan," a Defendant employee, sent Plaintiff a credit application to see if she qualified to purchase a Toyota C-HR.

24. The next day, Jonathan told Plaintiff via text that her "credit is light," and asked if she could get a co-signer for the purchase of the car.

25. Plaintiff's mother, Rosita Sanchez, agreed to co-sign for the car and submitted a credit application to Defendant. In response, on October 28, 2017, Jonathan texted Plaintiff: "No problem getting a car with your mom and you, when are you free?"

26. On November 4, 2017, Plaintiff and her mom went to Defendant's Defendant and purchased a Toyota C-HR, VIN # NMTKHMBXIJR030026 ("vehicle"). *See* **Exhibit A**, a true and correct copy of the retail installment sales contract. They drove the car home that day.

27. The retail installment sales contract ("RISC") states that total sales price of $31,370.40, cash price of $23,798.00, and monthly payments of $435.70 starting December 19, 2017.

28. Under the terms of the contract, if Defendant "is unable to assign the contract to any one of the financial institutions with whom [Defendant] regularly does business under an assignment acceptable to [Defendant] may cancel the contract." *See* **Exhibit A**.

29. However, in order for Defendant to cancel the contract pursuant to that provision, it was required to "give you written notice (or in any other manner in which actual notice is given to you) within 10 days this contract is signed by Seller."

30. Two days after the contract was signed, on November 6, 2017, Jonathan texted Plaintiff and asked her how the new car was.

31. Three days after the contract was signed, on November 7, 2017, Jonathan texted Plaintiff and asked her if she had any questions about the new car. In response, Plaintiff said the new car was "awesome" and "beautiful," but that she could hear air from the outside when she was driving on the freeway. Jonathan said that he could arrange a time with service to look at the car for her, and Plaintiff thanked him.

32. Seven days after the contract was signed, on November 10, 2017, Plaintiff took the vehicle to Defendant dealer so service could look at the issue she was having with her windows.

33. Within 10 days of the signing of the contract, Defendant did not exercise its right to cancel,

34. On November 16, 2017, almost 2 weeks after she signed the contract, Jonathan texted Plaintiff and asked if service looked at her car yet.

35. On December 4, 2017, one month after the contract was signed, Jonathan texted Plaintiff and asked her to contact Nathan, Defendant's Finance Manager, because Nathan needed to talk to her. On December 17, 2017, Plaintiff received a text from Nathan stating he wanted Plaintiff to "redo the paperwork or contract."

36. Also around that date, because Plaintiff had yet to receive a bill from instructing her where to make the first payment that was due December 19, 2017, she contacted Toyota Motor Credit Corporation by calling 800-874-8822.

37. Mariah, a representative of Toyota Motor Credit Corporation, advised Plaintiff to go to Defendant to make a payment because she could not access an account for Plaintiff for the purchase of the car, VIN # NMTKHMBX1JR030026.

38. That same day, on December 18, 2017, Nathan showed up at Plaintiff's home in Lake Elsinore, where Plaintiff lived with her husband, son, and parents. Because Plaintiff was not home, Nathan left his business card with Plaintiff's brother, Ernie Sanchez III.

39. On December 19, 2017, Plaintiff went to Defendant to make a car payment. Once there, Nathan told Plaintiff that he wanted to redo the contract for the car naming only Plaintiff's mother as the owner. But obviously, because Plaintiff's mother wasn't present, they could not instantly "redo" the contract. Nathan began insisting that they had to go to Plaintiff's mother's place of work to get her to sign the new contract. Not wanting to interfere with her mother's job, Plaintiff said no, but offered to come back with her mother the next morning.

40. The Defendant Manager at the dealership then confronted Plaintiff and told her that she had to give the car back. Scared, Plaintiff tried to leave, and the Manager threatened to call the police on her. The manager then screamed at Plaintiff, in front of everybody present at the Defendant's dealership, yelling how bad her credit history was and that her credit report had a previous repossession on it. The head manager humiliated Plaintiff in front of a bunch of strangers and made her feel like a worthless piece of trash.

41. Because Plaintiff needed the car to get work and school, she left Defendant's dealership with the car and sent the first month's car payment to Defendant via certified mail. *See* **Exhibit B**, a true and correct copy of the payments made by Plaintiff.

42. Sometime between December 20-22, 2017, the Defendant spoke with Plaintiff's father, and told him that the Defendant was going to take his house if Plaintiff did not return the vehicle.

43. Scared of having his house taken away, Plaintiff's father looked for Plaintiff's car at her place of work, but it was not there. When he next saw Plaintiff, Plaintiff's father tried to forcibly take Plaintiff's purse from her, to get the car key, by locking his arm around her to stop her from resisting. When she screamed, Plaintiff's husband came to her aid and had to wrest his wife free from her father's grip. Upset that Plaintiff was not returning the car, despite Defendant's threats, Plaintiff's father then kicked Plaintiff, her husband, and her 8-year old son out of the house, ordering they pack up their things immediately, leaving them homeless.

44. On January 3, 2018, Kaelyn Parkhurst, Defendant's employee, called Plaintiff at her job, and told Plaintiff that if she did not return the car within the next week, the Defendant would file criminal charges against Plaintiff, accusing her of stealing the vehicle.

45. Ms. Parkhurst also called Plaintiff's Manager, Gerry Underwood, harassing him regarding the vehicle as well.

46. On January 30, 2018, Temecula Police Department Deputy Dan Torning came to Plaintiff's job looking to repossess the vehicle. He told Plaintiff that he would handcuff her and bring her to jail if she did not return the car immediately. Plaintiff agreed to return the vehicle immediately to avoid going to jail, but could not reach her husband who had possession of the car at the time. Plaintiff began to panic, and through legal counsel's assistance, was able to avoid arrest and agreed to return the car by 8 am the next morning.

47. Upon information and belief, this threat to arrest was based on a police report filed by Defendant's dealership in which the Defendant claimed that it had cancelled the contract within the 10-days required by the contract by sending out a certified letter to effect on

November 14, 2017. *See* **Exhibit C**, a true and correct copy of the envelope of the alleged cancellation of contract letter However, while Defendant tried to make it look like the letter was sent on November 14, 2017 by stamping it with a Pitney Bowes Machine with a November 14, 2017 date, the USPS tracking for the letter clearly shows that this letter was not sent to the post office until December 20, 2017, 46 days after Plaintiff signed the contract. *See* **Exhibit D**, a true and correct copy of the post office tracking of the certified mail.

48. In other words, Defendant did not, and knew it did not, cancel the contract in the required 10-day window, and therefore, Defendant did not have a right to cancel the contract.

49. In attempt to avoid this litigation, on August 7, 2018, Plaintiff, through her attorneys, sent identical letters via certified mail, to Richard J. Romero, Chief Executive Officer of Defendant, as well as Tom Rudnai, the President of Temecula Valley Toyota. These letters were received and signed for on August 10, 2018.

50. In her letter, Plaintiff explained the substance of her claims against Defendant and requested that the parties engage in Structured Negotiation in attempt to resolve her dispute.

51. In further effort to resolve this case before filing, on September 4, 2018, Plaintiff's counsel sent Defendant's counsel a Structured Negotiation Agreement which if agreed to, would permit the parties to try to resolve Plaintiff's dispute without the need for litigation. This Agreement also provided that if the parties were unable to resolve Plaintiff's claims, they would agree to go to binding arbitration.

52. Defendant did not sign the Structured Negotiation Agreement and as a result, Plaintiff now brings suit.

COUNT I
VIOLATION OF THE ROSENTHAL FAIR DEBT COLLECTION PRACTICES ACT Cal. Civ. Code §§ 1788-1788.32 (RFDCPA)

53. Plaintiff incorporates by reference all of the above paragraphs of this Complaint as though fully stated herein.

54. By falsely representing to police that Plaintiff stole the vehicle, or had no right to the vehicle, or that Defendant timely sent Plaintiff the 10-day cancellation notice, Defendant violated Cal. Civ. Code § 1788.10(a), (b), and (d) by: (1) using criminal means to cause harm to Plaintiff, her reputation, and her property and (2) asserting that Plaintiff committed a crime by retaining possession of the vehicle, which was false.

55. By contacting Plaintiff's boss regarding the collection of the debt, and harassing him, Defendant violated Cal. Civ. Code § 1788.12(a).

56. By representing that it had a right to the vehicle when it did not, by falsifying documents to make it look like it exercised its 10-day right to cancel when it did not, by telling Plaintiff's father that it would take his house if Plaintiff did not return the vehicle, and by filing a false police report in order to obtain the vehicle from Plaintiff, Defendant violated (CC 1788.17 as it incorporates 15 U.S.C. § 1692e) by using false, deceptive, and misleading representations in connection with the collection of Plaintiff's alleged debt.

57. Through the above conduct, Defendant violated Civil Code 1788.17 (which incorporates 15 U.S.C. § 1692b and c) by discussing Plaintiff's alleged debt with others.

58. Through the above conduct, Defendant violated Civil Code § 1788.17 (which incorporates 15 U.S.C. § 1692d) by engaging in conduct, the natural consequence of which is to harass, oppress, or abuse any person in connection with the collection of a debt, and by threatening to and using criminal means, i.e. filing a false police report, in regard to such.

59. Through the above conduct, Defendant violated Civil Code § 1788.17 (which incorporates 15 U.S.C. § 1692e(2)(A)) by falsely representing the character, amount, and legal status of a debt.

60. Through the above conduct, Defendant violated Civil Code § 1788.17 (which incorporates 15 U.S.C. § 1692e(10)) by using false representations and deceptive means to collect a debt.

61. Through the above conduct, Defendant violated Civil Code § 1788.17 (which incorporates 15 U.S.C. § 1692f) by using unfair and unconscionable means to collect Plaintiff's alleged debt.

62. Through the above conduct, Defendant violated Civil Code § 1788.17 (which incorporates 15 U.S.C. § 1692f and 1692f(6)), by engaging in unfair or unconscionable means to collect or attempt to collect a debt, including taking non-judicial action to affect dispossession of property to which it had no present right of possession.

63. The foregoing acts and omissions constitute numerous and multiple violations of the RFDCPA.

64. As a result of each and every violation of the RFDCPA, Plaintiff is entitled to any actual damages pursuant to Cal. Civ. Code § 1788.30(a), statutory damages for a knowing or willful violation in the amount up to $1,000.00 pursuant to Cal. Civ. Code § 1788.30(b), and reasonable attorney's fees and costs pursuant to Cal. Civ. Code § 1788.30(c) from Defendant.

COUNT II
BREACH OF CONTRACT
(Against Defendant and DOES 1 through 50)

65. Plaintiff incorporates by reference all of the above paragraphs of this Complaint as though fully stated herein.

66. Plaintiff and Defendant entered into a contract for the purchase of the vehicle. *See* **Exhibit A**.

67. Under the express terms of the contract, if Defendant wanted to cancel the contract for failure to assign it to a third party, it had to notify Plaintiff within 10 days of the signing of the contract. Defendant did not notify Plaintiff that it elected to cancel within the 10 days. *See* **Exhibit D.**

68. Defendant then materially breached the contract by causing the vehicle to be taken from Plaintiff.

69. As a result of Defendant's material breach of the contract, Plaintiff sustained additional compensatory, general and special damages, including loss of use damages, in an amount according to proof.

///

COUNT III
BREACH OF IMPLIED COVENANT OF GOOD FAITH AND FAIR DEALING
(Against Defendant and DOES 1-50)

70. Plaintiff incorporates by reference all of the above paragraphs of this Complaint as though fully stated herein.

71. There is an implied covenant of good faith and fair dealing in every contract that neither party will do anything which will injure the right of the other to receive the benefits of the agreement.

72. The terms of the loan imposed upon Defendant a duty of good faith and fair dealing in this matter.

73. This covenant protects the benefits of the contract that the parties reasonably contemplated when they entered into the agreement.

74. Defendant willfully breached the implied covenant of good faith and fair dealing with Plaintiff when it tried to cancel the contract after the time to do so had expire. Specifically, Defendant falsely represented to Plaintiff and the police that it had sent a letter within the requisite 10 days when it had not, and even filed a police report against Plaintiff based upon such false letter.

75. Defendant's conduct has caused Plaintiff to be dispossessed of the vehicle, causing her actual damages.

COUNT IV
NEGLIGENCE

76. Plaintiff incorporates by reference all of the above paragraphs of this Complaint as though fully stated herein.

77. Defendant's outrageous, abusive, and intrusive acts as described herein constitute negligence.

78. Defendant negligently inflicted emotional distress upon Plaintiff.

79. Defendant owed Plaintiff a duty of care to: (1) cancel the contract within 10 days of creation if it was going to do so, (2) under California Penal Code 148.5(a) to not file a false

police report against her, and to (3) refrain from unlawful debt collection under California Civil Code § 1788, among others.

80. By trying to cancel the contract after 10-days, and then falsifying documents to try to cancel the contract, then telling Plaintiff's father that his house would be taken if Plaintiff did not return the vehicle, and then filing a false police report misrepresenting that Defendant had a right to the vehicle, Defendant breached its contractual and statutory duties to Plaintiff.

81. The injury resulted from an occurrence the nature of which the above statutes were designed to protect Plaintiff from.

82. Plaintiff is a member of the class of persons the statutes were designed to protect.

83. Defendant conduct is the "but for" cause of Plaintiff's injuries. In other words, "but for" Defendant's conduct, Plaintiff would not have suffered severe emotional distress and would not have lost the use of her vehicle.

84. As a direct and proximate result of Defendant's conduct, Plaintiff has suffered severe emotional distress and other harm, and will continue to suffer harm, in an amount according to proof at the time of trial.

COUNT V
VIOLATION OF THE CALIFORNIA BUSINESS AND PROFESSIONS CODE § 17200

85. Plaintiff incorporates by reference all of the above paragraphs of this Complaint as though fully stated herein.

86. Business and Professions Code § 17200 et seq prohibits any unlawful, unfair or fraudulent business practice, an unfair, deceptive, untrue or misleading advertising, and any violation of Business and Professions Code § 17500 et seq.

87. Defendant's conduct involves their business acts and practices.

88. In particular, Defendant is a car retailer, routinely entering into contracts for the purchasing and leasing of vehicles. As part of their duties in same, it is to honor the contracts as written, and not take any unfair action regarding same.

89. Defendant's conduct is unlawful to the extent that they have violated the law as alleged in this complaint.

90. Defendant's conduct is unfair because it is entirely against California's public policy of, among other things, enforcing contracts as written and prohibiting the filing of false police reports.

91. Plaintiff has suffered economic injury, and as a result of Defendant's conduct, which has deprived her of her use of the vehicle and caused her to be kicked out of her home.

92. Plaintiff has suffered damages due to Defendant' conduct, including but not limited to, loss of use of the vehicle, additional housing costs, and severe aggravation and stress.

COUNT VI
CONVERSION

93. Plaintiff incorporates by reference all of the above paragraphs of this Complaint as though fully stated herein.

94. Plaintiff had possession of the vehicle.

95. By filing a false police report and taking possession of Plaintiff's vehicle, Defendant intentionally and substantially interfered with Plaintiff's property and her rights thereto.

96. Plaintiff was harmed and Defendant's conduct was a substantial factor in causing Plaintiff's harm.

COUNT VII
INTRUSION UPON SECLUSION

97. Plaintiff incorporates by reference all of the above paragraphs of this Complaint as though fully stated herein.

98. Defendant's acts described herein constitute an invasion of Plaintiff's privacy and an intrusion upon her right to seclusion.

99. Plaintiff has a common law right to, and a reasonable expectation of privacy at her home, place of employment, and in regard to her private affairs.

100. Defendant's abusive and improper conduct regarding its attempts to regain possession of the vehicle, including but not limited to: (1) screaming at Plaintiff and announcing her

negative credit history to other customers at the Defendant, as well as her past repossession; (2) coming to her home and threatening to Plaintiff's family that they would lose their house if Plaintiff did not return the vehicle; (3) contacting Plaintiff's employer in attempt to collect the property; (4) filing a false police report, causing a police officer to come to Plaintiff's work and threaten Plaintiff with arrest, (5) falsely accusing Plaintiff of a crime in order to extort her out of property to which the Defendant had no present right of possession, constitute a substantial invasion of Plaintiff's seclusion and privacy, and would be highly offensive to a reasonable person.

