In the United States Court of Appeals for the Third Circuit

Nos. 10–3309 & 10–4249

MENTE CHEVROLET OLDSMOBILE, INC. f/k/a Mente Chevrolet, Inc. trading as Mente Chevrolet; MENTE CHRYSLER DODGE, INC.; and DONALD M. MENTE,
Plaintiffs/Appellees/Cross–Appellants,

v.

GMAC.

GMAC INC., now known as ALLY FINANCIAL INC.,
Defendant/Appellant/Cross–Appellee.

On Appeal from the U.S. District Court for the Eastern District of Pennsylvania, No. 08–cv–2403
(Honorable Juan R. Sanchez, U.S. District Judge)

BRIEF FOR APPELLANT ALLY FINANCIAL INC. AND VOLUME ONE OF THE JOINT APPENDIX
(Pages 1a–96a)

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CORPORATE DISCLOSURE STATEMENT

Ally Financial Inc. (formerly known as GMAC Inc.) declares that it is not a publicly traded corporation, that it does not have a parent corporation, and that no publicly held corporation owns 10% or more of its common stock. Ally states the following with respect to beneficial ownership of Ally common stock by each person known to Ally to be the beneficial owner of more than five percent of Ally's outstanding common stock: U.S. Department of Treasury (73.78%); persons affiliated with Cerberus Capital Management, L.P. (7.83%); and GMAC Common Equity Trust I (5.92%).

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I. STATEMENT OF SUBJECT–MATTER AND APPELLATE JURISDICTION

The trial court possessed subject–matter jurisdiction over plaintiffs' claims arising under federal law pursuant to 28 U.S.C. §1331 and over plaintiffs' pendent state law claims pursuant to 28 U.S.C. §1367. App.123a.

This Court possesses appellate jurisdiction over GMAC's appeal pursuant to 28 U.S.C. §1291. The district court entered judgment on the jury's verdict in favor of plaintiffs on their breach of contract claim on November 24, 2009. App.45a, 113a. Thereafter, GMAC timely filed its renewed motion for judgment as a matter of law under Federal Rule of Civil Procedure 50(b) and its motion for a new trial under Federal Rule of Civil Procedure 59(b). App.114a. On July 23, 2010, the district court issued a published opinion and an order denying those motions. *See Mente Chevrolet Oldsmobile, Inc.* v. *GMAC*, 728 F. Supp. 2d 662 (E.D. Pa. 2010); App.46a–79a. On July 31, 2010, GMAC filed its timely notice of appeal from the judgment entered in favor of plaintiffs and from the district court's orders denying GMAC's renewed motion for judgment as a matter of law and motion for a new trial. App.1a, 120a.

II. STATEMENT OF THE ISSUES ON APPEAL

1. Did the district court err in holding that the Forbearance Agreement entered into between defendant GMAC and plaintiffs Mente and his motor vehicle dealerships — in which Mente admitted that he and his dealerships were in breach of the underlying contracts with GMAC, released GMAC from any and all claims, and waived any and all defenses to GMAC's enforcement of its rights — was invalid due to lack of consideration and unclean hands, notwithstanding the jury's verdict finding that adequate consideration existed and the inapplicability of the unclean hands doctrine?

Where preserved: *See* GMAC's renewed motion for judgment as a matter of law (App.2132a–43a).

2. Did the district court err in denying GMAC's renewed motion for judgment as a matter of law, when the governing Wholesale Security Agreement in effect between defendant GMAC and plaintiffs expressly authorized GMAC to require repayment of all monetary obligations owed by plaintiffs at any time, "on demand," at GMAC's sole discretion?

Where preserved: *See* GMAC's renewed motion for judgment as a matter of law (App.2127a–32a).

3. Does the jury's answer of "yes" on the verdict slip in response to the question "[d]id any of the claims pursued by Mente in this case accrue after the date of execution of the Forbearance Agreement?" preclude the entry of judgment as a matter of law in favor of GMAC on plaintiffs' claim for breach of contract, which undeniably accrued before execution of the Forbearance Agreement?

Where preserved: *See* GMAC's renewed motion for judgment as a matter of law (App.2145a–47a).

4. Must the jury's award of $4,000,000 in damages be set aside as impermissibly speculative and due to plaintiffs' lack of standing?

Where preserved: *See* GMAC's renewed motion for judgment as a matter of law (App.2147a–53a).

III. STATEMENT OF RELATED CASES AND PROCEEDINGS

Aside from GMAC's appeal and plaintiffs' cross–appeal, there are no pending related cases or proceedings in any court. Previously, GMAC had commenced a confession of judgment action against Mente and the Dealerships to collect the approximately $1.45 million in loan proceeds that Mente and the Dealerships still owe to GMAC. However, to avoid a

multiplicity of actions, that state court proceeding was voluntarily dismissed without prejudice pending the outcome of this action. The jury's verdict in favor of Mente and his dealerships at issue in this appeal does not take into account the $1.45 million that Mente and the Dealerships still owe to GMAC.

IV. STATEMENT OF THE CASE

In its current posture, this appeal involves a breach of contract case. The district court allowed plaintiffs to present five separate claims against GMAC to the jury: (1) breach of contract alleging a breach of the Wholesale Security Agreement, General Security Agreement, and Revolving Line of Credit Agreement; (2) violation of the federal Dealers Day in Court statute; (3) violation of the Pennsylvania Dealers Day in Court statute; (4) the tort of conversion; and (5) tortious interference with contract. App.400a–02a.

The jury found in favor of Mente and his motor vehicle dealerships, and against GMAC, on the breach of contract claim only and awarded the sum of $4 million in damages to plaintiffs on that claim. App.401a.

The jury found in favor of GMAC and against plaintiffs on the other four claims that went to trial. App.400a–02a.

As the jury verdict slip reveals, the first series of questions that the jury was instructed to resolve involved the enforceability of the so–called "Forbearance Agreement" that GMAC entered into with Mente and his motor vehicle dealerships some two months after GMAC had allegedly breached the underlying agreements with the plaintiffs by first requesting payment on floorplanned motor vehicles that had been sold to retail customers by the Mente dealerships and then by demanding payment of all outstanding amounts owed by Mente and his dealerships to GMAC. App.398a–99a. The Forbearance Agreement states that Mente and his dealerships, in exchange for receiving money from GMAC to which they were not otherwise entitled and receiving GMAC's forbearance over a substantial period of time in collecting on moneys immediately owed to GMAC by Mente and his dealerships, agreed to release all claims against GMAC and acknowledged their own multiple breaches of the preexisting underlying loan agreements between the parties. App.2476a–77a.