101. Defendant intended to cause emotional distress and/or engaged in reckless disregard of the probability of causing Plaintiff emotional distress.

102. As a proximate result of Defendant's conduct, Plaintiff has suffered damages in an amount to be determined by proof and finder of fact at trial.

103. Defendant acted with oppression, fraud, and/or malice, thereby entitling Plaintiff to punitive damages in an amount according to proof and a finder of fact at trial.

COUNT XIII
CIVIL EXTORTION

104. Defendant committed civil extortion by obtaining of property from another, with his consent, or the obtaining of an official act of a public officer, induced by a wrongful use of force or fear, or under color of official right.

105. Defendant committed civil extortion by obtaining property from another by use of fear, including threating to do an unlawful injury of another (wrongfully dispossessing Plaintiff of her car); accusing Plaintiff of a crime; exposing Plaintiff to disgrace, and exposing secrets affecting Plaintiff.

106. As a proximate result of Defendant's conduct, Plaintiff has suffered damages in an amount to be determined by proof and finder of fact at trial.

107. Defendant acted with oppression, fraud, and/or malice, thereby entitling Plaintiff to punitive damages in an amount according to proof and a finder of fact at trial.

COUNT IX
DECLARATORY AND INJUNCTIVE RELIEF

108. Plaintiff incorporates by reference all of the above paragraphs of this Complaint as though fully stated herein.

109. Plaintiff alleges that there is an actual controversy between Plaintiff and Defendants, which relates to the legal rights and duties of the parties as they relate to Plaintiff's property, as discussed above.

110. Plaintiff seeks declaratory relief in the form of a judicial declaration that the contract between Defendant on the one hand, and Plaintiff and her mother on the other, is valid.

111. Declaratory relief is necessary for the purpose of determining how the parties engage in future conduct.

PRAYER FOR RELIEF

112. WHEREFORE, Plaintiff Girlie Sanchez respectfully requests that judgment be entered in her favor, and against Defendants, for the following:

a. Statutory, actual, and punitive damages;

b. Attorneys' fees and costs;

c. For declaratory, injunctive, and all other equitable relief, including an order declaring that the contract for the vehicle at issue is valid and enforceable;

d. For such other and further relief as this Court deems just and proper; and

e. Pre-judgment and post-judgment interest at the legal rate.

TRIAL BY JURY

113. Plaintiff demands trial by jury.

DATED: October 3, 2018

CONSUMER ACTION LAW GROUP, PC

By: _____

YELENA GUREVICH 269487
lena@calgroup.org
Attorney For Plaintiff Girlie Sanchez

2021 WL 2631962 (Cal.Super.) (Arbitration Award)
Superior Court of California.
Los Angeles County

Girlie **SANCHEZ**, an individual, Claimant,

v.

OREMOR OF TEMECULA, LLC dba, Temecula Valley Toyota, Respondent.

Nos. 21STCP01595, 12200055820.

February 24, 2021.

Editor's Note: This document was acquired from a Court file.

Case Type: Contract
Award Amount: $227,000
Attorney for Petitioner: Ronald Wilcox; Yelena A. Gurevich
Attorney for Respondent: Paul M. Mahoney; Ryan P. Mahoney; Richard A. Soll
Award Date: 02/24/2021
Arbitrator: Lexi W. Myer

Final Award

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Arbitrator: Lexi W. Myer

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ARBITRATOR

JAMS ARBITRATION

Arbitrator

The parties have appointed as sole Arbitrator:

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Place of Arbitration: JAMS Virtual Arbitration

Hearing:A hearing was originally scheduled to occur in the JAMS Irvine Resolution Center. Due to health concerns raised by the COVID-19 pandemic, the Arbitrator ordered the hearing to be held virtually, via the Zoom platform. The parties were offered training assistance by the JAMS administration in order to be fully conversant in virtual hearings. Ultimately, a hearing was held on June 22-24, 2020. The parties submitted Initial Closing Briefs on July 24, 2020 and Reply Closing Briefs on August 7, 2020. The matter was submitted as of that date.

Witnesses: The following witnesses were examined and cross-examined: Nathan Banuelos, Amber Blackburn, Kaelyn Parkhurst, Tom Rudnai, Jun Nagaoka, Esmeraldo Nieto, Girlie **Sanchez**, Rosita **Sanchez**, and Jonathan Teng.

Exhibits: All exhibits introduced at hearing were deemed admitted, except those objected to by the parties and specifically ruled inadmissible.

Procedural History: On October 4, 2018, Claimant filed a Complaint and Demand for Jury Trial in Riverside County Superior Court. Pursuant to the arbitration clause contained in the parties' Retail Installment Sales Contract, Claimant filed a Demand for Arbitration to JAMS on April 1, 2019. This Demand was amended on June 10, 2019. Respondent filed an Answer on September 20, 2019.

The hearing in this matter took place via Zoom on June 22-24, 2020. On August 27, 2020, the Arbitrator issued an Interim Award, stating that Claimant Girlie **Sanchez** established causes of action for her 42 U.S.C. § 1983, Rosenthal Fair Debt Collection Practices Act (RFDCPA), Fair Credit Reporting Act (FRCA), civil extortion, intrusion upon seclusion, negligence, and negligent infliction of emotional distress (NIED) claims against Respondent Oremor of Temecula, LLC d/b/a/ Temecula Valley Toyota (TVT). The Arbitrator also found that Claimant failed to establish her causes of action for breach of contract and the implied covenant of good faith and fair dealing, conversion, 15 U.S.C. § 1691(d) and California Business and Professions Code § 17200.

As a result of these findings, the Arbitrator determined that Claimant was entitled to an award of $75,000 in actual damages, $2,000 in statutory damages and $150,000 in punitive damages. The Interim Award cited the parties' arbitration agreement, which states: “Each party shall be responsible for its own attorney, expert and other fees, unless awarded by the arbitrator under applicable law.”' (IA at 42, citing Ex. 104 at 7) Pursuant to this provision, the Arbitrator requested that the parties submit further briefing regarding whether an award of attorney fees and costs was appropriate under applicable law.

On October 7, 2020, the parties submitted simultaneous Opening Briefs regarding entitlement to attorney fees and costs. On October 28, 2020, the parties submitted simultaneous Reply Briefs. On November 9, 2020, the Arbitrator issued an Order Re Claimant's Entitlement to Attorney Fees and Costs, finding that Claimant was the prevailing party and entitled to an award of attorney fees and costs. As part of the Order, the Arbitrator set a briefing schedule for Claimant's application for fees and costs. Originally, briefing was to be submitted as of December 18, 2020, but due to a series of extensions, some of which were medically related, the briefing was finally submitted as of February 9, 2021.

On February 18, 2021, the Arbitrator issued an Order Re Claimant's Motion for Attorney's Fees and Costs. The findings of this Order are incorporated below.

Agreement to Arbitrate: The parties' Agreement to Arbitrate is contained in the November 4, 2017 Retail Installment Sale Contract. According to the agreement, this matter is submitted to binding arbitration by a single arbitrator at JAMS, by mutual consent.

Applicable Law and Rules: This arbitration is governed by the JAMS Comprehensive Arbitration Rules and Procedures, in accordance with the JAMS Policy on Consumer Arbitration Minimum Standards of Procedural Fairness. In addition, the arbitration is governed by the Federal Arbitration Act.

I. FACTUAL BACKGROUND

The following is a summary of certain facts found by the Arbitrator to be true and relevant to the decision. Any differences between this summary and either of the parties' positions or contentions are the result of the Arbitrator's determinations as to witness credibility, relevance, burden of proof considerations, and weighing of the evidence, both oral and written. Based on the documentary evidence, witness testimony, and arguments of counsel, the Arbitrator hereby provides the following factual background:

This dispute concerns the sale of a CH-R model Toyota to Claimant Girlie **Sanchez** ("Claimant" or "Ms. **Sanchez**") by Respondent Oremor of Temecula, LLC d/b/a Temecula Valley Toyota ("Respondent" or "TVT"). On October 20, 2017, Claimant filled out an online credit application with TVT. (Ex. 23) According to Jonathan Teng, Internet Sales Manager at TVT, the application requires that the potential buyer fill out certain mandatory fields, including name, address, current employer, work history and social security number. (RT 313:9-14) The actual application that Ms. **Sanchez** saw and completed online was not introduced into evidence. Instead, the output, or printout, resulting from the application was produced. (RT 312:14-17, Ex. 23) On the printout, there are fields entitled "Repossession Indicator" and "Repossession Date." Mr. Teng testified that the applicant is not required to complete these fields. (RT 310:13-20)

After completing the online application, Claimant received a text message from the dealership, informing her that she had been approved to purchase a Toyota Corolla. (RT 437:23-438:11) Ms. **Sanchez** asked if she could qualify for a better model car and was told that to purchase something other than a Corolla, she would need someone to cosign the loan due to her low credit score. (Id.) As a result, Claimant asked her mother, Rosita **Sanchez**, to cosign. Her mother agreed. (RT 438:12-13)

On November 4, 2017, Claimant and her mother went to the dealership to purchase a vehicle. At the dealership, Claimant was informed that with her mother as cosigner, she had been approved to purchase a Toyota CH-R. (RT 438:22-25) Ms. **Sanchez** and her mother signed their credit applications and were escorted into the office of Nathan Banuelos, a Finance Manager at TVT. There, they executed a Retail Installment Sale Contract ("Agreement"). (Ex. 104, RT 439:10-16) The Agreement contained a term permitting the Seller's right to cancel the contract, which both Claimant and her mother acknowledged by signature. (Ex. 104 at 3) Specifically, the provision stated:
a. Seller agrees to deliver the vehicle to you on the date this contract is signed by Seller and you. You understand that it may take some time for Seller to verify your credit and assign the contract. You agree that if Seller is unable to assign the contract to any one of the financial institutions with whom Seller regularly does business under an assignment acceptable to Seller, Seller may cancel the contract.

b. Seller shall give you written notice (or in any other manner in which actual notice is given to you) within 10 days of the date this contract is signed if Seller elects to cancel. Upon receipt of such notice, you must immediately return the vehicle to Seller in the same condition as when sold, reasonable wear and tear excepted. Seller must give back to you all consideration received by Seller, including any trade-in vehicle.

c. If you do not immediately return the vehicle, you shall be liable for all expenses incurred by Seller in taking the vehicle from you, including reasonable attorney's fees.

d. While the vehicle is in you possession, all terms of the contract, including those relating to use of the vehicle and insurance for the vehicle, shall be in full force and you shall assume all risk of loss or damage to the vehicle. You must pay all reasonable costs for repair of any damage to the vehicle until the vehicle is returned to Seller. (Id. at 5)

After signing the Agreement, Claimant drove the car off the lot. On November 6, 2017, the following Monday morning, the TVT Finance Department received word that Claimant's credit had been declined by Toyota Financial Services. (Ex. 8) The report noted that Ms. **Sanchez** had a prior Toyota repossession from 2008, which she failed to note on her credit application. (Exs. 8, 23) As a result, Toyota determined that the contract with Claimant needed to be reconfigured or "unwound" either by restructuring the loan or obtaining an additional cosigner. (RT at 74:24-75:8) Without bank financing, the car was in Claimant's possession without being secured by a loan. (RT 82:1-14)

According to the Agreement, TVT had ten days from the date of purchase, or until November 14, 2017, to notify Claimant that the contract was canceled. Mr. Banuelos prepared a letter to Claimant and her mother, which stated that Respondent elected to cancel the contract pursuant to the Seller's Right to Cancel. (Ex. 1; RT 166:6-8)

TVT does not have a written policy regarding outgoing mail. (RT 50:11-14) Typically, Jun Nagaoka, the Finance Director, would provide an envelope to Mr. Banuelos with the postage already affixed. (RT 168:14-21) Mr. Banuelos would put the letter in the envelope and fill out the certified return receipt with the customer name and address. (RT 168:22-24) Mr. Banuelos would take the letter to the receptionist for mailing, or, if she was not at her desk, he would place it in the outgoing mailbox. (RT 169:3-14)

In this particular instance, Mr. Banuelos does not recall delivering Claimant's letter to the receptionist, and it did not get timely sent. (RT 170:19-21) Although the letter was dated November 14, 2017, the tracking information from the Postal Service indicates that the letter did not arrive at the Post Office until December 21, 2017 and was not delivered to Claimant until December 22, 2017. (Exs. 2, 3) As a result, Claimant contends she did not receive notice within the 10-day window that the Agreement was canceled. Claimant testified that even though Mr. Teng texted her on November 6, 2017 he did not inform her that there was a problem with the contract. (RT 441:4-8) Further, Ms. **Sanchez** stated that she brought the car in for service on November 10, 2017 but was never informed that the contract had been canceled. (RT 441:10-443:6) In a text message dated November 16, 2017, Mr. Teng asked Claimant whether she was able to service the car but did not mention the contract. (Ex. 20) As Ms. **Sanchez** explained, it was not until December 4, 2017, one month after the contract date, that she was told by Mr. Teng to call Mr. Banuelos, the Finance Manager. (Ex. 20, RT 444:6-14)

Respondent disputes Claimant's version of events. Mr. Banuelos testified that when a contract needed to be redone, Mr. Nagaoka would advise Finance Managers to call the customers daily until they were reached. (RT 130: 14-20) Therefore, before preparing the November 14, 2017 letter, Mr. Banuelos stated that he tried calling both Claimant and her mother on each of the numbers listed on the credit application. (RT 137:3-7) He further explained, "[w]e call the customer right away if we get a turndown, and that's the only bank we can go with." (RT 191:20-221) Further, he testified that he would not send a 10-day letter out right away without talking to the customer first. (RT 192:24-193:3) As Mr. Nagaoka explained, the first attempt to reach a customer "would be a verbal attempt because the ten-day letter is a lot stronger verbiage. So that would be saved for the very end if they're not cooperating, we're not able to get ahold of the customer. But first attempt would be usually a phone or text or e-mail communication. That would be the first attempt." (RT 294:15-295:1) In Mr. Nagaoka's experience, the dealership's normal practice would be to notify the customer right away to attempt to make a new deal on different terms. (RT 295:5-12) He testified that he could not "recall a time that we'll just send a letter prior to - at least in multiple attempts over the phone or - you know, things over the phone or e-mail or text or in person." (RT 295:18-21)

Prior to this arbitration, Mr. Tom Rudnai, President and Owner of TVT, testified that Mr. Banuelos and Mr. Nagaoka informed him that there was "constant communication letting [Claimant and her mother] know that their contract was cancelled and we needed the car back because they couldn't come up with another cosigner." (RT 36:22-25) Mr. Banuelos recalled that he called Claimant and her mother as soon as he learned of the turndown and they came in the week of November 6, 2017. (RT 193:8-14) During the meeting, Mr. Banuelos allegedly told Claimant and her mother that the contract needed to be redone but that he was open to finding a way to keep Ms. **Sanchez** in the vehicle. According to Mr. Banuelos, Claimant responded that she and her mother would attempt to add their husbands as additional cosigners. (RT 195:2-18) At that point, Mr. Banuelos agreed to let Ms. **Sanchez** take the car while he waited to hear whether their husbands would agree. (RT 195:19-22) Mr. Banuelos testified that he did not hear back from Claimant despite further attempts to contact her by telephone. (RT 196:2-22)

On November 25, 2017, Ms. **Sanchez** received a letter from Toyota Financial Services stating that her credit was declined for several reasons, including the prior repossession. (Ex. 107)

For her part, Ms. **Sanchez** states she was not informed by Mr. Banuelos that the contract had to be redone until December 4, 2017, when she called him in response to Mr. Teng's text message. (RT 444:17-445:14) Ms. **Sanchez** received voicemails from both Mr. Banuelos and Mr. Teng on December 16, 2017. (Ex. 21, 25) Both voicemails requested that Ms. **Sanchez** return to the dealership to complete the contract. (Id.) On December 17, 2017, Mr. Banuelos sent a further text message stating that he "may need the vehicle back" if Ms. **Sanchez** did not complete the paperwork. (Ex. 26) On December 18, 2017,[1] Ms. **Sanchez** texted Mr. Teng, informing him that someone from TVT had gone to her house and left a business card with her brother. She further inquired where she could make her first car payment. In response, Mr. Teng replied, "Please call Nathan [Banuelos], they need your husband to sign the contract." (Ex. 22) Nevertheless, Ms. **Sanchez** appeared at the dealership the following day to make a car payment. (RT 453:17-22)

At the dealership, Ms. **Sanchez** testified that she was approached by a TVT employee and asked if she had the contract papers with her, to which she responded, "No, I don't have it. I'm here to make a payment, my first month payment. Because I was told just to come here. And also to see Nathan [Banuelos]." (RT 453:23-454:8) During her meeting with Mr. Banuelos, they discussed redoing the contract and as Ms. **Sanchez** explained, "that's when he told me that me that my husband was not approved to cosign." (RT 454:14-18) At that point, Claimant states Mr. Banuelos said that only her mother could be on the contract if Claimant wanted to keep the car, and Claimant agreed to bring her back in the morning. (RT 454:19-455:8) As Claimant was leaving the dealership, she recounted that a "person with authority" began yelling at her, asking for the keys, claiming that she had a past repossession in the vicinity of other customers and threatening to call the authorities. She did not have the keys or the car, and ultimately left. (RT 455:15-456:9) Although she tried making her car payment at the dealership, they would not accept it. (RT 468:19-20)

The next day, Claimant's parents appeared at her place of work. Rosita **Sanchez** told Claimant that the dealership had called and her father, who answered the call, was told that TVT needed the car back. Claimant testified, "[a]nd I was like, 'Why do you guys need the contract? How come everybody wants the contract' - I even told my mom - 'and the keys?"' (RT 456:11-22) Claimant then notified her mother that she retained an attorney, and her parents left. (RT 456:24-457:4) On December 22, 2017, Claimant mailed her car payment to the dealership.