Because the Forbearance Agreement, if enforceable, would have precluded Mente and his motor vehicle dealerships from pursuing all of their claims against GMAC except for their tortious interference claim (which arguably may have arisen after the Forbearance Agreement had been entered into), the Jury Verdict Slip instructed the jury to first answer a series of questions aimed at determining whether the Forbearance Agreement was enforceable. App.398a–99a.

In answering those questions with regard to the Forbearance Agreement, the jury specifically found: (1) that the plaintiffs were not under duress when they entered into that agreement; (2) that the plaintiffs were not fraudulently induced by GMAC to enter into the agreement; and (3) that the Forbearance Agreement was supported by valid consideration. App.398a–99a.

The jury, however, answered "yes" on its verdict slip in response to the question "Does the doctrine of 'unclean hands' bar enforcement of the Forbearance Agreement?" App.399a. The jury's verdict can also be understood as finding that plaintiffs did not "knowingly and voluntarily" enter into the Forbearance Agreement and that GMAC had exercised "undue influence" in causing plaintiffs to enter into the

Forbearance Agreement. App.398a–99a. Notably, however, the trial court in its opinion addressing GMAC's post–judgment motions ruled both that "the jury's finding Plaintiffs did not sign the Forbearance Agreement 'knowingly and voluntarily' is unsupportable" and that the jury's undue influence finding also had to be set aside. *See Mente Chevrolet Oldsmobile, Inc.* v. *GMAC*, 728 F. Supp. 2d 662, 672 & n.25 (E.D. Pa. 2010); App.58a.

In denying GMAC's renewed motion for judgment as a matter of law, the district court ruled that the doctrine of unclean hands barred enforcement of the Forbearance Agreement, as did the absence of consideration. *Id.*, 728 F. Supp. 2d at 672–75; App.57a–62a. The district court's *sua sponte* conclusion that a lack of consideration prevented enforcement of the Forbearance Agreement was directly contrary to the jury's express finding that adequate consideration existed. App.398a. Plaintiffs had not filed any post–judgment challenge to the jury's finding against plaintiffs on the question whether the Forbearance Agreement was supported by adequate consideration, and thus the trial court's decision to set aside that finding was entirely on the trial court's own motion.

The jury on its verdict slip also answered "yes" in response to the question "Did any of the claims pursued by Mente in this case accrue after the date of execution of the Forbearance Agreement?" App.399a. The jury verdict slip did not require the jury to identify which claim or claims accrued after that date (*id.*), and thus it is unknown which of Mente's five claims the jury found to have accrued after the date of execution of the Forbearance Agreement. The opposing parties agree, however, that plaintiffs' tortious interference claim (the details of which are supplied below in the Statement of Facts) accrued after the date of execution of the Forbearance Agreement.

Because the only claim on which the jury returned a verdict in plaintiffs' favor is the breach of contract claim, it is important to note that although the contracts between the parties are in writing, the district court explained in ruling on GMAC's post–judgment motions that the district court had denied GMAC's motion for summary judgment based on having concluded that the meaning of plaintiffs' obligation in the Wholesale Security Agreement to "faithfully and promptly" remit to GMAC the amounts loaned on vehicles that have been sold or leased was ambiguous. *See* 728 F. Supp. 2d at 666;

App.47a. Additional background on the differing meanings that the parties ascribed to the "faithfully and promptly" repayment requirement can be found below in the Statement of Facts. On that issue, however, the jury expressly found in favor of plaintiffs that they had not violated the "faithfully and promptly" repayment obligation and thus were not "out of trust" for having failed to more promptly repay amounts owed and received on the sale or lease of vehicles. App.400a.

In its post–judgment motions, GMAC also challenged the jury's award of damages as unduly speculative and for lack of plaintiffs' standing. App.2147a–53a. With regard to the standing challenge, the physical space occupied by Mente Chrysler was actually owned by an entity known as Don's Limited Partnership, an entity controlled by Don's Corporation, which in turn was a corporation controlled by Mente. App.623a–24a. The separate physical structure housing Mente Chevrolet was owned by Mente Chevrolet Oldsmobile, Inc. App.626a. A third property, referred to as the "big lot," was owned by Don's Limited Partnership. App.627a. Although Mente held a controlling interest in Don's Corporation, neither Don's Limited Partnership nor Don's Corporation ever appeared as plaintiffs in the lawsuit. *Id.* GMAC

argued that non–parties could not recover damages for claimed injury to property.

In its opinion addressing GMAC's post–judgment motions, the district court rejected GMAC's challenge to the speculativeness of damages and declined to address the standing issue, concluding that the damages could be upheld on a basis other than the loss of property value. *See* 728 F. Supp. 2d at 676–78; App.64a–67a.

V. STATEMENT OF FACTS

In addition to lending money to those who purchase or lease motor vehicles at retail, GMAC also serves as a lender to motor vehicle dealerships. As relevant here, GMAC served as floorplan lender and extended a revolving line of credit to Mente Chevrolet Oldsmobile, Inc. and Mente Chrysler Dodge, two dealerships owned and operated by Donald Mente.

Mente Chevrolet and Mente Chrysler were two motor vehicle dealerships located in Kutztown, Berks County, Pennsylvania. App.124a. The dealer principal of each was Donald Mente, and the Dealerships' comptroller was Donna Johnson, who also owned a

minority interest in Mente Chrysler. App.1346a. Mente held a degree in business administration and had a business background. App.706a. Johnson was a seasoned employee with experience in the financial operations of a motor vehicle dealership. App.535a. Among other responsibilities, Johnson, who holds an accounting degree, reviewed motor vehicle sales to ensure requirements with state laws and handled other financial aspects of the Dealerships. App.1283a.