On December 23, 2017, after arriving home, Claimant heard her father run down the stairs and try to grab her purse to get her keys. (RT 458:11-22) A violent, physical fight between Claimant, her father and Claimant's husband, Elmer Nieto, ensued, resulting in a call to 911. (RT 458:23-459:8) The police advised Claimant and her husband not to return to the house, which owned by Claimant's parents, and the couple were left without a place to stay. (RT 461:1-19) Shortly thereafter, on Christmas Eve, Claimant's young son, who was still with Claimant's family, suffered from illness brought on by an infection in his leg. (RT 462:23-25) Ms. **Sanchez** brought him to the ER, where he was diagnosed with cellulitis. (Ex. 47) In one medical record, Claimant's son reported that "he was jumping in a jumper and someone 'vomited on his leg."' (Id. at CL 163) Another record notes "Shawn went into ER on Thursday since his right leg got swollen due to a bite a couple of weeks ago." (Id. at CL 174)

On December 28, while Claimant was still in the hospital with her son, TVT sent a letter to her parents' home, informing her that they were returning the check for her car payment, stating "the Retail installment sale contract of the 2018 Toyota C-HR is null and void as we were unable to get your deal funded by a bank. Temecula Valley Toyota is not the lender of this contract." (Ex. 5) In addition, the letter stated that "[a]s of right now your vehicle is out for Repo. You can either have the vehicle taken involuntarily by a Repo company or voluntarily return the vehicle to Temecula Valley Toyota." *(Id.)* Ms. **Sanchez** testified that because she was no longer living at her parents' home, she did not receive this letter until mid-January 2018. (RT 469:19-470:11) Ms. **Sanchez** testified that she made another car payment in January 2018, because at this point, she was advised that the dealer became her finance company if they failed to cancel the contract within the first ten days. (RT 472:8-15)

Meanwhile, as promised in TVT's December 28, 2017 letter, Respondent put the vehicle out for repossession. Kaelyn Parkhurst, Loss Prevention Manager at TVT in charge of collecting bad debts, was tasked with repossessing Claimant's car. (RT 80:3-5) On December 20, 2017, Ms. Parkhurst assigned the repossession to Allwest Recovery. (Ex. 3 at TVT 127-29) At the same time, Ms. Parkhurst attempted four or five times to reach Claimant by telephone, all of which went unanswered. (RT 114:15-115:3) Ms. Parkhurst eventually reached Claimant's mother, who claimed not to know how to reach Claimant. (RT 115:22-116:18) As Ms. Parkhurst testified, "[TVT] does not put a car out for repo unless we have no way to get ahold of the customer. It's normally a practice that we go about because normally the customer will bring the car back willingly." (RT 117:13-16)

Between December 26, 2017 and January 15, 2018, Allwest made several attempts to retrieve the car to no avail. (Id. at TVT 130) Mr. Nieto testified that on one occasion, he was in the car when he saw the truck from the repossession company approach, and his "instinct was to take off." (373:20-23) He stated that he did so because he did not recognize the truck and was scared. However, he also testified that he understood the concept of a repossession. (RT 373:20-374:14)

On January 15, 2018, Ms. Parkhurst filed a stolen police report with the State of California Department of Highway Patrol. (Ex. 4) TVT did not first obtain a court order to do so. (RT 84:13-15) The responding detective informed Ms. Parkhurst that this was a criminal matter and stated that he would send an unmarked car to sit outside of Claimant's place of work to try to retrieve the vehicle. (RT 89:10-90:4) Soon thereafter, on January 22, 2018, Ms. Parkhurst sent a letter to Claimant and her mother, returning Claimant's second car payment and informing her that the contract was void. (Ex. 5 at TVT 89) Additionally, the letter stated that since Claimant had not returned the vehicle, "TVT has contacted the authorities and the vehicle is now reported stolen and criminal charges have been filed against Rosita and Girlie **Sanchez**. Should you have any further questions, you can feel free to contact the Temecula Sheriffs [sic] Department at (951) 696-3000." (Id.) Claimant testified that she received this letter from her mother. (RT 480:2-8)

On January 24, 2018, Officer Toming of the Riverside County Sheriff Department was assigned to investigate the stolen care report. (Ex. 1 at CL 76-77) In his Incident Report, Officer Torning stated that he spoke with Ms. Parkhurst on January 26, 2018, who explained:
Sanchez signed the purchase agreement on 11/4/17, and during the 10 day time frame, Toyota was unable to get financing for **Sanchez**. A certified letter was sent out on 11/14/17, requesting the vehicle be returned. This was 10 days after the contract was signed, which is on the contract **Sanchez** signed. Per the contract agreement on page 5, Toyota can cancel the contract agreement within 10 days of the date the contract is signed, if the seller is unable to find a financial institution to take the loan of the vehicle. Toyota was unable to find financing for **Sanchez**, due to her past repossession of a vehicle in 2008. **Sanchez** also had several collection notices on her credit report. Per Parkhurst, Toyota had **Sanchez's** mother, Rosita **Sanchez** sign as a cosigner. This, however, did not help to get financing.

Parkhurst said, she finally got in touch with **Sanchez** and she refused to return the vehicle stating she had retained an attorney. **Sanchez** said she was not served until after the 10 days. *(Id.)*

Ms. Parkhurst showed Officer Toming the letters TVT sent to Ms. **Sanchez**, requesting eturn of the vehicle, as well as evidence of the repossession attempts by Allwest Recovery. (Id.) On January 26, 2018, Officer Torning requested that a deputy check Claimant's mother's home for the vehicle, but it was not in the neighborhood. *(Id.)* Therefore, on January 30, 2018, Officer Toming arrived at Claimant's place of work, where he met with Ms. **Sanchez**. His account of the meeting is as follows:

I met with **Sanchez**, who was working the warehouse area of the business, (Accord Appliance repair, suite B). I tried to speak with **Sanchez** who was not answering some of my questions other than telling me she had an attorney and was advised not to return [the car] I told **Sanchez** she was being charged with an embezzled vehicle. **Sanchez** did tell me she was making payments on the vehicle. I informed her Toyota was not accepting the checks and wanted the vehicle back.

Sanchez told me she signed the contract and was told by the attorney that it was past the 10 days and it was a civil issue. I told **Sanchez**, Toyota was unable to get financing for the vehicle and requested the vehicle be returned. Toyota sent out a certified letter to **Sanchez**. **Sanchez** said she needed to call her attorney, while I was with her and asked me to speak with them regarding this matter.

It was agreed upon by **Sanchez**, her attorney's [sic] and I, that the vehicle would be returned to Toyota tomorrow, and I would file charges out of custody on Girlie **Sanchez**. I was notified by Parkhurst later that day that Girlie **Sanchez** returned the vehicle to Toyota. Based on the evidence I am requesting that one count of embezzlement be filed on Girlie **Sanchez**." (*Id.* at CL 78)

Ms. **Sanchez** recalls the meeting differently. She testified that Officer Toming did not show her a court order. (RT 487:22-24) Instead, she states that "[he] was just there with his handcuff swinging. Just, like, breathing so hard behind me while I was - He was just there. He showed up, and there was another sheriff that - I don't know if that was his backup - that was just standing there. The other one was in uniform. He was not. And then he was just following me around in the warehouse. And then when I said I needed to go out - because I was on the computer - so I can contact my lawyer, he was there breathing so hard, like - and then he was just - kept clicking his handcuff." (RT 487:25-488:10) Further, she testified: "And I even told him, 'Do you even have a warrant of arrest?' He said, ' don't need it. Toyota will deal with you once they' - you know, 'once you get,' you know - will just deal with you when you' - 'after I bring you in.'" (RT 488:12-18)
While meeting with Claimant, Officer Toming left Mr. Nieto a voicemail, stating: "Elmer, this is Deputy Tony with the Sherriffs Department. I'm here with your wife, Girlie, regarding the vehicle. At this particular time, since the vehicle is not here and it doesn't seem like anyone's going to bring the vehicle back, she's going to be placed under arrest, and you will be able to pick her up and bail her out at the Southwest Detention Center in Murrieta." (Ex. 54)

Claimant testified that the encounter with the police left her feeling threatened, humiliated, and scared. (RT 489:4-19) Once Officer Toming left and Claimant's husband arrived to pick her up in the car, Claimant decided to immediately return the vehicle to the dealership. (RT 490:22-491:11) From that point on, Claimant and her husband, who were left homeless after the incident with her father, alternatively lived in their van or in an undeveloped property from which they were eventually evicted. After a time, Claimant was permitted to return to her parents' home, but her husband was not. (RT 496:5-502:7) As it turns out, this was not the first time Mr. Nieto was barred from living with Claimant. Mr. Nieto had a previous felony conviction, and as Claimant explained, "That's the one reason probably why my dad and Elmer doesn't get along before because his - that too - because of his records or - yeah." (RT 510:3-7) Ultimately, however, the family was reunited and now live together with Claimant's parents. (512:15-21)

As a result of the TVT's actions surrounding the sale of the car, Claimant initiated this arbitration, contending that her rights were violated, causing extreme emotional distress. Specifically, Claimant requests a ruling that TVT violated 42 U.S.C § 1983, the Rosenthal Fair Debt Collection Practices Act, the Fair Credit Reporting Act, the Equal Credit Opportunity Act, and California Business and Professions Code § 17200. In addition Claimant seeks a finding that TVT breached the Retail Installment Sale Agreement and the implied covenant of good faith and fair dealing, acted negligently and negligently inflicted emotional distress, intruded upon Claimant's seclusion and

committed conversion and civil extortion, entitling her to damages. Respondent contends that Claimant's version of events is not credible and therefore, she has failed to meet her burden on proof on any of her claims.

II. LEGAL ANALYSIS

A. 42 U.S.C. § 1983

Claimant alleges that TVT's use of the police and threats of arrest to repossess the vehicle was a violation of section 1983. To establish whether a violation occurred, the Arbitrator must determine: 1) whether Respondent deprived Claimant of her rights; and 2) whether Respondent acted under the color of law when attempting recovery of the vehicle.

1. Respondent deprived Claimant of her right to due process

"Liability under s 1983 can be established by showing that the defendants either personally participated in a deprivation of the plaintiff's rights, or caused such a deprivation to occur. The statute is violated when a person, acting under color of the power vested in him as a government officer, proximately causes a citizen of the United States to be deprived of any rights, privileges, or immunities secured by the Constitution or laws." Harris v. City of Roseburg, 664 F.2d 1121, 1125 (9th Cir. 1981) (internal citations omitted). "[A] debtor has a right to minimal due process (i.e., notice and prior hearing) before a state may assist a secured creditor in repossessing the debtor's property." Id. With respect to the repossession of an automobile, if "the buyer objects and protests against such retaking, and obstructs the seller in doing so, it is the duty of the seller to proceed no further in such attempted retaking, but to resort to legal process to enforce his right of repossession." Id. at 1126. A deprivation will occur not only when an officer actually takes property, but when "the officer assists in effectuating a repossession over the objection of a debtor or so intimidates a debtor as to cause him to refrain from exercising his legal right to resist a repossession." Id. at 1127.

Here, Ms. **Sanchez** objected to TVT's recovery of the vehicle. She refused to answer Officer Toing's questions or discuss the matter with him, claiming that she needed to speak with her attorney. The police laughed in response and treated her "like I had no rights, like I was nothing. Thas how he made me feel. That's how he tried to how he like, how he was threatening me." (RT 490:10-15) Ultimately, Officer Toming and Claimant's attorney agreed to surrender the car the following day. Nevertheless, Officer Toing's intimidating threats of arrest and criminal charges prompted Claimant to take the car back that day. (RT 490:22-491:17) To Claimant's knowledge, TVT has never withdrawn the police report. (RT 493:6-13)

The Arbitrator finds that Officer Toming assisted in effectuating TVT's repossession over Claimant's objection and caused her to refrain from exercising her right to resist. Because TVT did not resort to the legal process before involving the police in the vehicle recovery, Respondent deprived Claimant of her right to due process.

2. Respondent acted under the color of law

Respondent argues that to be liable under section 1983, TVT must have engaged in a joint activity with police. TVT contends that Ms. Parkhurst simply filed a police report and the police conducted its own investigation, which is not sufficient evidence of a joint activity. In other words, action taken by private individuals will only be under the color of state law "where there is signfican state involvement in the action." *Howertn v. Gabica,* 708 F.2d 380, 382 (9 Cir. 1983) (internal citations omitted). "The extent of state involvement remains a factual inquiry. Only by sifting facts and weighing circumstances can the nonobvious involvement of the State in private conduct be attributed its true significance. *Id.* (internal citations omitted).

For example, *Collins v. Womancare* involved citizens arrests made by a women's health service facility against abortion picketers, after the San Diego Police Department declined to intervene. 878 F.2d 1145 (12th Cir. 1988). In determining whether the facility violated section 1983, the court analyzed the facts under the joint activity test and ultimately determined that the state did not so far insinuate[] itself into a position of interdependence with [Womancare employees] that it must be recognized as a joint participant in the challenged activity. *Collins v. Womancare, supra,* 878 F.2d at 1155. First, the court established that the impetus for the arrests came from Womancare and not the San Diego Police Department. Second, the court explained that the police officer conducted an independent investigation and refused to arrest the protestors on his own authority. Finally, the court found that there was no evidence to suggest that the police did anything but maintain a policy of neutrality in the dispute. *Id.* at 1155-56. Accordingly, the court held that the citizens arrests did not constitute joint action.

Unlike Collins, this case presents an opposite set of facts. Here, the police department actively carried out TVT's bidding. As Ms. Parkhurst testified, the detective told her that he would send an unmarked car to find the vehicle at Claimant's residence and then go to Claimant's place of employment to retrieve the vehicle. (Ex. 1, 86:5-13) The police also informed Claimant that this was a criminal matter. (RT 88:6-8) Despite knowing that Ms. **Sanchez** had retained an attorney, Ms. Parkhurst did nothing to stop the detective. See Incident Report at Ex. 1 at CL 77: "Parkhurst said, she finally got in touch with **Sanchez** and she refused to the return the vehicle stating she had retained an attorney. **Sanchez** said she was not served until after the 10 days."