GMAC is in the business of offering various types of loans to motor vehicle dealerships, such as wholesale floorplan, real estate, and working capital loans. App.1774a. GMAC extended wholesale floorplan financing and a revolving line of credit to the Mente dealerships. Wholesale or floorplan financing is a common lending method that allows a seller, such as a vehicle dealer, to use credit in order to acquire inventory held for resale. App.1775a. Specifically, dealers with a GMAC floorplan acquire new vehicles directly from the manufacturer (*id.*), and GMAC pays the manufacturer for the purchase on delivery. Until sold or leased to a retail customer, the financed vehicles serve as collateral for the floorplan, and as each vehicle is sold or leased the dealer is required to repay the outstanding loan balance attributable to that

vehicle to GMAC. *Id.* The revolving line of credit that GMAC extended was also secured by the vehicles in addition to the Dealerships' other assets. App.1776a.

The Dealerships signed a series of documents that gave GMAC a security interest in all vehicles at the Dealerships, whether specifically purchased with GMAC funds or not. Among the various loan documents the parties signed, the Wholesale Security Agreement served as the master agreement that governed the wholesale financing relationship between GMAC and the Dealerships. Importantly, the Wholesale Security Agreement allows GMAC, in its discretion, to demand repayment of all amounts due from the Dealerships at any time. App.1778a. The Wholesale Security Agreement provides, in relevant part:

> In the course of our business, we [the Dealerships] acquire new and used cars, trucks and chassis ("Vehicles") from manufacturers or distributors. We desire you [GMAC] to finance the acquisition of such vehicles and to pay the manufacturers or distributors therefor.
>
> *We agree upon demand to pay to GMAC the amount it advances* or is obligated to advance to the manufacturer or distributor for each vehicle with interest at the rate per annum designated by GMAC from time to time and then in force under the GMAC Wholesale Plan.

> We also agree that to secure collectively the payment by us of the amounts of all advances and obligations to advance made by GMAC to the manufacturer, distributor or other sellers, and the interest due thereon, GMAC is hereby granted a security interest in the vehicles and the proceeds of sale thereof ("Collateral") as more fully described herein.
>
> The collateral subject to this Wholesale Security Agreement is new vehicles held for sale or lease and used vehicles acquired from manufacturers or distributors and held for sale or lease, and all vehicles of like kinds or types now owned or hereafter acquired from manufacturers, distributors or sellers by way of replacement, substitution, addition or otherwise, and all additions and accessories thereto and all proceeds of such vehicles, including insurance proceeds.

App.2462a (emphasis added).

By its terms, the Wholesale Security Agreement expressly required the Dealerships to pay GMAC the amounts advanced for each vehicle, with interest, "upon demand." App.1777a. Mente did not challenge the demand obligation or contend that it was ambiguous. On the contrary, Mente acknowledged that GMAC had the authority to demand payment, and the Dealerships agreed to pay on demand. App.723a. Similarly, Johnson agreed that all vehicles, including ones that had not been specifically purchased using GMAC's loan, were collateral for the floorplan. App.1366a–67a. Johnson also acknowledged that GMAC had a security interest in all inventory, equipment, fixtures, and accounts

receivable. App.1367a. In addition to the Wholesale Security Agreement, Mente Chevrolet executed the General Security Agreement, which gave GMAC a security interest in all of the Dealerships' assets, including general intangibles, equipment, accounts receivable, cash, and inventory, including used motor vehicles owned by the Dealerships. App.2460a. As the Dealerships' expert testified, the security interest encompasses virtually all assets of Mente Chevrolet. App.999a–1001a, 1779a, 2460a.

Mente also executed a personal guaranty of all debts to GMAC, and the Dealerships executed a Cross–Collateralization, Cross–Guaranty and Cross–Default Agreement. App.700a, 1807a, 3123a. According to these agreements, any default by either Dealership on any obligation would be a default of all of the obligations to GMAC owed by both Dealerships, and all of the collateral securing any of the individual obligations secured all of the obligations. App.1807a–08a. Accordingly, it was undisputed that GMAC had a first priority perfected security interest in all assets of the Dealerships. App.1001a–02a.

The Dealerships also granted GMAC a specific written assignment of all funds due to the dealers by the respective vehicle manufacturers,

known in the trade as "open accounts." App.745a. An open account, which is typically reconciled once per week, is the mechanism through which financial transactions between the franchisee and franchisor are settled. App.1309a. For example, if the Dealerships buy parts from Chevrolet or Chrysler, the manufacturers charge the Dealerships through the open account, and if the manufacturer owes the Dealerships money under sale incentive programs or for warranty repairs, the credits will flow through the open account. *Id.*

GMAC also extended to the Dealerships a separate, revolving line of credit in the amount of $500,000. App.577a, 1779a. A dealer can use the revolving line of credit for periodic cash flow needs or other short–term funding. App.1779a. GMAC also received and maintained a security interest in all of the Dealerships' assets as collateral for the revolving credit line.

Since 1971, the Dealerships sold Chrysler and General Motors vehicles, but beginning in 2005 the Dealerships suffered a series of financial setbacks and serious difficulties in maintaining a positive cash flow. Both Mente and Johnson testified that for several years the Dealerships lost money, and that for eighteen months prior to July

2007, the used car component of the Dealerships was simply not profitable. App.718a, 1372a. As of June 30, 2007, Mente Chevrolet had a net loss for the year to date of approximately $200,000. App.707a, 968a. From January 1, 2007 through June 30, 2007, the Chrysler store reported a $100,000 net loss. App.708a. Moreover, the two stores combined (Chevrolet and Chrysler) had a $600,000 combined deficit net worth as of June 30, 2007. *Id.* During the previous year the Dealerships lost approximately $650,000. App.969a. Mente's own expert acknowledged at trial that the Dealerships were not making money. App.970a. Furthermore, as of April 30, 2007, the Dealerships had a combined net working capital deficit of approximately $900,000, meaning that the Dealerships had spent $400,000 more than cash taken in for the year. App.710a–11a, 971a. As of September 19, 2007, the credit line reached its $500,000 maximum, and the Dealerships could not borrow anything further under that facility. App.737a, 1369a.