The Incident Report contains myriad quotes from Ms. Parkhurst but does not reflect that the police conducted an independent investigation. Office Tming did not testify at the hearing, and there was no evidence to indicate that the police did anything but accept TVT's version of events. Officer Ting determined this was a criminal case involving embezzlement without contacting Claimant's attorney. In fact, unlike the San Diego Police Department in Collins, Officer Toing was far from neutral in this situation. He not only threatened Claimant and her husband with Claimant's arrest, but also acted in a menacing way at Claimant's place of work, essentially forcing her to return the vehicle. Whether he brandished his handcuffs or not, Officer Tming most certainly intimidated Ms. **Sanchez** by telling her she was being charged with a crime.

Based on these facts, the Arbitrator finds that the police department did insinuate itself into a position of interdependence with TVT, acting as a joint participant in the repossession of the vehicle. This was not merely a case of Ms. Parkhurst filing a police report and leaving it to the authorities to resolve. Rather, the police directly depended upon TVT's account when deciding what action to take. Accordingly, TVT acted under the color of law.

Having determined that TVT deprived Ms. **Sanchez** of her right to due process and that Respondent acted under the color of law, the Arbitrator finds that TVT violated 42 U.S.C.

B. Rosenthal Fair Debt Collection Practices Act

Claimant alleges that TVT repeatedly violated the Rosenthal Fair Debt Collection Practices Act ("RFDCPA" or "Rosenthal Act"). The purpose of the RFDCPA is "to prohibit debt collectors from engaging in unfair or deceptive acts or practices in the collection of consumer debts and to require debtors to act fairly in entering into and honoring such debts, as specified in this title." Cal. Civ. Cde 1788.1(b). To establish this claim, Claimant must demonstrate: 1) TVT was a debt collector; and 2) that TVT's debt collecting conduct was prohibited by the RFDCPA. If the Claimant is successful, the Arbitrator must then consider whether TVT has any cognizable defenses.

1. TVT is a debt collector

Prior to determining whether TVT is a debt collector, the Arbitrator must first resolve the threshold issue of whether the vehicle can be considered a "debt" according to the statute.

Respondent argues that the vehicle was not a debt because the contract was properly canceled, the car was not secured by loan financing, and therefore, Claimant did not owe money to a financial institution or to TVT. As Ms. Parkhurst and Mr. Rudnai testified, TVT is not a bank and was not trying to collect money from Claimant. Rather, the dealership was simply trying to recover their property. (RT 82:8-21; 45:17-20) It is important to note that for purposes of this argument, Respondent depends upon the definition of "debt" recited in the Federal Debt Collection Practices Act (FDCPA). This definition states: "[t]he term 'debt' means any obligation or alleged obligation of a consumer to pay money arising out of a transaction in which the money, property, insurance or services which are the subject of the transaction are primarily for personal, family, or household purposes, whether or not such obligation has been reduced to judgment." 15 U.C. 1692a(5). Respondent cites to various FDCPA cases, which hold that a debt only occurs when an obligation to pay arises. See, e.g., Turner v. Cook, 362 F.3d 1219 (9th Cir. 2004); Bass v. Stolper, Koritzindky, Brewster Neider, S.C., 111 F.3d 1322 (7th Cir. 1997). These cases support Respondent's position that because the contract was canceled, Ms. **Sanchez** did not owe an obligation to pay and the vehicle did not constitute a debt.

However, this claim was brought under the RFDCPA. See Arbitration Demand at 3. Although Respondent states that the Rosenthal Act is California's version of the FDCPA and essentially "mimics" the federal statute's requirements, the RFDCPA does not incorporate by reference the *definitions* found in 15 U.S.C. § 1692a. Instead, Cal. Civ. Code § 1788.17 only adopts the federal requirements regarding debt collection practices and remedies. This is an important distinction because the definition of "debt" in the Rosenthal Act does not discuss an obligation to pay. According to Cal. Civil Code § 1788.2(d), the term "debt" means "money, *property* or their equivalent that is due or owing or alleged to be due or owing from a natural person to another person." (emphasis added). Quite simply, under the Rosenthal Act, a debt is property that is due; "[o]ne does not need to go beyond the plain language of the statute to make that determination." *Shannon v. Windsor Equity Group, Inc.,* No. 12-CV-1124-W(JMA), 2014 WL 977899, at *10 (S.D. Cal. Mar. 12, 2014). Here, TVT has always held the position that because the contract was canceled, the vehicle belonged to TVT and Ms. **Sanchez** needed to return it to the dealership. (RT 82:1-5) Therefore, under the Rosenthal Act, TVT treated the car as a debt of property due and owing.

However, even if the definition of debt under the Rosenthal Act required that there be an obligation to pay, section 1788.2(d) makes clear that the debt need only be *alleged,* not extant. *See also* Cal. Civ. Code 1788.2(f) ("[t]he terms 'consumer debt' and 'consumer credit' mean money, property, or their equivalent, due or owing, or *alleged to be due or owing,* from a natural person by reason of a consumer credit transaction.[2]") (emphasis added); *Fausto v. Credigy Services Corp.,* 598 F.Supp.2d 1049, 1053 (N.D. Cal. 2009) ("...the Court finds that the FDCPA defines 'debt' as 'any obligation or alleged obligation of a consumer,' and does not require that the debt be actual and extant at the time of the attempted collection.") (emphasis in original). The Ninth Circuit "has found that 'Congress designed the FDCPA to 'eliminate the recurring problem of debt collectors dunning the wrong person or attempting to collect debts which the consumer has already paid.'' *Fausto v. Credigy Services Corp., supra,* 598 F.Supp.2d at 1053.

In this case, Claimant contends that she was not notified that contract was canceled within the ten-day period. As a result, she made two car payments, which is sufficient evidence to show that she *alleged* a debt was owed on the vehicle. Therefore, TVT's attempts to reclaim the vehicle after Claimant made payment is the exact type of conduct the FDCPA was meant to address, even if no actual financial debt was due at the time. Therefore, the Arbitrator finds that the vehicle was a debt for purposes of the statute.

In any event, "determining whether a debt includes property such as an automobile is not particularly important; the primary issue...to consider... is whether [Defendant] 'regularly... engages in debt collection' and whether its

practices are 'connect[ed] with the collection of consumer debts.'" Shannon v. Windsor Equity Group, Inc., supra, 2014 WL 977899, at *10. Pursuant to the RFDCPA, a debt collector is "any person who, in the ordinary course of business regularly, on behalf of that person or others, engages in debt collection. This term includes any person who composes and sells, or offers to compose and sell, forms, letters, and other collection media used or intended to be used for debt collection." Cal. Civ. Code section 1788.2(c).

Ms. Parkhurst testified that it was mainly her job to handle the collection of bad debts for the dealership. (RT 78:6-8) Further, she stated that TVT sent her to a debt collection seminar as training (RT 78:9-17) Ms. Parkhurst explained that she placed monthly calls to collect bad debts. (RT 78:22-24) Ms. Parkhurst also testified that she sent letters to Claimant in an attempt to recover the vehicle. (RT 79:12-14) In addition, Mr. Banuelos and Mr. Nagaoka testified that the Finance Managers would call customers on a daily basis to collect balances on down payments. (RT 131:10-19; RT 229:8-17) At times, Mr. Banuelos explained that he has gone to customers' houses to redo a contract if he was unable to reach them by phone. (RT 133:1-134:9) In fact, he did leave his business card at Claimant's home (RT 161:25-162:15) Mr. Banuelos also testified that he would send form letters to customers to get cars back. (RT 131:20-32:3) On average, around 60 people per year do not redo their contracts, causing TVT to send 12 to 16 ten-day cancellation letters a month. (RT 75:20-76:7; 128:4-9; 127:14-20)

This testimony makes clear that TVT regularly engaged in debt collection, not just with Claimant, but with other customers. Ms. Parkhurst and the Financial Managers dedicated at least a portion of most days crying to recover money, or in Claimant's case, the vehicle. Accordingly, the Arbitrator finds that TVT is a debt collector within the meaning of the statute.

2. TVT violated the RFDCPA

The FDCPA provides that a debt collector "may not use any false, deceptive, or misleading representation or means in connection with the collection of any debt." 15. U.S.C. § 1692e (incorporated by the RFDCPA at section 1788.17). Section 1692e prohibits, in part:
1692e(4) : The representation or implication that nonpayment of any debt will result in the arrest or imprisonment of any person or the seizure, garnishment, attachment, or sale of any property or wages of any person unless such action is lawful and the debt collector or creditor intends to take such action.

1692e(5): The threat to take any action that cannot legally be taken or that is not intended to be taken.

1692e(7) : The false representation or implication that the consumer committed any crime or other conduct in order to disgrace the consumer.

In addition, a debt collector may also not "engage in any conduct the natural consequence of which is to harass, oppress, or abuse any person in connection with the collection of a debt." 15 U.S.C. § 1692d. Finally, section 1692c(b) bars debt collectors from communicating with "any person other than the consumer, his attorney, a consumer reporting agency if otherwise permitted by law, the creditor, the attorney of the creditor, or the attorney of the debt collector." 15 U.S.C. § 692c(b).

TVT's actions violated these provisions. First, TVT filed a police report, without first obtaining a court order, and unlawfully represented to Claimant that she would be charged and arrested if she did not return the vehicle. TVT compounded this action by sending Claimant a letter stating that criminal charges would be filed. The presence of the police at Claimant's place of employment and the multiple threats of arrest were certainly intended to disgrace, harass, and abuse Claimant.

In addition, TVT violated the RFDCPA when Ms. Parkhurst gave Claimant's personal credit information to Officer Torning, which he then disclosed in the Incident Report. The Incident Report stated that TVT was unable to find financing for Claimant due to her past repossession and that Claimant had several collection notices on her credit report. These facts were not necessary to Officer Torning's investigation. At most, Officer Toming needed to know that the Agreement with Claimant needed to be redone, not the specific reasons why. Providing these details to Officer Toming was an impermissible communication with a third party in violation of section 1692c(b).

Based on the foregoing, the Arbitrator finds that TVT was a debt collector and did violate the RFDCPA.

3. TVT Defenses

Respondent contends that even if TVT committed violations of the RFDCPA, it is entitled to a complete defense for several reasons: 1) the vehicle was not purchased for personal use, as required by the statute; 2) the defense of privilege bars Claimant's claim; and 3) California Civil Code sections 1788.30(e) and (g) insulate TVT from liability.

a. Consumer Purposes

First, Respondent argues that Claimant did not purchase the vehicle "primarily for personal, family or household purposes" as required by Cal. Civil Code section 1788.1(c). During the arbitration hearing, there was some testimony that the car was used primarily by Mr. Nieto, who was an appliance technician. (RT 365:20-366:16) However, Mr. Nieto also went on to explain that he drove it to go to the park with his son, "because my van is full with work things. So, I take the car to take my son to the store, you know. It's usually meant for my son, really. So I had to drive that car. And, like every day, yes I do drive the car." (RT 367:5-14) Mr. Nieto also testified that he liked driving the van because "it fits all my tools and the parts." (RT 383:10-12) Conversely, he stated that the "car was bought for my son to make it to school, really, to be sure about, you know - to have a dependable car." (RT 385:3-5) Rosita **Sanchez** testified similarly, stating, "I want to help [Girlie] to have a vehicle - a dependable vehicle for them to drive." (RT 388:4-5) She confirmed that Claimant used the car to go to work, for personal errands and to take her son to school. (RT 388:6-16)

This evidence demonstrates that Mr. Nieto used his larger vehicle, the van, for business purposes and that the family used the Toyota vehicle for personal reasons. Therefore, the Arbitrator finds that the Rosenthal Act does apply to Claimant's car purchase.

b. Privilege

Next, Respondent claims that TVT's attempts to recover the vehicle were privileged under California law. According to TVT, any statements made to the police regarding Claimant were protected as a privileged publication under Cal. Civil Code § 47. However, as Respondent acknowledges in its Initial Closing Brief, Cal. Civil Code section 47 does not bar claims brought under the RFDCPA. *In re Singh,* No. 09-45778-E-13 2010 WL 9485835 at *8 (U.S.B.C. E.D. March 18, 2010). As the California courts have stated, "there is sufficient direct precedent, generated by the district courts within the Ninth Circuit, excepting the Rosenthal Act from the scope of the privilege." *Yates v. Allied Intern. Credit Corp.,* 578 F.Supp.2d 1251, 1255 (S.D. Ca. 2008). Therefore, the Arbitrator finds that Respondent is not entitled to the protection of Cal. Civil Code section 47.

c. Cal. Civ. Code 1788.30

Respondent argues that TVT is not liable pursuant to Cal. Civil Code section 1788.30(e), which states: "[a] debt collector shall have no civil liability to which such debt collector might otherwise be subject for a violation of this title, if the debt collector shows by a preponderance of the evidence that the violation was not intentional and resulted notwithstanding the maintenance of procedures reasonably adapted to avoid any such violation." Cal. Civ. Code § 1788.30(e). Claimant argues that Respondent made false statements to the police because the 10-day notice was not sent on November 14, 2017. Respondent argues that these false statements were unintentional because no one at TVT realized that the letter was not timely sent.

The Arbitrator is persuaded that the failure of the 10-day notice to go out in a timely manner was not an intentional act by TVT. Claimant did not demonstrate that car dealerships had a standard of handling mail in a certain way, and therefore did not establish that TVT fell below any such standard of care. Further, no evidence was adduced to demonstrate that Claimant's letter was held back by TVT for any reason, or that TVT employees were aware the letter did not go out as dated.

On the other hand, the Arbitrator finds that TVT did intentionally engage the police to aid in the recovery of the vehicle. In doing so, Ms. Parkhurst disclosed Claimant's personal credit information to a third party, knowingly agreed to file a police report which caused the officers to threaten and harass Ms. **Sanchez**, and violated her right to due process by involving law enforcement prior to getting a court order. Further, as Mr. Rudnai testified, this was the first time TVT ever had a customer fail to return a vehicle. (RT 51:21-25) Consequently, TVT did not have procedures reasonably adapted to avoid violations of Claimant's rights. Therefore, the Arbitrator finds that Respondent is unable to avoid liability under Cal. Civ. Code § 1788.30(e).

Respondent next contends that TVT is shielded from liability pursuant to California Civil Code section 1788.30(g). This provision states: "[a]ny intentional violation of the provisions of this title by the debtor may be raised as a defense by the debt collector, *if such violation is pertinent or relevant to any claim or action brought against the debt collector* by or on behalf of the debtor." Cal. Civ. Code § 1788.30(g) (emphasis added). Respondent argues that Claimant violated section 1788.20(b), which governs credit applications and prohibits any person from "[k]nowingly submit[ting] false or inaccurate information or willfully conceal[ing] adverse information bearing upon such person's credit worthiness, credit standing or credit capacity." *Cal. Civ. Code* § 1788.20(TVT asserts that Claimant's failure to disclose her prior repossession on her credit application entitles it to a complete defense.

As an initial matter, the Arbitrator is not convinced that Claimant's failure to disclose her previous repossession is relevant to her claims that TVT engaged in impermissible communications with third parties or used harassing and unfair conduct by engaging the police. Even if it was pertinent, Respondent failed to demonstrate that Ms. **Sanchez** willfully concealed her repossession. The online application that Ms. **Sanchez** filled out was not introduced into evidence at the hearing, and there was no way to determine whether she was asked to complete any questions regarding repossession. As Mr. Teng testified, the "Repossession Indicator" and "Repossession Date" fields on the printout of the application were not required and therefore, were not part of the request. Moreover, Mr. Banuelos testified he did not ask customers about bankruptcies or repossessions and had never filled out the online application. (RT 180:7-10) Mr. Teng testified that he has never seen a customer fill out the repossession fields or asked a customer to fill it out. (RT 313:15-22) He stated that to his knowledge, no one at the dealership asks a customer to fill out the repossession fields on the printout because "[i]f it was required, that would be a mandatory field and then the customer will have to fill it out or complete it." (RT 314:1-3)

Without any evidence that TVT requested Ms. **Sanchez** to disclose her previous repossession, the Arbitrator cannot conclude that Claimant knowingly or willfully provided inaccurate information to TVT when she did not. Of course, she could have affirmatively mentioned it to Mr. Teng or Mr. Banuelos on the day she came to purchase the car, but if TVT did not ask, it is fair to assume that TVT either already knew about it from her credit report (it

was, after all, a previous Toyota repossession) or did not care. In any event, TVT has not established that Claimant violated section 1788.20(b).