GMAC conducts routine, unannounced audits in order to ensure that dealerships are fulfilling their obligations to remit payment for the floorplan balance attributable to each vehicle when that vehicle is sold or leased. Kilvin Carrier, GMAC's Operations Manager for Audits, has

been with GMAC for 21 years. App.1607a. In his role as Operations Manager, Carrier oversaw the wholesale audit section. App.1608a. The wholesale audit process, also known as a floorplan audit, occurs when GMAC sends representatives to check on a dealer's lot with a list of vehicles to confirm that the vehicles that have outstanding floorplan balances are present or, if not, to determine their location. *Id.* If the vehicles are not on the lot, GMAC evaluates whether the dealer has sold or leased the vehicles and, if so, whether the dealer has remitted necessary funds in accordance with the Wholesale Security Agreement. App.1608a–09a.

Carrier confirmed that GMAC does not advise dealers regarding an anticipated audit date. App.1610a. He testified that this would defeat the purpose of the audit because it would allow a dealer to mislead GMAC as to the location of vehicles that serve as collateral for GMAC's loans. *Id.* Thus, GMAC schedules audits as randomly as possible. *Id.* When asked about audits historically, Mente readily admitted that "yes, they did not tell us when they are coming." App.783a. Johnson agreed, testifying that "[w]ell, basically, they would come in, unannounced and you know, we never knew when they were coming in." App.1295a.

On January 11, 2007, GMAC conducted a wholesale inventory inspection and vehicle audit and observed an excessive number of payment delays at both Dealerships and so advised the Dealerships in writing. App.785a, 3045a. During that audit, GMAC discovered nine payment delays out of twelve vehicles sold by Mente Chevrolet. App.786a. GMAC also observed seven payment delays out of ten vehicles sold in December and part of November 2006. App.786a–87a. GMAC observed similar delays in connection with Mente Chrysler, finding a combined total of 28 payment delays or 72% of vehicles sold. App.788a. The Dealerships did not challenge, dispute, or even respond to GMAC's January notice regarding unacceptable payment delays. App.789a.

Carrier scheduled another audit for July 2007. App.1610a. Accordingly, on July 19, 2007, after the January audit demonstrated a litany of late payments, and one month after GMAC advised Mente that it had concerns about the Dealerships' cash position and payment delays, GMAC initiated an inspection of collateral, and the collateral audit revealed that Mente Chevrolet had again failed to pay GMAC for floorplanned vehicles that had been sold or leased — this time

$317,841.20 in proceeds for fourteen sales. App.580a, 728a, 1612a. During the audit Mente explained that Johnson was on vacation and that she had advised GMAC that she would be unavailable to assist with any audit conducted during this period. App.583a, 1611a. Mente further testified that he could not provide the information regarding sales proceeds from the fourteen cars without Johnson's assistance notwithstanding that GMAC had previously conducted random, unannounced audits while Johnson was absent. App.581a–82a.

It was plaintiffs' position at trial that GMAC, in the past, had refrained from conducting unannounced audits while Johnson was away from the Dealerships on a vacation whose dates she had previously shared with GMAC, and that GMAC had therefore through its conduct authorized longer payment delays during such vacation periods.

Upon learning during the July audit that Mente did not have the collateral or information regarding the disposition of the proceeds from the sale of such collateral, the auditor called Portfolio Manager Paul O'Neill. App.1612a. O'Neill told Mente over the telephone that the Dealerships had an obligation to remit the funds for cars already sold

and immediately demanded payment. App.583a–85a. Although Mente did not dispute that he sold cars without remitting funds, he refused to do more, insisting that he could not pay until Johnson returned from her vacation. App.586a. Nonetheless, in an effort to fulfill the Dealerships' obligations, Mente provided approximately $70,000 of his own funds toward the outstanding balance. App.588a.

As a result of the admitted failure to account for proceeds from the fourteen sold vehicles, GMAC concluded that the Dealerships were "out of trust" and in default for failing to pay the amount financed by GMAC for vehicles sold. App.1473a, 1477a. Based on the default, and in accordance with the loan documents, GMAC thereafter demanded payment of the entire debt and took immediate possession of the keys, the titles, and manufacturers' certificates of origin. App.1469a, 1614a. GMAC also exercised its collateral rights as to the open accounts of the Dealers. App.1365a.

On July 20, 2007, the day after the audit, Carrier, along with Sean Sullivan, the Sales Purchase Branch Manager, met with Mente and the sales manager from Mente Chevrolet. App.1616a. At the meeting, Mente reiterated that he was not able to pay for a number of vehicles.

Id. Accordingly, Carrier advised Mente that GMAC would maintain a "keeper" at Mente Chevrolet — an individual who monitors the remaining collateral by holding the keys, titles, and manufacturers' certificates of origin and releases them when necessary for a sale or test drive. App.1616a, 1621a. At trial, Johnson testified that the presence of the keepers created a general feeling of "chaos" at the Dealerships. App.1311a. Specifically, she believed that the presence of a keeper made taking cars on a test drive more of a "hassle." App.1312a. Nonetheless, following the audit and immediately afterward, Mente did not complain or suggest that GMAC was not acting appropriately. App.1617a. Rather, Mente was cordial and cooperative. *Id.* He did not dispute the Dealerships' obligations to GMAC or contest GMAC's conclusion that Mente Chevrolet was out of trust for failing to remit funds. App.1618a. Further, GMAC did not remove any vehicles from the premises. App.1383a. GMAC also did not garnish or seize any funds held by the Dealerships in any bank accounts. App.1384a.

Late in the day on July 20, 2007, the very next day after the audit occurred, Johnson returned early from her vacation and arrived at the Chrysler Dealership. She provided Carrier with files relating to the

floorplan inventory. App.1619a. Johnson did not object to Carrier's review of the files or retrieval of the keys or titles relating to the floorplanned vehicles. App.1620. Johnson turned over the keys, titles, and certificates of origin from the Chrysler store. *Id.* Carrier reiterated that he did not take possession of any of the foregoing without Johnson's permission. *Id.* Johnson testified that on July 19, 2007, the Dealerships' bank account contained $91,000, with another $65,000 available through the open account. App.1326a. According to Johnson, this would have been sufficient to pay for the fourteen missing vehicles. *Id.* Johnson further testified that, but for GMAC's actions, additional funds would have been available on July 20, 2007, and the Dealerships would have paid for the fourteen vehicles. App.1327a. Nonetheless, it is undisputed that the Dealerships did not tender the full sum due for the fourteen vehicles even after Johnson returned from her vacation, nor was that amount ever repaid to GMAC at any time thereafter.