Based on the foregoing, the Arbitrator finds that TVT is liable for violations under the Rosenthal Act and is not entitled to a defense.

c. Breach of Contract and the Implied Covenant of Good Faith and Fair Dealing

1. TVT did not breach the contract

Claimant's cause of action for breach of contract is predicated on the argument that TVT failed to cancel the contract within the 10-day period prescribed in the Seller's Right to Cancel provision of the Agreement According to Claimant, the notice of cancellation was not timely sent and therefore, TVT breached the Agreement by taking the vehicle back.

It is beyond question that the 10-day notice letter was not timely sent. Mr. Rudnai, President and Owner of TVT concedes as much. (RT 31:5-9) Although the letter was dated November 14, 2017, which would be within the 10-day timefrae, the evidence from the US Postal Service indicates that the letter was not mailed until December 21, 2017. The postal records also show that the letter did not arrive at Claimant's home until December 22, 2017, more than a month after the 10-day period expired.

However, the Seller's Right to Cancel does not require TVT to give notice by mail. Instead, the provision states: “Seller shall give you written notice (or in any other manner in which actual notice is given to you) within 10 days of the date this contract is signed if Seller elects to cancel. Upon receipt of such notice, you must immediately return the vehicle to Seller.” (Ex. 104 at 5, emphasis added) The text of the entire provision was set in a box, making it stand out from other provisions in the contract. (Id.) Accordingly, Claimant should have known that TVT had the right to verbally notify her of any cancellation.

Claimant disputes that she received verbal notice. However, the Arbitrator finds it implausible that TVT never attempted to call Ms. **Sanchez** after they received the credit denial on November 6, 2014. Mr. Banuelos testified that his practice was to call the customer right away. Correspondingly, he testified that he made several attempts to call Claimant that first week, but had difficulty reaching her.

In addition, Mr. Nagaoka stated that upon learning of a turndown, the dealership's first attempts to reach the customer would always be verbal, because the language of the written notice was stronger. Mr. Nagaoka explained that TVT did so because it wanted to make a new deal on different terms with the customer. It makes sense that TVT would call the customer and persuade her to take a new deal, rather than to just notify the customer in writing that the contract is canceled. TVT is motivated to sell cars and foster customer loyalty, not to let deals die. Accordingly, the Arbitrator is persuaded that Respondent attempted to call Claimant during the 10-day cancellation period.

Moreover, the evidence in this case demonstrates that whether it was because she had multiple phones, left her phone turned off, or had other reasons, Claimant was resistant to answering or returning TVT's telephone calls. This is proven by the sheer number of voicemails and texts left for her by Mr. Banuelos, Mr. Teng, and Ms. Parkhurst, as well as the fact that Mr. Banuelos had to go to Claimant's home to try to reach her. Although these attempts all occurred after the 10-day cancelation period had expired, it is entirely plausible that Claimant ignored attempts to reach her during the 10-day period as well. In other words, Mr. Banuelos' testimony that it was difficult to reach her during the first week is entirely credible.

Claimant argues that even if she received voicemails and messages from TVT, none of them mentioned cancelation of the contract until she spoke with Mr. Banuelos on December 4, 2017. To begin with, TVT is not required by the Agreement to use any particular "magic words" in voicemails or texts to explain that the contract was canceled. Therefore, Claimant's argument that she was never specifically told the contract was "canceled," is unavailing. Having spent time in his office during her car purchase, Claimant knew that Mr. Banuelos was responsible for financing the vehicle. Therefore, the Arbitrator finds that when Mr. Banuelos left repeated messages for Claimant during the 10-day period, Claimant should have been aware that some financial matter needed Claimant's attention. It is not credible that Claimant received multiple messages from Mr. Banuelos so soon after purchasing the car, but had no idea there was a financial issue with the transaction.[3] In short, Claimant cannot feign ignorance or use her failure to return Mr. Banuelos's messages within the 10-day window to her advantage by claiming she was not provided actual notice.

Accordingly, the Arbitrator finds that Claimant has failed to establish a cause of action for breach of contract. Although written notice was not timely sent, TVT demonstrated that verbal notice was provided to Claimant.

2. TVT did not breach the covenant of good faith and fair dealing

"It has long been recognized in California that here is an implied covenant of good faith and fair dealing in every contract that neither party will do anything which will injure the right of the other to receive the benefits of the agreement. Kransco v. American Empire Surplus Lines Ins. Co. (2000) 23 Ca.4th 390, 400. Here, Claimant contends that TVT breached the implied covenant by fabricating the November 14, 2017 notice as a basis to file a police report against Ms. **Sanchez**.

As discussed in Section I.C. above, there is no dispute that the letter notifying Claimant of the contract cancelation was not timely mailed. However, the Arbitrator is not persuaded that the late mailing was intentional or that the letter was fabricated to form the basis of a police report, as Claimant suggests. Mr. Banuelos testified that he wrote the November 14, 2017 letter and put it in an envelope with postage, given to him by Mr. Nagaoka. (RT 166:6-7; 168:14-21) He then filled out the certified mail receipt, the same way he did with all customers. (RT 168:22-24) As he explained, the procedure at TVT was to either leave the mail with the receptionist, or if she was not there, to leave it in the outgoing mailbox. (RT 169:10-14)

Mr. Banuelos does not specifically recall whether he gave Claimant's letter to the receptionist and did not check to see whether the certified letter was received or signed by her. (RT 170:19-25) In fact, prior to his deposition, Mr. Banuelos did not know that the notice had not been timely mailed. (RT 172:12-19) However, Mr. Banuelos also stated that he had no reason to believe that the receipt of the ten-day letter was the result of any intentional misconduct. (RT 202:20-23) Mr. Rudnai agreed with Mr. Banuelos, stating that the failure to mail the notice on time was not intentional (RT 68:16-20) Ms. Parkhurst also stated that she believed the notice was timely mailed when she drafted her December 28, 2017 letter to Claimant and her mother. (RT 101:1-18) She testified that she did not intentionally tell the police anything that she knew to be false. (RT 122:3-6)

The procedure used by TVT to prepare and send outgoing mail is not unreasonable. Further, the fact that TVT has no written procedure regarding how to send mail is also not unreasonable, given that it is an obvious task. Outside of speculation, there is no way to determine why the letter was not sent; and equally no way to confirm that any TVT employee fabricated Claimant's notice or undertook any intentional acts with respect to the letter. Therefore, the Arbitrator finds that Claimant has failed to establish its cause of action for breach of the covenant of good faith and fair dealing.

D. Conversion

Claimant contends that Respondent wrongfully exercised control over the vehicle. To establish this claim, Claimant must demonstrate: 1) that she possessed a right to the vehicle; 2) that TVT interfered with Claimant's property by knowingly or intentionally taking possession of the vehicle; 3) that Claimant did not consent; 4) that Claimant was harmed; and 5) that TVT's conduct was a substantial factor in causing Claimant's harm. See CACI 2100.

The sources and authority for CACI 2100 further define what is needed to demonstrate that Claimant had possession of the vehicle. "The first element of that cause of action is his ownership or right to possession of the property at the time of the conversion. Once it is determined that [plaintiff] has a right to reinstate the contract, he has a right to possession of the vehicle and standing to bring conversion." *Id., citing Cerra v. Blackstone* (1985) 172 Cal.App.3d 604, 609. "Where plaintiff neither has title to the property alleged to have been converted, nor possession thereof, he cannot maintain an action for conversion." *Id., citing Moore v. Regents of the Univ. of Cal.* (1990) 51 Cal.3d 120, 136.

Unlike the definition in the Rosenthal Act, conversion requires an actual right to possession, not an *alleged* right to possession. Claimant cited a case from another judicial district for the proposition that courts find use of the police to repossess a car over a consumer's objection to be conversion. *See Hyman v. Capital One Auto Finance,* 306 F.Supp.3d 756, 763-66 (W.D. Pa. 2018). However, in Hyman, the car was financed, and the plaintiff made regular car payments for approximately two years. While hospitalized, plaintiff missed a car payment (although she attempted to defer the payment) and the car was repossessed without notice. *Id.* at 760. Therefore, the court found that she did have an ownership interest in the vehicle, and the repossession amounted to conversion.

The facts in this case are different. Here, the car was not financed, and as discussed above, the Arbitrator finds that TVT properly canceled the contract. Therefore, Claimant's attempts to make car payments are insufficient evidence of ownership, because at the time she made them, she did not actually have title to the vehicle and there was no contract to reinstate. Consequently, without being able to establish possession at the time she returned the vehicle, Claimant cannot maintain a cause of action for conversion.

E. Civil Extortion

To establish a claim for civil extortion, Claimant must show: 1) that TVT sent or delivered to Claimant written correspondence; 2) that the writing expressed or implied a threat listed in Cal. Penal Code § 519; 3) TVT intended to extort money or property from Claimant; 4) Claimant suffered harm; and 5) the harm was caused by TVT. *See Monex Deposit Co. v. Gilliam,* 680 F.Supp.2d 1148,1156. The threats enumerated in Cal. Penal Code section 519 include: 1) unlawful injury to the person or property of the individual threatened or of a third person; 2) accusing the individual threatened, or a relative of his or her, or a member or his or her family, of a crime; 3) exposing or imputing to him, her or them a deformity, disgrace or crime; 4) exposing a secret affecting him, her or them; and 5) reporting immigration status or suspected immigration status. *See Cal. Penal Code* § 519.

On January 22, 2018, TVT sent a letter to Claimant and her mother, stating: "Since you have not returned the vehicle, Temecula Valley Toyota has contacted the authorities and the vehicle is now reported stolen and criminal charges have been filed against Rosita and Girlie **Sanchez**." (Ex. 5 at TVT 089) Therefore, TVT delivered written correspondence to Claimant, that accused Ms. **Sanchez** and her mother of a crime. As a result, Claimant suffered harm at the hands of TVT, because she was confronted by police at her place of business and was fearful that she would be arrested.

The question is whether TVT intended to extort property from Claimant. The Arbitrator finds that it did. TVT used threats and the force of the police to obtain the vehicle, without affording Claimant any right to due process. Respondent argues that TVT owned the vehicle, and therefore, there could be no extortion. This, however, ignores the manner in which TVT attempted to obtain its property. Instead of using the courts as a means to recover the vehicle, TVT resorted to threats of arrest, the intimidation of police and criminal conviction in order to force Claimant to return the vehicle. This meets the definition of extortion.

F. Intrusion Upon Seclusion

An action for intrusion upon seclusion has two elements: 1) intrusion into a private place, conversation or matter; and 2) in a manner highly offensive to a reasonable person. *SEE TAUS V. LOFTUS,* 40 Cal.4th 683, 725. The intrusion must be intentional and may also include highly offensive intrusions into another person's private affairs or concerns. *Id.* The Restatement (Second) of Torts § 652B, cmt. d describes the type of conduct that is highly offensive: "...there is no liability for knocking at the plaintiff's door, or calling him to the telephone on one occasion or even two or three, to demand payment of a debt. It is only when the telephone calls are repeated with such persistence and frequency as to amount to a course of hounding the plaintiff, that becomes a substantial burden to his existence, that his privacy is invaded." *Jones v. U.S. Child Support Recovery,* 961 F.Supp. 1518, 1521 (D. Utah 1997), *citing Restatement (Second) of Torts,* § 652B, cmt. d. As a result, "the court must view the nature (quality) of the Defendants' actions." Id. "The mere efforts of a creditor...to collect a debt cannot without more be considered a wrongful and actionable intrusion. A creditor has and must have the right to take reasonable action to pursue his debtor and collect his debt. But the right to pursue the debtor is not license to outrage the debtor." Id. at 1522.

"To determine whether conduct is 'offensive' within the meaning of the law, courts consider 'the degree of intrusion, the context, conduct and circumstances surrounding the intrusion as well as the intruder's motives and objectives, the setting into which he intrudes, and the expectations of those whose privacy is invaded." Fausto v. Credigy Services Corp., supra, 961 F.Supp.2d at 1056. In Fausto, the court notes that a creditor making 90 calls to the debtor was abusive and harassing. Id.

Claimant alleges that TVT invaded her privacy by 1) attempting to collect and wrongfully using the police to repossess, without a court order, property to which it did not have a lawful right; 2) repeatedly attempting to contact Claimant to collect property it had no lawful right to and impermissibly contacting her family and coworkers; 3) revealing her private credit information to third parties; 4) refusing to stop collection efforts after being told TVT had no right to the vehicle; 5) wrongfully using the police in an unlawful attempt to have Claimant arrested; and 6) taking the car from Claimant.

Taken alone, the Arbitrator finds that TVT's attempts to contact Ms. **Sanchez** were not highly offensive. Because the contract had been canceled, TVT had a lawful right to the vehicle and was reasonable in its efforts to pursue Claimant by phone, text and written correspondence. TVT made nowhere near 90 calls to Claimant. Moreover, Claimant was avoiding TVT's efforts to contact her. However, TVT erred when it involved the police without first obtaining a court order. It is one thing to call Claimant, or even search for her at her residence. It is quite another to file a police report recommending criminal charges and broadcasting her personal credit information. Filing this police report resulted in two officers appearing at Claimant's place of work and threatening her with arrest and criminal proceedings. This degree of intrusion was too forceful to be considered simple debt collection. It is enough to be considered highly offensive within the meaning of the law.

G. Negligent Infliction of Emotional Distress ("NIED") and Negligence

1. NIED

A cause of action for NIED requires that Claimant show: "(1) serious emotional distress, (2) actually and proximately caused by (3) wrongful conduct (4) by a defendant who should have foreseen that the conduct would cause such distress." Austin v. Terhune, 367 F.3d 1167, 1172 (9th Cir. 2004).

By using the force of the police without a court order, sending letters that made threats of arrest, and impermissibly communicating with third parties, TVT actually and proximately caused emotional distress to Claimant. TVT knew that the police would be visiting Ms. **Sanchez** at work and should have foreseen that Claimant would be distressed by such an action. However, although the Arbitrator finds that TVT is liable for NIED, the extent of Claimant's distress and her actual damages are discussed in greater detail below. See Section III.A.

2. Negligence

Under California law, "[e]veryone is responsible, not only for the result of his or her willful acts, but also for an injury occasioned to another by his or her want of ordinary care or skill in the management of his or her property or person..." Cal. Civ. Code § 1714. California courts have permitted plaintiffs to plead negligence in consumer protection matters, holding that a "'violation of a statutory duty to another may therefore be a tort, and violation of a statute embodying a public policy is generally actionable even though no specific remedy is provided in the statute itself.'" Weakley v. Redline Recovery Services, LLC (2010) 723 F.Supp.2d 1341, 1346 (S.D. Cal. 2010).

The Arbitrator finds that TVT failed to exercise its duty of ordinary care when enlisting the police to recover the vehicle and communicating Claimant's personal credit information to third parties. Further, TVT committed multiple violations of the RFDCPA, all of which resulted in harm to Claimant. Accordingly, TVT is liable for negligence.

H. Fair Credit Reporting Act

Under the Fair Credit Reporting Act (FCRA), "[a] person shall not use or obtain a consumer report for any purpose unless (1) the consumer report is obtained for a purpose for which the consumer report is authorized to be furnished under this section; and (2) the purpose is certified in accordance with section 1681e of this title by a prospective user of the report through a general or specific certification." 15 U.S.C. § 1681b(f).

Claimant contends that TVT violated the FCRA when it disclosed her private credit information to third parties, such as the police. As previously discussed, the Arbitrator finds that the police were not entitled to the details of Claimant's credit history, nor did Officer Toming need that information to conduct his investigation. Therefore, this was an impermissible use of Claimant's credit information under the FCRA.

I. Equal Credit Opportunity Act

The Equal Credit Opportunity Act (ECOA) requires that creditors who take an adverse action against an applicant provide a statement of reasons to the applicant for such action. 15 U.S.C. § 1691(d)(1). The statement of reasons must be in writing and it must contain the specific reasons for the adverse action taken. 15 U.S.C. § 1691(d)(2), (3).