Following the oral declaration of default, on July 25, 2007 GMAC sent the Dealerships a written notice of default. App.1477a, 2451a. As set forth in the default letter, GMAC demanded that the Dealerships pay the full balance of $5,228,904.36 by the close of business on July 26,

2007. App.1478a. That amount included $4,406,432.45 owed for floorplanned vehicles, $289,643.47 for vehicles sold but the floorplanned balance not paid, the $500,000 revolving line of credit, and past due interest charges of $32,828.44. App.2451a. The default letter also suspended the wholesale floorplan credit line, which prevented the Dealerships from becoming further indebted to GMAC. *Id.*

Around this same time, the Dealerships were pursuing alternative financing from Citizens Bank. App.791a, 2457a. Joseph Galvin worked as a Vice President in charge of Dealer Financial Services for Citizens Bank for approximately two years when the July 19, 2007 audit occurred. At the time of trial, Galvin no longer worked for Citizens Bank but instead acted as an independent consultant on behalf of lenders working with motor vehicle dealers experiencing problems. App.1080a. Galvin testified that Mente and the Dealerships were looking to borrow money to construct a service facility and to resolve an issue pertaining to his parents' estate. App.1051a.

On July 20, 2007, the day after the audit, Citizens Bank corresponded with Mente to advise him regarding the general terms under which Citizens Bank would offer a floorplan to Mente Chevrolet

and a commercial real estate mortgage for certain properties. App.559a, 2457a. The proposal letter expressly advised Mente that Citizens Bank had "started the process of completing an analysis of your dealership's operation and approval will be required by this bank's credit committee prior to any disbursement of funds." App.559a, 2457a. Mente acknowledged his understanding that additional approval was a necessary condition to obtaining financing from Citizens Bank. App.560a. Galvin also explained at trial that he deemed Mente creditworthy, but that the new loan was not a certainty and that if a dealership has negative cash flow and a history of losses it would usually not be a suitable candidate for a loan. App.1073a. Galvin also testified that he could not recall what financial statements he reviewed that supported his conclusion, or whether Mente Chevrolet was turning a profit, its deficit net worth, or whether it was experiencing a negative cash flow. App.1072a.

While the Dealerships terminated virtually all of their employees on or around July 27, 2007, they remained open and continued to sell vehicles with the consent of GMAC. App.1312a–13a. They also

continued to liquidate the Dealerships' assets serving as collateral for the obligations due to GMAC. App.1829a.

On September 20, 2007, two months and one day after the unannounced audit had occurred, the Dealerships, Mente, Johnson, and GMAC executed a Forbearance Agreement that included a series of recitals that the parties represented to be true and correct. App.2467a–80a. Among the recitals were that GMAC provided credit accommodations to the Dealerships; as of September 19, 2007 the principal amount of $2,949,450.60 was due and owing from Mente Chevrolet and $1,554,077.80 from Mente Chrysler; Mente in his capacity as an obligor pursuant to the May 14, 2007 Guaranty, as well as the Dealerships, failed to conform to terms and conditions of the loan documents and were in material default of their obligations thereunder for not tendering $224,323 — the shortfall discovered during the July 19, 2007 audit; and that while an officer of the Dealerships and 25% owner of Mente Chrysler, Johnson does not personally assume any of the indebtedness due GMAC. App.2467a–68a, 2478a.

The Forbearance Agreement identified a contemplated sale of assets by Mente Chevrolet to CSC Auto, Inc., and, through the Forbearance

Agreement, GMAC agreed to forbear from enforcing its rights to be paid all amounts owed under the Loan Documents to allow the Dealerships to sell their assets during the agreed–upon 90–day forbearance period. App.2468a–69a, 2473a. Additionally, GMAC agreed to provide Mente Chevrolet with $59,000 to pay expenses owed to suppliers so that the Dealerships could continue to operate and sell their assets, and to provide refunds to customers for cancelled service contracts. App.2468a–69a. In the Forbearance Agreement, the Dealerships, Mente, and Johnson acknowledged that GMAC was under no obligation to provide the $59,000. App.2469a.

The Forbearance Agreement set forth the total amount due to GMAC as of September 19, 2007 at $4,503,528.40, which included the out of trust amount as well as principal and interest. *Id.* In exchange for GMAC's forbearance, the Dealerships and Mente agreed to pay the total outstanding amount due to GMAC on or before the termination of the Forbearance Period. App.2470a. The Forbearance Agreement also noted the Dealerships' knowledge and agreement with the fact that GMAC had invoked its rights under the assignment of the open accounts and

that all funds thereunder may be applied to the total outstanding indebtedness to GMAC. App.2471a.

The Forbearance Agreement that the Dealerships, Mente, individually, and Johnson executed contained a general release specifically providing as follows:

> Obligors [the Mente Dealerships and Mente] and Johnson hereby forever waive, relinquish and release all defenses and claims of every kind or nature, whether existing by virtue of state, federal, bankruptcy or nonbankruptcy federal law, by agreement or otherwise (collectively "Claims") against GMAC, its affiliates, and its respective board of directors, consultants, successors, assigns, directors, officers, agents, employees and attorneys, (individually and collectively "GMAC Parties") whether known or unknown, whether in dispute or not, whether liquidated or contingent, foreseen or unforeseen, whether in contract, tort, equity or otherwise, whether heretofore or now existing, arising out of or related to any transactions or dealings between any of the GMAC Parties on the one hand and Obligors [Mente Dealerships and Mente] and Johnson on the other, or otherwise, including without limitation, any affirmative defenses, counterclaims, setoffs, deductions or recoupments ("Release"). The foregoing Release includes, without limitation, the right to contest, in the event GMAC enforces its rights under the Loan Documents, Guaranty, and/or this Agreement:
>
> (a) any events of default under the Loan Documents, whether or not declared by GMAC
>
> (b) any provisions of the Loan Documents, Guaranty or this Agreement

> (c) the security interest or liens of GMAC in any property (whether tangible or intangible), right, or other interest, now or thereafter arising;
>
> (d) the conduct of GMAC in administering credit lines, financing accommodations and loans to Dealers, in exercising any and all rights under the Loan Documents or otherwise; or
>
> (e) the amount of the Total Indebtedness.