Claimant contends that TVT became the lender on the contract because it did not timely send the Notice of Cancellation. As the lender, Claimant argues that TVT failed to send her a statement of reasons for the adverse credit action, as required by the ECOA. However, for the reasons stated above, the Arbitrator found that TVT did timely cancel the contract through verbal communication. Therefore, TVT was not the lender, and had no obligation under the ECOA to provide Ms. **Sanchez** with a statement of reasons for her credit denial.[4]

J. Business and Professions Code § 17200

California Business and Professions Code § 17200 governs unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising. Cal. Bus. & Prof. Code § 17200. In her Closing Briefs, Claimant fails to address the merits of her cause of action, stating only that injunctive relief should be issued for TVT to provide proper notices to borrowers under the law.

As the Arbitrator found, TVT did provide proper notice in this case. Accordingly, lack of notice cannot form the basis for liability under this statute.

With respect to liability in this case, the Arbitrator has made some findings in favor of Claimant and some against. However, the Arbitrator's conclusions with respect to 42 U.S.C. § 1983, the Rosenthal Act, the FRCA, civil extortion, intrusion upon seclusion, negligence and NIED do not conflict with the determinations made regarding the breach of contract, breach of good faith and fair dealing, conversion, and ECOA claims.

On the one hand, TVT did provide verbal notice to Claimant and did properly cancel the contract. Therefore, TVT was not a lender, but the owner of the car, with a right to reclaim it. On the other hand, TVT did not have a right to pursue Claimant in the manner they did, by involving the police and threatening arrest. At the time of repossession, Claimant alleged she owed a debt and resisted returning the vehicle on the advice of counsel. She explained to Ms. Parkhurst that she had not been "served" within 10 days and had retained counsel. Therefore, TVT had an obligation to use the legal process to recover the vehicle before involving law enforcement, an abusive form of debt collecting. As a result, Claimant suffered harm.

III. DAMAGES

A. Actual Damages

Claimant seeks actual damages in the amount of $250,000 for personal humiliation, embarrassment, various medical issues including headaches, sleeplessness, stomach problems, weight loss and anxiety, among others. In addition, she seeks compensation for the distress arising from the fight with her father, resulting homelessness, her son's illness and the stress of being separated from her husband.

In addition to Claimant's common law claims, the FCRA provides for compensation in the form of actual damages, which has been interpreted to include recovery for emotional distress and humiliation. Guimond v. Trans Union Credit Information Co., 45 F.3d 1329, 1332-33 (9th Cir. 1995) (internal citations omitted). The same is true for civil rights violations under 42 U.S.C. § 1983. Anderson v. Central Point School Dist. No. 6, 746 F.2d 505, 508 (9th Cir. 1984), In addition, "[ajctual damages are available to any person injured by a violation of the FDCPA. FDCPA actual damages encompass damages for emotional distress and relational injuries." Nelson v. Equifax Information Services, LLC, 522 F.Supp.2d 1222, 1239. The Rosenthal Act incorporates FDCPA's damages provisions. See Cal. Civ. Code § 1788.17; 15 U.S.C. § 1692k.

The Arbitrator finds that TVT violated Claimant's civil rights, the FCRA and the RFDCPA, and is liable for civil extortion, intrusion upon seclusion, negligence and NIED, all of which entitle Claimant to damages for emotional distress. Therefore, the question is not whether, but to what extent, Claimant is entitled to such damages. As a threshold matter, the Arbitrator is persuaded that Claimant did in fact, suffer from emotional distress. Emotional distress damages may be "awarded on testimony alone or appropriate inference from circumstances." *Passantino v. Johnson Consumer Products, Inc.,* 212 F.3d 493, 513 (9th Cir. 2011). Claimant testified that she suffered a range of symptoms resulting from TVT's conduct. From the Arbitrator's perspective, it is difficult to imagine

being threatened with criminal charges by the police and not suffer from some form of stress, embarrassment, humiliation, fear, anxiety, or other form of medical or mental anguish.

Throughout this analysis, the Arbitrator has made clear that TVT should not have used the force of the police to recover the vehicle without first engaging in the legal process. Therefore, Claimant's emotional distress stemming from the police report, the police visit, the letter threatening her with criminal charges and the phone call to Mr. Nieto from Officer Toming is foreseeable and actionable. Further, any embarrassment or humiliation Ms. **Sanchez** suffered from having her personal credit history improperly disclosed is also foreseeable. As for distress caused by the fight with her father and resulting sequelae, including her son's illness, her homelessness, and the separation from her husband, the Arbitrator finds that these events are one step beyond what was foreseeable.

Simply put, it is not foreseeable that TVT's phone call to Claimant's house, which happened to be answered by Claimant's father, would trigger a vicious, physical attack upon Ms. **Sanchez**, resulting in a restraining order. This is not a typical reaction to a phone call from a car dealership, even one in which return of a vehicle is requested. In addition, TVT could not have known that Claimant's father already distrusted Mr. Nieto because he had been in trouble with the law, and that by intervening in the fight, Mr. Nieto's violence likely encouraged Claimant's father to get a restraining order. With respect to Claimant's son, his medical records indicate that his infection was brought on by vomit from another child or a spider bite, not by stress from the altercation. Even if it were, TVT could not possibly predict that Claimant's son would become ill.

Accordingly, the Arbitrator finds that Claimant's homelessness, her son's illness, and the fight with her father is far too arbitrary to be ascribed to TVT. Therefore, when the Arbitrator puts those alleged damages aside, what remains is a smaller universe of harm caused by TVT. To be sure, TVT's threats of arrest and Claimant's encounter with the police was stressful and humiliating, however, it was short-lived. Ultimately, Claimant was never arrested or charged with any criminal activity. Once she returned the vehicle, she was not contacted by police again. Further, any damages she suffered from disclosure of her credit history would cause embarrassment only with a small group of people, including a coworker and a few police officers.[5]

That said, Claimant is entitled to recover for what must have been upsetting events. However, this recovery must be commensurate with TVT's offending conduct, which is less extensive than what Claimant has alleged. Accordingly, the Arbitrator awards Claimant actual damages for emotional distress in the amount of $75,000. This award is made to compensate Claimant for her civil rights, FRCA, RFDCPA, extortion, intrusion upon seclusion, NIED and negligence claims.

B. Statutory Damages

With respect to Claimant's RFDCPA claim, the Arbitrator finds that TVT is liable for $1,000 in statutory damages under Cal. Civil Code § 1788.17 and $1,000 under Cal. Civil Code § 1788.30(b). As described above, TVT's use of the police and impermissible disclosure of Claimant's credit history was intentional and abusive in nature.

As to Claimant's FRCA claim, statutory damages are subsumed in the Arbitrator's award of actual damages. *See* 15 U.S.C. § 1681n(1)(A).

C. Punitive Damages

"In an action for the breach of an obligation not arising from contract, where it is proven by clear and convincing evidence that the defendant has been guilty of oppression, fraud, or malice, the plaintiff, in addition to the actual damages, may recover damages for the sake of example and by way of punishing the defendant." Cal. Civil Code §

3294(a). Punitive damages are also available in actions involving the FCRA and 42 U.S.C. § 1983. See 15 U.S.C. § 1681n(a)(2); *Smith v. Wade,* 461 U.S. 30, 56 (1983).

California law imposes punitive damages where the defendant acts with "the intent to vex, injure or annoy or with a conscious disregard of the plaintiff's rights." *Bell v. Sharp Cabrillo Hospital* (1989) 212 Cal.App.3d 1034, 1044. "Where nonintentional torts involve conduct performed without the intent to harm, punitive damages may be assessed 'when the conduct constitutes conscious disregard of the rights or safety of others."' *Id.* "Nonintentional conduct [conduct committed without intent to harm] comes within the definition of malicious acts punishable by the assessment of punitive damages when a party intentionally performs an act from which he knows, *or should know,* it is highly probably that harm will result." *Id.* at 1044-45 (emphasis in original).

In *Clodfelter v. United Processing, Inc.,* plaintiff made a claim under the FDCPA after he was threatened with arrest as well as criminal prosecution by a debt collector at his place of employment. *See Clodfelter v. United Processing, Inc.,* 2008 WL 4225557 at *1 (C.D. Ill. Sept. 12, 2008). Defendant also phoned plaintiffs relatives and employer, stating that plaintiff would be criminally prosecuted because of the debt. *Id.* The court found that these acts were sufficiently egregious to impose an award of punitive damages in the amount of $250,000. *Id.* at *5.

Clodfelter is substantially similar to this case. Here, TVT involved the police in its collection efforts without first seeking a court order, in violation of Claimant's rights. Further, TVT impermissibly disclosed Claimant's credit history to third parties. Even if TVT did not intend to cause the harm that followed - namely, the emotional distress caused by these events - TVT should have known that filing police reports, threatening Claimant with criminal acts, endorsing Officer Toming's appearance at Claimant's place of work and sharing Claimant's credit history would cause harm. Accordingly, TVT's conduct warrants punitive damages.

However, "punitive damages should not be grossly excessive." *Id.* "Punitive damages... should be allowed with caution and within narrow limits." *Fountila v. Carter,* 571 F.2d 487, 491 (9th Cir. 1978) "The infliction of such damages, and the amount thereof when inflicted, are of necessity within the discretion of the trier of fact." *Id.* Claimant has requested a punitive damages award of $,000,000.

This request assumes that all of Claimant's alleged damages, including the argument with her father, her homelessness, son's illness and separation from her husband is attributable to TVT. As previously discussed, the Arbitrator finds that these damages go beyond what TVT could have known would occur. Further, the request for $1,000,000 in punitive damages also assumes that Claimant was completely free of any culpability. The Arbitrator notes that had Claimant returned TVT's multiple messages or answered any of the letters she received, she may have avoided a situation where TVT involved the police. Mr. Rudnai testified that TVT had never encountered a situation where a customer failed to return a vehicle, indicating that TVT does not have a pattern and practice of calling the police on customers.

These facts do not excuse TVT's violations of Claimant's right to due process or her other claims, but the Arbitrator finds that it does mitigate the amount of a punitive damages award. Punitive damages are meant to deter but must be ""both reasonable and proportionate to the amount of harm to the plaintiff and to the general damages recovered."" *Williams v. First Advantage LNS Screening Solutions, Inc.,* 238 F.Supp.3d 1333, 1357 (USDC N.D. Fla. March 2, 2017).

Based on the foregoing, the Arbitrator finds that Claimant is entitled to punitive damages in the amount of $150,000, an amount both reasonable and proportionate to Claimant's harm. This award is made to compensate Claimant for her civil rights, FRCA, and common law claims.

IV. ATTORNEY FEES AND COSTS

Pursuant to the Order Re Claimant's Motion for Attorney's Fees and Costs, the Arbitrator found that Claimant is entitled to an attorney fee award of $399,355.50 for fees incurred by the Wilcox Law Firm and $121,465 for fees incurred by the YG Legal Firm. Further, Claimant's request for a 1.5 lodestar multiplier was denied.

The Arbitrator also found that Claimant is entitled to a cost award of $15,654.28 for costs incurred by the Wilcox Law Firm and $4,404.94 for costs incurred by the YG Legal Firm.

Finally, the Arbitrator ordered that the attorney fee and cost awards were to be paid directly to the Wilcox Law Firm, P.C. and the YG Legal Firm, as described in the declarations attached to Claimant's Motion for Attorney's Fees and Costs.

V. FINAL AWARD

The Arbitrator hereby declares and finds:

Claimant Girlie **Sanchez** has established causes of action for her 42 U.S.C. § 1983, RFDCPA, FRCA, civil extortion, intrusion upon seclusion, negligence and NIED claims against Respondent Oremor of Temecula, LLC d/b/a Temecula Valley Toyota. Claimant is entitled to an award of $75,000 in actual damages, $2,000 in statutory damages and $150,000 in punitive damages for these claims, totaling $227,000, to be paid by Respondent.

Claimant has failed to establish her causes of action for breach of contract and the implied covenant of good faith and fair dealing, conversion, 15 U.S.C. § 1691(d) and California Business and Professions Code § 17200 and shall take nothing on these claims.

Claimant is entitled to an attorney fee award of $399,355.50 for fees incurred by the Wilcox Law Firm and $121,465 for fees incurred by the YG Legal Firm, to be paid by Respondent. Claimant's request for a 1.5 lodestar multiplier is denied.

Claimant is entitled to a cost award of $15,654.28 for costs incurred by the Wilcox Law Firm and $4,404.94 for costs incurred by the YG Legal Firm.

The attorney fee and cost awards are to be paid directly to the Wilcox Law Firm, P.C. and the YG Legal Firm, as described in the declarations attached to Claimant's Motion for Attorney's Fees and Costs.

This Award is in full resolution of all claims and counterclaims submitted in this Arbitration. All claims not expressly granted herein are hereby denied.

IT IS SO ORDERED.

Dated: February 24, 2021

<<Signature>>

Lexi W. **Myer**, Esq.

Arbitrator

Footnotes

1 Although the text message contained in Exhibit 22 is not dated, Ms. **Sanchez** states that her car payment is due the following day, which according to Exhibit 104 would be December 19, 2017.

2 A consumer credit transaction has been interpreted to mean "a transaction where a person provides property or services in advance of payment... In other words, there is a consumer credit transaction when the consumer acquires something without paying for it." *Gouskos v. Aptos Village Garage, Inc.* (2001) 94 Cal.App.4th 754, 759 (emphasis in original). Here, Claimant acquired the vehicle from TVT on credit, without a down payment. TVT even refers to the Agreement as a "Consumer Credit Contract." See Ex. 104. Therefore, at least at the outset, the Arbitrator is persuaded that Claimant and TVT were involved in a consumer credit transaction.

3 The Arbitrator is mindful that Mr. Banuelos testified that he actually met with Ms. **Sanchez** and her mother the week of November 6, 2017. However, the timing of this meeting is disputed, and it is unclear when it occurred. Nevertheless, as explained above, the Arbitrator is convinced that Mr. Banuelos made several attempts to call Ms. **Sanchez** immediately after her credit was turned down.

4 It should be noted that the true creditor, Toyota Financial Services, did supply Ms. **Sanchez** with a written statement regarding the reason for her credit denial on November 25, 2017. (Ex. 107)

5 The Arbitrator is mindful that Claimant also alleges that a TVT employee shouted about Claimant's credit in the lobby of the dealership, and that other strangers overheard. However, several TVT employees claim this never happened. Either way, while temporarily embarrassing, such a fleeting event would not cause long-lasting harm.

End of Document

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI

WILLIAM and STACI BELL,	)	
	)	
Plaintiffs,	)	**Case No.**
	)	
v.	)	
	)	
CITY CHEVROLET LLC	)	
d/b/a	)	
CABLE-DAHMER OF KANSAS CITY,	)	
	)	
Defendant.	)	

COMPLAINT

Plaintiffs William and Staci Bell, by and through their undersigned attorneys, state and allege as follows:

INTRODUCTION

1. In late December 2021, Plaintiffs visited Defendant's dealership, where they traded their 2018 Ford Expedition in towards a 2021 Chevy Suburban. Despite leaving Defendant's lot with the Suburban and without the traded-in Expedition, Plaintiffs ultimately ended up with *neither* vehicle. This haywire outcome was the result of Defendant's implementation of a "yo-yo" scheme, as described in detail below. En route to breaching multiple agreements with Plaintiffs, Defendant improperly took ownership of the Expedition and offered it for sale, while refusing to honor the terms of its financing contract with Plaintiffs.

PARTIES

2. Plaintiffs William and Staci Bell (collectively, "Plaintiffs" and, disjunctively, "William" or "Staci") are individual Kansas residents, a married couple, and consumers. William is a servicemember in the U.S. Army.

3. Defendant City Chevrolet d/b/a Cable-Dahmer of Kansas City is a Missouri limited liability company. It can be served by serving its registered agent: Patric S. Linden, 2600 Grand Blvd., Ste. 300, Kansas City, Missouri 64108.

JURISDICTION & VENUE

4. This Court has subject-matter jurisdiction over this lawsuit pursuant to 28 U.S.C. § 1331 because it's an action under the federal Truth in Lending Act.

5. This Court also has subject-matter jurisdiction over this lawsuit pursuant to 28 U.S.C. § 1331 because it's an action under the federal Equal Credit Opportunity Act.