App.2476a–77a.

Thus, in the Forbearance Agreement, both Mente and the Dealerships admitted that they were in breach of the underlying agreements that they had previously entered into with GMAC; Mente and the Dealerships agreed to waive and release all claims that they had or may have had against GMAC when the Forbearance Agreement was executed; and Mente and the Dealerships agreed to relinquish any and all defenses to GMAC's exercise of GMAC's rights that Mente and the Dealerships possessed or may have possessed when the Forbearance Agreement was executed. App.2467a–80a.

At trial, Mente and Johnson testified extensively regarding the Forbearance Agreement. Mente explained that his counsel negotiated terms of the Forbearance Agreement for at least 30 days before it was signed. App.725a, 771a. Mente further acknowledged that he only

signed the Forbearance Agreement after receiving advice of counsel and with the intent to fully perform the obligations set forth thereunder, and that his attorney was present when he signed it. App.726a, 736a. He also claimed that he signed it because he believed he was facing criminal charges for the failure to pay certain taxes on cars sold. App.619a. Mente further testified that, by signing the Forbearance Agreement, he admitted that Mente Chevrolet and Mente Chrysler failed to conform to the Loan Documents and were in material default of their obligations thereunder due to a failure to remit $317,841.20 due no later than July 19, 2007. App.728a.

Mente admitted that GMAC was otherwise authorized to enforce its rights as a secured creditor but that GMAC, pursuant to the Forbearance Agreement, agreed not to do so to allow Mente Chevrolet to sell its assets. App.732a. It is also undisputed that GMAC did forbear for a period of 90 days in accordance with the Forbearance Agreement. App.759a. Mente also understood the General Release language as prohibiting his right to sue GMAC and agreed that it was clear. App.761a.

Johnson testified similarly to Mente with regard to the Forbearance Agreement. App.1356a–61a. She admitted that her counsel reviewed and negotiated its terms and went back and forth with GMAC's counsel for approximately 30 days before agreeing upon the final terms. *Id.* Johnson likewise confirmed the accuracy of the recitals contained within the Forbearance Agreement, including, but not limited to, the Dealerships' failure to remit funds as required. *Id.* She acknowledged that nobody from GMAC threatened her in any way or otherwise forced her to sign the Forbearance Agreement. *Id.*

In accordance with the representations in the Forbearance Agreement, the Dealerships attempted to sell Mente Chevrolet to another local General Motors dealer; however, for reasons unconnected to GMAC, that sale did not occur. App.619a–20a. During trial, undisputed evidence revealed that neither Mente Chevrolet nor the anticipated buyer of Mente Chevrolet, Philip Calvacanti, submitted all necessary applications and related information to General Motors required to obtain approval of the sale. As documentary evidence revealed, the purported buyer to whom Mente sought to sell Mente Chevrolet never submitted verification of a source of funds. App.773a–

74a. A letter from General Motors also advised Mente that the proposed location did not meet space guide requirements and other necessary standards for approval. App.775a–77a, 3204a–06a. The correspondence concluded by advising Mente that the "proposal is rejected." App.777a, 3206a. In follow–up correspondence, General Motors reiterated that the proposal for Calvacanti's purchase of Mente Chevrolet was unacceptable because it did not provide for "two separate and distinct bearable operations for Chevrolet and Pontiac and GM Cadillac" or "verification of source of funds." App.781a. Mente agreed at trial that the General Motors deal never transpired because of a failure by the prospective buyer to submit everything required. App.783a.

On August 8, 2007, General Motors terminated the Mente Chevrolet dealership franchise (effective August 27, 2007), and on October 16, 2007, DaimlerChrysler terminated its sales and service agreement with Mente Chrysler because the dealership operations had been suspended for seven consecutive business days. App.687a–89a, 2402a, 2404a, 2504a. Nonetheless, Mente, through his attorney, successfully extended the termination period through January 2008 in order to attempt to sell Mente Chevrolet. App.772a.

VI. SUMMARY OF THE ARGUMENT

The district court committed reversible error in failing to grant GMAC's renewed motion for judgment as a matter of law. The one and only claim on which the jury found in favor of plaintiffs and against GMAC was plaintiffs' claim for breach of contract. However, in the Forbearance Agreement that the opposing parties entered into some two months after GMAC's alleged breach of contract, plaintiffs waived and released any and all breach of contract claims that they then possessed or may have possessed against GMAC.

The district court erred as a matter of law in failing to give effect to the settlement and release of plaintiffs' breach of contract claim against GMAC contained in the Forbearance Agreement. The voluntary settlement and compromise of claims is unquestionably an important goal of our judicial system. Here, the district court committed two critical errors in allowing plaintiffs to escape their otherwise binding and enforceable waiver and release of their breach of contract claim against GMAC.

The district court's first major error consists of overturning the jury's express finding that GMAC had provided consideration to plaintiffs for

entering into the Forbearance Agreement. When the existence of consideration is disputed, as here, it presents a quintessential jury question. Additionally, plaintiffs did not seek the entry of judgment as a matter of law in their favor before the jury returned its verdict on the issue of any alleged absence of consideration, nor did plaintiffs argue in their post–judgment motions or briefing that the jury's express finding that consideration existed was contrary to the great weight of the evidence.

As law school teaches, even the exchange of an acorn can constitute valid consideration for entry into a contract. In this case, GMAC agreed to provide plaintiffs with $59,000 in cash and to refrain for a 90–day period from further enforcing its rights as a secured creditor, in exchange for the plaintiffs' waiver and release of any and all claims and defenses that they possessed against GMAC. The district court's decision that the Forbearance Agreement was invalid for lack of consideration, notwithstanding the jury's express finding to the contrary, was thus procedurally and substantively erroneous.

The district court's second major error consists of applying the defense of unclean hands to invalidate the Forbearance Agreement.

Under Pennsylvania law, which governs plaintiffs' breach of contract claim, unclean hands is only available as a defense to an action seeking affirmative equitable relief. By contrast, here, GMAC was raising the contractual–based defenses of waiver and release to plaintiffs' breach of contract claim seeking damages at law. GMAC was not seeking any affirmative equitable relief, but rather was merely defending an action for damages at law, and thus the doctrine of unclean hands was inapplicable under Pennsylvania law and would not allow plaintiffs to escape their express promises to GMAC (which included the waiver and release of all claims then existing) embodied within the Forbearance Agreement.

The doctrine of unclean hands was also unavailable to plaintiffs for a second reason. GMAC's alleged wrongdoing and breaches of contract were fully disclosed and known to, and no way hidden from, plaintiffs at the time plaintiffs, with the advice of counsel, agreed to enter into the Forbearance Agreement. The defense of unclean hands is unquestionably equitable in nature, and the defense does not allow a party to shake the alleged and fully disclosed unclean hands of its adversary, by entering into a new contractual undertaking, gain the

benefit of that contractual undertaking (in the form of money and forbearance/delay), and then deny at its whim the other party's ability to enforce the rights expressly conferred on that other party under the terms of that same contractual undertaking.

Because the district court committed reversible error when it invalidated the Forbearance Agreement due to a supposed lack of consideration and unclean hands, this Court should reverse the district court's denial of GMAC's renewed motion for judgment as a matter of law.

The jury's finding that at least one of the claims pursued by plaintiffs in this case accrued after the date of execution of the Forbearance Agreement does not necessitate affirmance. To begin with, that finding is not linked to any of the five specific claims that Mente presented to the jury. Under Pennsylvania law, when a claim accrues presents a legal question for a court to decide. GMAC's alleged breaches of the underlying contractual agreements between the parties occurred before the Forbearance Agreement was executed; otherwise, the Forbearance Agreement would not have specified that plaintiffs were waiving and releasing any and all such claims for breach of those underlying

contracts. The mere fact that damages continued to flow from GMAC's alleged contractual breaches does not mean that the breaches themselves did not occur months before the parties signed the Forbearance Agreement. Moreover, the jury's specific finding that at least one of plaintiffs' claims arose later need not be set aside, because plaintiffs' claim for tortious interference with contract unquestionably arose after the Forbearance Agreement was signed, but the jury found against plaintiffs on that claim for other reasons.

Finally, judgment as a matter of law in GMAC's favor is warranted both because damages are completely speculative and because there was an award for damages to real property not owned by plaintiffs. Plaintiffs do not have standing to recover damages to the value of land which they do not own, and the damages awarded are otherwise unsupported by the record.

VII. ARGUMENT

A. The District Court Erred In Denying GMAC's Motion For Judgment As A Matter Of Law On Plaintiffs' Breach Of Contract Claim

1. Standard of review

This Court exercises plenary review of a district court's ruling on a renewed motion for judgment as a matter of law, viewing the evidence in a light most favorable to the jury's findings and verdict. *See Foraker* v. *Chaffinch*, 501 F.3d 231, 234 (3d Cir. 2007).

2. The district court erred in setting aside the jury's express finding that plaintiffs received consideration for entering into the Forbearance Agreement

Some two months after GMAC declared the motor vehicle Dealerships "out of trust" and demanded repayment of all amounts loaned to the Dealerships, GMAC entered into the Forbearance Agreement with Mente and his dealerships. Before the Forbearance Agreement was signed, the parties, through counsel, had negotiated its terms for one month, and it is undisputed that Mente and his dealerships knowingly and voluntarily entered into the Forbearance Agreement with the advice of counsel. Included within the Forbearance

Agreement is a waiver and release of any and all claims that Mente and his motor vehicle dealerships have or may have against GMAC as of the date of that contract's execution. App.2476a–77a.

Under Pennsylvania law, which governs plaintiffs' breach of contract claim against GMAC, one of the elements in forming a binding contract is consideration. *See Helpin* v. *Trustees of Univ. of Pa.*, 969 A.2d 601, 610 (Pa. Super. Ct. 2009), *aff'd*, 10 A.3d 267 (Pa. 2010). Where the existence of consideration is in dispute, that factual question is routinely, as in this case, given to a jury for resolution. *See Janis* v. *AMP, Inc.*, 856 A.2d 140, 145 (Pa. Super. Ct. 2004) (noting that the jury had decided whether consideration existed giving rise to the existence of a contract); *Brozovich* v. *Dugo*, 651 A.2d 641, 643 (Pa. Commw. Ct. 1994) (recognizing that the existence of consideration in formation of contract presents a jury question). Here, the jury in its verdict expressly found that the motor vehicle dealerships and Mente received consideration for entering into the Forbearance Agreement with GMAC.

The evidence introduced at trial fully and adequately supports the jury's finding of consideration. In exchange for plaintiffs' entry into the Forbearance Agreement, on advice of plaintiffs' counsel and following

approximately 30 days of negotiations between the parties' respective counsel, GMAC provided to plaintiffs $59,000 in cash and agreed to refrain from exercising its rights as secured creditor in the collateral for several additional months. App.2469a.

GMAC's transfer of money to plaintiffs and GMAC's promise to refrain from exercising rights that GMAC was otherwise entitled to exercise both constitute adequate consideration for the promises that plaintiffs exchanged with GMAC in the Forbearance Agreement. *See Ferguson* v. *McKiernan*, 940 A.2d 1236, 1241 n.9 (Pa. 2007) (citing *York Metal & Alloys Co.* v. *Cyclops Steel Co.*, 124 A. 752, 754 (Pa. 1924) ("There is a consideration if the promisee, in return for the promise, does anything legal which he is not bound to do, or refrains from doing anything which he has a right to do, whether there is any actual loss or detriment to him or actual benefit to the promisor or not.")).

It is not properly the role of a court to evaluate, after the fact, whether a party has made a good or bad deal in determining whether adequate consideration exists. *See Thomas* v. *Thomas Flexible Coupling Co.*, 46 A.2d 212, 216 (Pa. 1946) ("it is an elementary principle that the law will not enter into an inquiry as to the adequacy of the

consideration"); *Delaware Valley Factors, Inc.* v. *Ronca*, 660 A.2d 623, 625 (Pa. Super. Ct. 1995) (same).

The issue is not whether giving up a breach of contract claim against GMAC that might ultimately be worth $4 million in exchange for a $59,000 payment and several months of additional time in which plaintiffs could seek to liquidate their assets, obtain alternate financing, and/or sell their businesses to third–parties was or was not a fair bargain. At the time plaintiffs entered into the Forbearance Agreement, they had no way of knowing if they would prevail on any claims against GMAC or, if so, what their recovery might be.