6. This Court also has subject-matter jurisdiction over this lawsuit pursuant to pursuant to 28 U.S.C. § 1332 because it's an action between citizens of different states and the amount in controversy exceeds $75,000, exclusive of interest and costs.

7. This Court has (general) personal jurisdiction over Defendant because it conducts its business largely or wholly in this District.

8. Venue in this Court is proper pursuant to 28 U.S.C. § 1391(b)(2) because a substantial portion of the events or omissions giving rise to the claims contained herein occurred in this District.

9. Venue in this Court is also proper pursuant to 15 U.S.C. § 1691e(f).

FACTS COMMON TO ALL COUNTS

10. On or about December 30, 2021, Plaintiffs visited Defendant's dealership in Kansas City.

11. During that visit, Plaintiffs decided to purchase the 2021 Chevy Suburban with VIN: 1GNSKEKD6MR338074 ("the Suburban").

12. Plaintiffs entered into a retail installment sales contract ("the RISC") for the purchase of the Suburban.

13. The RISC listed a financed amount of $97,644.42; finance charge of $32,888.70; total sale price of $130,533.12; and APR of 7.5%.

14. The RISC's financing structure resulted in an amortization schedule with monthly payments of $1,359.72 over ninety-six months.

15. As stated, Plaintiffs traded their 2018 Ford Expedition (VIN: 1FMJK1MT5JEA22553; "the Expedition") in towards the purchase of the Suburban.

16. The RISC stated a trade-in allowance of $55,000.00 for the Expedition.

17. The RISC also stated that, with an outstanding lien of $61,358.47, the trading in of the Expedition would add $6,358.47 to the financed amount.

18. The APR on the Expedition loan was 5.84%.

19. The RISC named Defendant as the "seller-creditor."

20. The RISC stated that it was "the complete and exclusive statement of the agreement" between Plaintiffs and Defendant.

Defendant Ensnares Plaintiffs in a "Yo-Yo" Scheme

21. "Yo-yo" financing schemes are a well-established method of deceit whereby car dealers enter into retail installment contracts with purchasers and then, usually after a few days or so, inform those same purchasers that their credit application was declined such that they must return and contract for less favorable financing terms.

22. Here, as detailed, Defendant, as the "seller-creditor," entered into the RISC with Plaintiffs.

23. A dealership's entering into financing contracts as the "creditor" before finalizing credit-application acceptance by external creditors is a hallmark of "yo-yo" schemes.

24. In so doing, dealerships mislead consumers into believing that financing is final while knowing that financing is not final. Then, the dealerships take advantage of consumer naiveté to threaten the borrower with new terms, frequently using their down payments and/or trade-in vehicles as ransom.

25. And that is precisely what Defendant did to Plaintiffs. On or about January 6, 2022—seven days after Plaintiffs left with the Suburban—the Postal & Community Credit Union emailed Defendant's finance manager, cc'ing Staci, and said that it couldn't do the loan because Staci's current employment was temporary. And this despite the fact that Defendant had submitted a title application with Postal & Community named as the lienholder *a week before* (in violation of R.S. Mo. § 301.198) and a day after Defendant had submitted Plaintiffs' credit application to Postal &

Community, in the midst of over a dozen other denials.

26. As described in detail below, Defendant, instead of honoring *its* agreement(s) with Plaintiffs, proceeded to keep the Expedition while persisting in its attempts to get Plaintiffs to purchase the Suburban under different financing terms.

27. Defendant submitted credit applications to numerous potential lenders, resulting in undue "hard pulls" and denials.

28. Defendant didn't apprise Plaintiffs of these many denials; instead, they had to learn about it from their credit reports. When they left Defendant's lot with the Suburban, they understandably believed the financing had been finalized at the terms stated in the RISC.

Defendant Also Violates Multiple Terms of Other Agreements with Plaintiffs

29. In addition to the RISC, Plaintiffs and Defendant signed a document entitled "Financial Terms Agreement" ("the FTA").[1]

30. The FTA states, in part, "**I understand and agree that my purchase of a vehicle from Cable Dahmer Automotive Group is conditioned upon my payment in full for the vehicle by a cash purchase or by obtaining adequate financing through the approval of my credit in conformity with the terms set forth in the Sales Contract and Retail Installment Contract, if applicable, which I have signed.**" (emphasis added).

31. Further, "**If my credit or the financing terms are not approved, I WILL**

[1] Plaintiffs plead relative to the faces of these documents and do not concede anything with regard to their legal propriety or the sequence in which they were signed.

return the vehicle to Cable Dahmer immediately and [Defendant] will hereafter return my down payment deposit, whether in cash or trade-in . . . and cancel the Sales Contract and the Retail Installment Sales Contract, if applicable, which I have signed." (emphasis added).

32. Even further, Plaintiffs and Defendant also signed a document that states, in part, "**If you're trading in a vehicle with a current open auto loan, you are responsible for making the payments to the lienholder until your new vehicle purchase is funded with the lender and we receive the funds. Your trade-in will not be paid off by us until your new vehicle purchase is funded with the lender and we receive the funds.**" (emphasis in original).

33. As stated, Plaintiffs entered into the RISC with Defendant, which named Defendant "seller-creditor." This means that Defendant was contractually obligated to provide and/or secure financing at the agreed-upon terms.

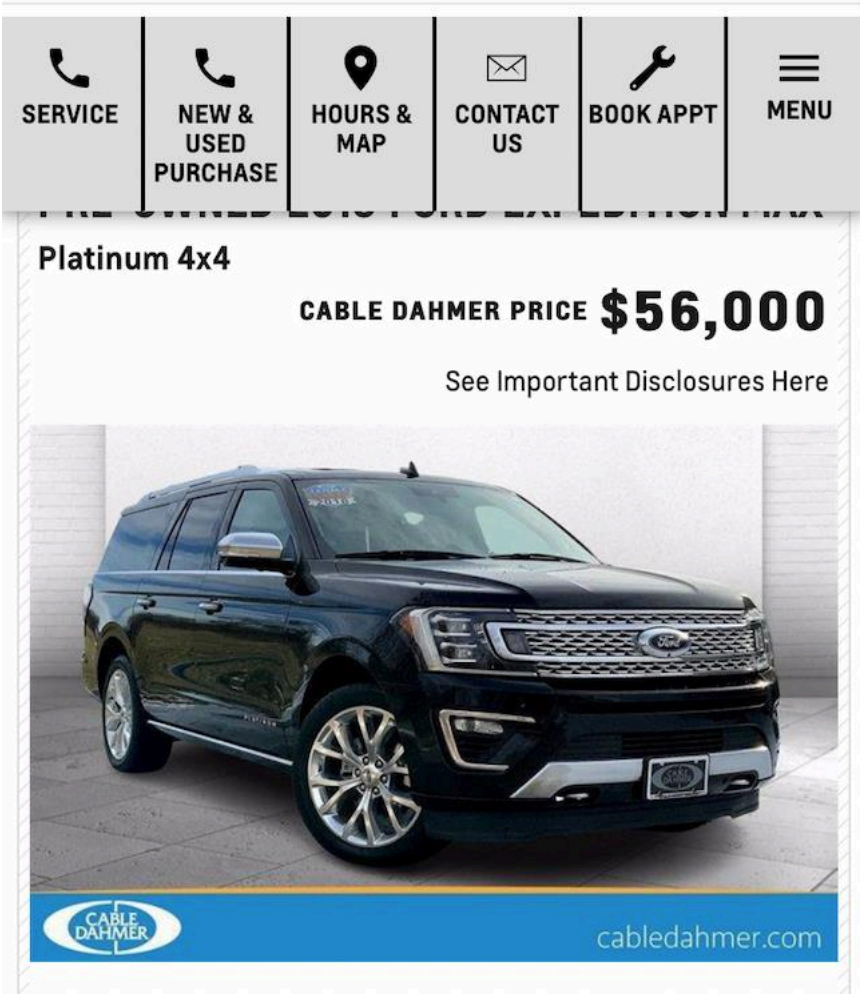
34. Then, the additional documents signed—whether executed earlier or later than the RISC—provided for a rescission process whereby, in the case of failure to obtain financing "in conformity with the terms set forth" in the RISC, the deal would be unwound and the relevant vehicles—including trade-ins—returned.

35. Despite its declaration that it would not pay off the Expedition's lien "**until [the Suburban's] purchase is funded with the lender and [Defendant] receive[s] the funds**," Defendant paid off the Expedition's lien and offered it for sale even though funding at the terms stated in the RISC had not been provided.

36. Again, Defendant was supposed to wait until *it had received the funds* for

the Suburban. In the absence of such receipt, there was no good reason for Defendant to simply take ownership of the Expedition.

37. As stated, **Defendant also didn't inform Plaintiffs that it had paid off the Expedition and offered it for sale**; rather, Plaintiffs had to learn of these events from, respectively, the lienholder and the Internet, where William discovered the Expedition for sale:



Plaintiffs Properly Return the Suburban While Defendant Refuses to Return the Expedition and, Instead, Persists in Trying to Get Plaintiffs to Agree to New Terms

38. On or about January 7, 2022, Jamie Burke—Defendant's finance manager—texted William, stating that he had identified a different (i.e., not Postal & Community Credit Union) potential lender for the sale of the Suburban.

39. Mr. Burke stated "we can do 1500 no gap and have manager sign off can you guys move to that." This message, on information and belief, meant new financing terms with a $1,500 (rather than $1,360) monthly payment and no GAP protection.

40. Per the RISC, the value of the GAP policy was $900.00.

41. If such increased payments were to be made for the same ninety-six months stated in the RISC, that would result in $144,000 in total payments, as opposed to the $130,533.12 listed in the RISC.

42. William replied to the offer of $1,500 monthly payments, saying, "No that is outside of our budget."

43. That same day, after learning of proposed financing terms, William again texted Mr. Burke, stating, "Jamie we can't do that big of a payment so I will return the car tomorrow."

44. On or about January 8, 2022, William again texted Mr. Burke, stating, "Can we deliver a time to have someone deliver our Expedition back to us and pick up the suburban in Leavenworth."

45. In reply, Mr. Burke asked, "Is there no way to swing the new payment [?]".

46. On or about January 10, 2022, William texted Mr. Burke, again asking to arrange a swap of the Expedition and Suburban.

47. In reply, Mr. Burke claimed to be "off" and informed William that he needed to contact a/the sales representative.

48. The same day, William sent Ken Walker—the sales representative responsible for the sale of the Suburban to Plaintiffs—an email requesting a date and time at which to exchange the Suburban for the Expedition.

49. In another text, Mr. Burke claimed to have been quarantined because of COVID and then proceeded to discuss financing terms, saying that he was "doing everything" to "save [Plaintiffs'] deal."

50. In reply, William texted, in part, "we are past the point of trying to sell me a vehicle"; "I went to make a payment on my trade-in vehicle per the terms of the contract and discovered the trade-in vehicle loan had already been paid"; and "I made multiple attempts to return the [Suburban] and retrieve [the Expedition] no one would assist me."

51. Indeed, the word "WILL," as cited above with regard to the FTA and a purchaser's alleged duty to return a vehicle whose financing fell through, is the only all-caps word in the body of the FTA. Clearly, this was intended to emphasize a purchaser's responsibility to "immediately" return a purchase.

52. And promptly return the Suburban—in excellent condition, with the keys and title—is precisely what William did.

53. However, as alluded to above, Defendant attempted to thwart the return

process by declining to have a manager and/or sales representative meet with William. Likewise, none of Defendant's agents would return the Expedition to William.

54. William ultimately effected the return of the Suburban by leaving the keys and title with a receptionist.

55. However, one of Defendant's managers then emerged and had the gall to claim that William owed Defendant money (because, presumably, Defendant had prematurely and improperly paid off the Expedition's lien).

56. Thus, Plaintiffs properly returned the Suburban while Defendant retained the Expedition.

57. William proactively contacted the Expedition's lienholder in an attempt to see if the mess created by Defendant could somehow be unwound; the lienholder, Commerce Bank, told him that wasn't possible.

58. On or about January 14, 2022, Mr. Walker, the sales representative, texted William, asking "what happened [?]".

59. William replied, stating that would be his final reply and he'd consider further direct contact from Defendant to be harassment.

60. Plaintiffs have suffered wasted time and emotional distress because of Defendant's behavior, as described above, which distress manifested in anger, anxiety, embarrassment, headaches, sleep loss, and a range of other negative symptoms.

61. Plaintiffs were compelled to seek and retain legal counsel because of Defendant's behavior, as described above.

62. Because Defendant improperly took ownership of the Expedition and

declined to honor the RISC, Staci was left without a vehicle. Months later, Plaintiffs were still finding it quite difficult to locate a suitable vehicle; they have a large family and needed a full-size SUV because of that. In the interim, Staci and some of the children often had to walk to school and/or have William drive them all. When Plaintiffs did locate a reasonably suitable vehicle for Staci, the vehicle was smaller, and generally less attractive, to Plaintiffs than the Suburban, and it had to be purchased during the inflation spike of March-April 2022.

63. William alone, given what had occurred relative to Staci's credit application with Defendant, had applied for financing with a major lender. However, William's application was declined, the sole reason given for that declination being, "There have been too many recent inquiries."

64. In order to acquire the aforementioned replacement vehicle, Plaintiffs had to ask Staci's mother to co-sign the loan.

COUNT I:
INJUNCTIVE RELIEF

65. Plaintiffs, for this Count I of their Complaint, incorporate the previous paragraphs as if wholly set forth herein.

66. As described, "yo-yo" schemes are inherently predatory as all risk generated by such schemes is borne by consumers. That is, in the case of credit denial by external lenders, subsequent loan terms will be worse, not better, than those for which they *already contracted*. Further, in many cases, the dealership is in possession of the consumer's down payment and/or trade in, such that they may hold them as

ransom.

67. Dealerships, such as Defendant, consistently implement such schemes because it's in their financial interest to do so, despite being illegal.

68. Such schemes, as described, are illegal because they inherently entail breach of contract.

69. Such schemes, as described, are illegal in Missouri because they're inherently deceptive, unfair, *and* violative of federal statutes and other laws, for multiple reasons. To provide but one, dealerships such as Defendant enter *financing* contracts, as the "seller-creditor," with consumers even though they have no intention of acting as the "creditor" and aren't licensed to act as such even if they did intend to supply auto loans.

70. Such schemes, as described, are generally illegal because they typically entail violation of the Truth in Lending Act, as the terms disclosed in the contracts are treated as (aspirational) estimates despite not being labeled as such.

71. Such schemes, as described, are generally illegal because they typically entail violation of the ECOA in that dealerships such as Defendant almost never send ECOA-compliant adverse-action notices.

72. As stated herein, Defendant didn't send Plaintiffs an adverse-action notice at all, despite repeated refusals to honor the RISC on its stated terms, and didn't let them know that the TILA disclosures to which they *contractually agreed* were estimates. There's no good reason to believe that behaving in this manner isn't a matter of course for Defendant.

73. The Court has authority to provide to Plaintiffs the injunctive relief sought below, including establishing the rights, status, and duties of the parties, pursuant to multiple laws, including the MMPA and Declaratory Judgment Act.

74. Plaintiffs hereby request injunctive relief in the form of a court order enjoining Defendant from paying off liens of trade-in vehicles before acquiring external financing, as stated in its own agreement. That is, Plaintiffs simply request that the Court enjoin Defendant from acting against its own agreement.

75. Plaintiffs hereby request injunctive relief in the form of a court order enjoining Defendant from entering retail installment contracts with consumers as the "seller-creditor" until Defendant is licensed as a creditor/lender with the Missouri Division of Finance.

76. Plaintiffs hereby request injunctive relief in the form of a court order enjoining Defendant from entering retail installment contracts, where financing hasn't yet been secured, with consumers unless the TILA disclosures are described as estimates or something substantially similar.

77. Plaintiffs have no adequate remedy at law for such relief, which fundamentally seeks legal compliance by Defendant on an ongoing basis.

78. Because of the factual overlap between this claim and fee-shifting laws below, Plaintiffs are entitled to reasonable attorneys' fees and costs in seeking this claim for injunctive relief.

COUNT II:
VIOLATIONS OF THE EQUAL CREDIT OPPORTUNITY ACT
15 U.S.C. § 1691 *et seq.*

79. Plaintiffs, for this Count II of their Complaint, incorporate the previous paragraphs as if wholly set forth herein.

80. Plaintiffs and Defendant are each a "person" for the purposes of the ECOA. *See* 15 U.S.C. § 1691a(f).

81. Defendant is a "creditor" for the purposes of the ECOA because it "regularly extends, renews, or continues credit" and/or "regularly arranges for the extension, renewal, or continuation of credit." *See* 15 U.S.C. § 1691a(e).

82. Plaintiffs were an "applicant" for "credit" for the purposes of the ECOA. *See* 15 U.S.C. § 1691a(b), (d).

83. Plaintiffs had Defendant take an "adverse action," or "adverse actions," against them, as described above. *See* 15 U.S.C. § 1691(d)(6).

84. Plaintiffs did not receive from Defendant an ECOA-compliant notice(s) as to that "adverse action," or "adverse actions," as described above. *See* 15 U.S.C. § 1691(d)(1)-(2).

85. Defendant deprived Plaintiffs of the benefit of their bargain, as enshrined in the RISC into which they entered with Defendant.

86. Plaintiffs have suffered actual damages because of Defendant's violations of the ECOA. *See* 15 U.S.C. § 1691e(a).

87. More specifically, Plaintiffs have suffered actual damages in the form of increased cost of subsequent financing; damage to their credit expectancy; loss of vehicular use; and significant emotional distress.

88. Defendant "shall" be liable to Plaintiff for actual damages and punitive damages. *See* 15 U.S.C. § 1691e(b).

89. Should Plaintiffs be successful in this action, Defendant "shall" be liable for their reasonable attorneys' fees and litigation costs. *See* 15 U.S.C. § 1691e(d).

90. Plaintiffs hereby pray for judgment against Defendant in such amount as is allowable by law and to be determined at trial, for their actual damages, pre- and post-judgment interest at the greatest rate allowed by statute, punitive damages, and for such other and further relief as the Court may find just and proper under the circumstances.

COUNT III:
VIOLATIONS OF THE TRUTH IN LENDING ACT
15 U.S.C. § 1601 *et seq.*

91. Plaintiffs, for this Count III of their Complaint, incorporate the previous paragraphs as if wholly set forth herein.

92. Defendant is a "creditor" as defined by the federal Truth in Lending Act ("TILA") because it regularly extends credit via installment contracts and is the person to whom Plaintiffs' debt was payable from the face of the RISC. *See* 15 U.S.C. § 1602(g). Indeed, the RISC lists Defendant as the "**seller-creditor**." (emphasis added).

93. Plaintiffs are and were "consumers" during all germane periods. *See* 15 U.S.C. § 1602(i).

94. Per the RISC, Defendant extended "credit" to Plaintiffs. *See* 15 U.S.C. § 1602(f).

95. Defendants' sale of the Suburban to Plaintiffs was a "credit sale." *See* 15

U.S.C. § 1602(h).

96. Plaintiffs' purchase of the Suburban was primarily for personal, household, and/or family purposes.

97. Per the RISC, the "amount financed" was $97,644.42.

98. Per the RISC, the "annual percentage rate" was 7.5%.

99. Per the RISC, the "total of payments" was $130,533.12.

100. Per the RISC, the "finance charge" was $32,888.70.

101. Per the RISC, the gross trade-in allowance was $55,000.00.

102. Per the RISC, the net trade-in allowance was -$6,358.47.

103. The RISC's "finance charge" was materially incorrect, in violation of 15 U.S.C. § 1638(a)(3), and Regulation Z, 12 C.F.R. §§ 226.18(d), 226.4.

104. The RISC's "annual percentage rate" was materially incorrect, in violation of 15 U.S.C. § 1638(a)(4) and Regulation Z, 12 C.F.R. § 226.18(e).

105. The RISC's "amount financed" was materially incorrect, in violation of 15 U.S.C. § 1638(a)(2A) and Regulation Z, 12 C.F.R. § 226.18(b).

106. Defendant further violated TILA because it treated the disclosures on the RISC as estimates about the terms of the credit that it might provide Plaintiffs and, pursuant to Regulation Z, 12 C.F.R. § 226.17(c)(2), the disclosures should have been marked as estimates.

107. As described above, Defendant entered the RISC with Plaintiffs but did not provide financing on those terms.

108. Pursuant to 15 U.S.C. § 1640(a), Plaintiffs are entitled to recover actual and

statutory damages because of Defendant's TILA violations.

109. In the case of successful enforcement of such TILA liability, Plaintiff is, per 15 U.S.C. § 1640(a)(3), also entitled to their reasonable attorney's fees and expenses in litigating this action.

110. Plaintiffs hereby pray for judgment against Defendant for their actual damages, pre- and post-judgment interest in the greatest amount allowable by statute, reasonable attorneys' fees, statutory penalties, costs in bringing this action, and such other and further relief as the Court finds just and proper under the circumstances.

COUNT IV:
VIOLATIONS OF THE MISSOURI MERCHANDISING PRACTICES ACT

111. Plaintiffs, for this Count IV of their Complaint, incorporate the previous paragraphs as if wholly set forth herein.

112. The Missouri Merchandising Practices Act ("MMPA"), R.S. Mo. § 407.010 *et seq.*, proscribes "[t]he act, use or employment by any person of any deception, fraud, false pretense, false promise, misrepresentation, unfair practice or the concealment, suppression, or omission of any material fact in connection with the sale or advertisement of any merchandise in trade or commerce . . . .".

113. Pursuant to 15 C.S.R. § 60-8.020, **Unfair Practice in General**, an "Unfair Practice" is any practice which – (A) either (1) offends any public policy as it has been established by the . . . U.S. Constitution, federal statutes, Federal Trade Commission regulations, or statutes or common law of this state, or (2) is unethical, oppressive or unscrupulous; and (B) represents a risk of, or causes, substantial injury to consumers.

114. Pursuant to 15 C.S.R. § 60-8.070, **Unilateral Breach of Contract**, "(1) It is an unfair practice for any person in connection with the sale of merchandise to unilaterally breach unambiguous provisions of consumer contracts."

115. Pursuant to 15 C.S.R. § 60-8.080, **Unconscionable Practices**, "(1) It is an unfair practice for any person in connection with the sale of merchandise to engage in any unconscionable act or practice, or to use any unconscionable contract or contract term."

116. Pursuant to 15 C.S.R. § 60-8.090, **Illegal Conduct**, "(1) It is an unfair practice for any person in connection with advertisement or sale of merchandise to engage in any method, use or practice which – (A) violates state or federal law intended to protect the public; and (B) presents a risk of, or causes, substantial injury to consumers."

117. Pursuant to 15 C.S.R. § 60-9.010(1)(C), **Definitions**, a material fact is "any fact which a reasonable consumer would likely consider to be important in making a purchasing decision, **or** which would be likely to induce a person to manifest his/her assent, **or** which the seller knows would be likely to induce a particular consumer to manifest his/her assent, **or** which would be likely to induce a reasonable consumer to act, respond or change his/her behavior in any substantial manner." (emphasis added).

118. Pursuant to 15 C.S.R. § 60-9.020, **Deception in General**, "(1) Deception is any method, act, use, practice, advertisement or solicitation that has the tendency or capacity to mislead, deceive or cheat, or that tends to create a false impression."

119. Pursuant to 15 C.S.R. § 60-9.040, **Fraud in General**, "(1) Fraud includes any acts, omissions or artifices which involve falsehood, deception, trickery, breach of

legal or equitable duty, trust, or confidence, and are injurious to another or by which an undue or unconscientious advantage over another is obtained."

120. Pursuant to 15 C.S.R. § 60-9.070, **Misrepresentation in General**, "(1) A misrepresentation is an assertion that is not in accord with the facts."

121. Pursuant to 15 C.S.R. § 60-9.110, **Concealment, Suppression or Omission of Any Material Fact in General**, "(1) Concealment of a material fact is any method, act, use or practice which operates to hide or keep material facts from consumers … (3) Omission of a material fact is any failure by a person to disclose material facts known to him/her, or upon reasonable inquiry would be known to him/her."

122. Plaintiffs and Defendant are all a "person" for the purposes of the MMPA.

123. The Suburban was/is "merchandise" for the purposes of the MMPA.

124. The Expedition was/is "merchandise" for the purposes of the MMPA.

125. The legal services that Plaintiffs were compelled to obtain because of Defendant's actions were/are "merchandise" for the purposes of the MMPA.

126. Plaintiffs' purchase of the Suburban was a "sale" in "trade" or "commerce" for the purposes of the MMPA.

127. Plaintiffs' trading in of the Expedition was a "sale" in "trade" or "commerce" for the purposes of the MMPA.

128. Plaintiffs' purchase of legal services was a "sale" in "trade" or "commerce" for the purposes of the MMPA.

129. Plaintiffs acted reasonably with regard to such transactions.

130. Defendant's violations as outlined herein would cause a reasonable

person to enter into the transactions outlined above.

131. Plaintiffs' damages can be proven with sufficiently definitive and objective evidence to allow the losses to be calculated with a reasonable degree of certainty.

132. Defendant's violations of R.S. Mo. § 407.020 include, but are not necessarily limited to, employing deception, fraud, misrepresentation, false pretense, false promise, unfair practice, concealment, suppression, and/or omission through:

a. Refusing to provide financing at the terms agreed upon in the RISC;
b. Improperly taking ownership of the Expedition;
c. Failing to inform Plaintiffs that it had taken ownership of the Expedition even though it hadn't received full payment for the Suburban, as described above;
d. Making it unduly difficult for Plaintiffs to return the Suburban;
e. Refusing to return the Expedition;
f. Violating R.S. Mo. § 301.198 by submitting a title application stating that Postal & Community Credit Union was the lienholder even though it hadn't approved Plaintiffs' loan application;
g. Violating the federal ECOA, as described above; and
h. Violating the federal TILA, as described above.

133. Defendant's conduct as outlined herein was intentional, willful, wanton, malicious, fraudulent, and/or with reckless disregard to Plaintiffs' rights.

134. Plaintiffs hereby pray for judgment against Defendant in such amount as is allowable by law and to be determined at trial, for their actual damages, pre- and post-judgment interest at the greatest rate allowed by statute, reasonable attorneys' fees, and such other and further relief as may be just and proper under the circumstances.

COUNT V:
CONVERSION

135. Plaintiffs, for this Count V of their Complaint, incorporate the previous paragraphs as if wholly set forth herein.

136. At all relevant times, Plaintiffs were the legal and rightful owners of the Expedition, as described above.

137. At no point did Plaintiffs authorize Defendant to assume or exercise the right of ownership over the Expedition in the absence of full payment for the Suburban.

138. Defendant's assumption and/or exercise of the right of ownership over the Expedition was to the exclusion of Plaintiff's rights.

139. As a direct and proximate result of Defendant's conduct, Plaintiffs have been damaged. Plaintiffs damages include, but are not necessarily limited to, loss of use of the Expedition and emotional distress.

140. Defendant's conduct was intentional, willful, wanton, reckless, and/or fraudulent.

Plaintiffs hereby pray for judgment against Defendant in such amount as is allowable by law and to be determined at trial, for their actual damages, pre- and post-judgment interest at the greatest rate allowed by statute, and for such other and further relief as may be just and proper under the circumstances.

COUNT VI:
BREACH OF CONTRACT

141. Plaintiffs, for this Count VI of their Complaint, incorporate the previous paragraphs as if wholly set forth herein.

142. As described, Plaintiffs entered the RISC with Defendant for the purchase

of the Suburban.

143. Sufficient consideration supported that contract.

144. Plaintiff performed and/or was willing to perform in compliance with the RISC. As stated, they traded in the Expedition for a gross trade-in allowance of $55,000.00.

145. As described herein, Defendant thoroughly breached the RISC.

146. As described above, Defendant further breached other agreements, or alleged agreements, with Plaintiff.

147. Defendant's breach of the RISC and/or other agreements was the direct and proximate cause of damages to Plaintiff, including but not limited to Defendant's retention of the Expedition.

148. Plaintiffs hereby pray for judgment against Defendant in such amount as is allowable by law and to be determined at trial, for their actual damages, pre- and post-judgment interest at the greatest rate allowed by statute, and for such other and further relief as may be just and proper under the circumstances.

COUNT VII:
UNJUST ENRICHMENT

149. Plaintiffs, for this Count VII of their Complaint, incorporate the previous paragraphs as if wholly set forth herein.

150. By the deceptive, misleading, bad-faith, and unlawful conduct alleged herein, Defendant unjustly received a benefit in the windfall it received in the form of Plaintiffs' Expedition, which it retained despite an agreement to do otherwise.

151. It is unjust to allow Defendant, given the deceptive, misleading, bad-faith, and unlawful conduct alleged herein, to retain the Expedition without providing compensation to Plaintiffs.

152. Defendant acted with conscious disregard for the rights of Plaintiffs.

153. Defendant has acted in a wanton and willful manner with respect to the rights of Plaintiffs.

154. Plaintiff is entitled to restitution, disgorgement, and/or the imposition of a constructive trust upon all profits, benefits, and other compensation obtained by Defendant from its deceptive, misleading, bad-faith, and unlawful conduct.

155. Plaintiffs hereby pray for judgment against Defendant in such amount as is allowable by law and to be determined at trial, for their actual damages, pre- and post-judgment interest at the greatest rate allowed by statute, reasonable attorneys' fees, and for such other and further relief as may be just and proper under the circumstances.

COUNT VIII:
FRAUD

156. Plaintiffs, for this Count VIII of their Complaint, incorporate the previous paragraphs as if wholly set forth herein.

157. As discussed above, "yo-yo" schemes are inherently fraudulent in that car dealerships mislead borrowers into believing that financing is finalized even while knowing that the financing is not finalized.

158. Such schemes are fundamentally unfair and predatory because all risk is tilted in favor of the seller: In case external financing is approved, then the deal

proceeds at the agreed-upon terms, as it should; however, in the case external financing is denied, the seller usually remains in control of the trade-in vehicle and/or cash down payment while the buyer is compelled to negotiate for less favorable terms than those stated in the contract to which they agreed.

159. Car dealerships are, of course, aware of this dynamic and, as in this case, will frequently enter into financing contracts as "seller-creditors" *before* applying for external financing.

160. The RISC was not conditional and constituted a valid contract between Plaintiffs and Defendant.

161. Defendant made (mis)representations in the RISC, including but not necessarily limited to the terms of financing—e.g., APR, monthly payment amount, total of payments—as described above. These terms, as stated in the RISC, were false.

162. The relevant (mis)representations Defendant made in the RISC were material.

163. Defendant knew the representations in the RISC to be false and/or untrue. Defendant knew this because it had not received the result(s) of Plaintiffs' credit application(s) and had no intention of financing the sale itself.

164. Defendant made the (mis)representations in the RISC with the intent of inducing Plaintiffs to purchase the Suburban. In order to effect the objective of a sale, Defendant presented Plaintiffs with the RISC, which they entered into, and induced them to sign the RISC by making representations that complied with Plaintiffs' budget constraints. As described repeatedly herein, Defendant had no idea whether a lender

would make a loan at the RISC's terms—indeed, they ultimately would not—but nonetheless offered Plaintiffs the contract so that they would act upon it.

165. Plaintiffs acted reasonably in their reliance and acting upon Defendant's (mis)representations and had the right to rely on the truth of the RISC's terms.

166. Plaintiffs didn't (and couldn't) know that Defendant wouldn't honor the terms in the RISC and were thereby ignorant of the falsity of the terms contained therein.

167. As described throughout, Plaintiffs' reliance on Defendant's (mis)representations injured them. These injuries include, but are not necessarily limited to, loss of use of the Expedition; diminished credit expectancy; and emotional distress.

168. Plaintiffs hereby pray for judgment against Defendant in such amount as is allowable by law and to be determined at trial, for their actual damages, pre- and post-judgment interest at the greatest rate allowed by statute, and for such other and further relief as may be just and proper under the circumstances.

DEMAND FOR JURY TRIAL

Plaintiffs hereby demand a jury trial on all issues so triable.

Respectfully Submitted,

/s/ Bryce B. Bell

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