For example, someone who purchases a Powerball lottery ticket for $1 when the grand prize jackpot is a mere $20 million is making an objectively foolish decision because the odds in advance that any particular set of winning numbers will appear are over 195 million to one. *See* http://www.powerball.com/powerball/pb_prizes.asp. But the law does not allow that person to await the results and then sue for refund of his $1 based on lack of valid consideration. In other words, whether consideration exists is not determined after the fact based on whether the disgruntled party actually made a good deal. Rather, the existence

of consideration is based on whether anything of value was exchanged for a promise. *See Wilson* v. *Viking Corp.*, 3 A.2d 180, 184 (Pa. Super. Ct. 1938) ("This advantage or benefit, slight though it may be, is sufficient consideration to support the contract. A very slight advantage to one party or a trifling inconvenience to the other is sufficient consideration") (internal quotations omitted).

Here, GMAC exchanged both money and its own promises to plaintiffs for various promises, admissions of liability, releases of claims, and waivers of defenses that plaintiffs knowingly and voluntarily provided to GMAC in return. The jury's finding that valid consideration existed is fully supported by both the evidence and Pennsylvania statutory law, and thus the district court committed an error of law in setting it aside. *See* 33 Pa. Stat. Ann. §6 ("A written release or promise, hereafter made and signed by the person releasing or promising, shall not be invalid or unenforceable for lack of consideration, if the writing also contains an additional express statement, in any form of language, that the signer intends to be legally bound.").

Not only was the district court's action substantively erroneous, but it also was procedurally erroneous. Under the Seventh Amendment's right to a jury trial and the Federal Rules of Civil Procedure, specified requirements exist for a party to preserve the right to seek a district court's decision setting aside a jury's findings. *See* Fed. R. Civ. P. 50(a). While the trial was underway, plaintiffs never sought the entry of judgment as a matter of law in their favor on the issue of lack of consideration for entering into the Forbearance Agreement. And, at the post–judgment motion stage, plaintiffs neither affirmatively moved nor defended against GMAC's Rule 50(b) motion by arguing that the jury's finding of consideration should be set aside.

Rather, the district court on its own motion decided to set aside the jury's express finding that plaintiffs received consideration for entering into the Forbearance Agreement. App.57a. The district court never gave GMAC any advance notice that the jury's finding of consideration for entering into the Forbearance Agreement was in peril or might be set aside. It is certainly not the law that a jury's findings in support of a verdict are sacrosanct while a jury's findings that do not support a verdict may be disregarded by a district court at whim. *See LePage's*

Inc. v. *3M*, 324 F.3d 141, 146 (3d Cir. 2003) (en banc) ("Our review of a jury's verdict is limited to determining whether some evidence in the record supports the jury's verdict."); *Fineman* v. *Armstrong World Indus., Inc.*, 980 F.2d 171, 183 (3d Cir. 1992) ("Absent a motion in accordance with Federal Rule of Civil Procedure 50(a), judicial reexamination of the evidence abridges [a party's] Seventh Amendment right to a trial by jury."). Nor is it proper for the district court to act as advocate for a party and invent new ways to uphold a verdict that the party benefitting from the verdict was itself not requesting from the district court. *See Henderson ex rel. Henderson* v. *Shinseki*, 131 S. Ct. 1197, 1202 (2011) ("Under [our adversarial] system, courts are generally limited to addressing the claims and arguments advanced by the parties. Courts do not usually raise claims or arguments on their own.").

This is not a situation where the jury's verdict is internally inconsistent or cannot stand as actually returned. Although the jury found the existence of consideration, the jury simultaneously made several other findings that enabled the jury to disregard the releases that plaintiffs entered into in favor of GMAC in the Forbearance

Agreement. Although the district court, in deciding GMAC's Rule 50(b) motion, overturned certain of those other findings, the district court did uphold (albeit erroneously, for reasons detailed below) the jury's finding of unclean hands to invalidate the Forbearance Agreement.

The point here is that where a jury's verdict is not otherwise internally inconsistent (and no one is arguing that this jury's verdict was), a district court has no greater ability to overturn findings that the jury returned against the prevailing party than the district court has to overturn findings that the jury made in favor of the prevailing party.

In sum, because adequate evidence supported the jury's express finding of consideration, because the existence of consideration is properly an issue for jury resolution under Pennsylvania law, because plaintiffs neither asked the district court to overturn that finding nor preserved any right to seek that relief, and because the district court may not *sua sponte* overturn findings simply based on a disagreement over how the evidence should be viewed, this Court should overturn the district court's decision insofar as it holds that the Forbearance Agreement could not be enforced due to a lack of consideration.

3. The district court erred in upholding the jury's finding of unclean hands to bar enforcement of the Forbearance Agreement

The doctrine of unclean hands is the other basis on which the district court invalidated the plaintiffs' waiver and release of all claims against GMAC contained in the Forbearance Agreement.

The district court's charge to the jury on the subject of unclean hands consisted, in full, of the following two paragraphs:

> The doctrine of unclean hands bars a party from enforcing an agreement or pursuing rights when that party has itself engaged in conduct that is inequitable or unconscionable. This doctrine bars a claim only if a party seeking affirmative relief is guilty of conduct involving fraud, deceit, unconscionability or bad faith. The conduct is directly related to the matter at issue, the conduct injures the other party and the party's conduct affected the balance of equities between the litigants.
>
> If you find GMAC engaged in inequitable conduct that satisfied the above elements then you may declare the forbearance agreement is void under the doctrine of unclean hands.

App.1939a–40a.

Likewise, the portion of plaintiffs' counsel's closing argument to the jury at the trial of this case on the issue of unclean hands consists of the following:

> And now the forbearance agreement. We wouldn't even be talking about the forbearance agreement were it not for the offense of July 19th. There wouldn't even be a forbearance agreement were it not for the offense of July 19th. That whole document stands or falls on a bogus default that was declared against the Mente dealerships on July 19th.
>
> You heard his Honor charges, let me highlight a couple of those for you: unclean hands. Unclean hands. Unclean hands, it's a principle that if a party like GMAC wants to enforce an agreement, it can't come into a court of law with dirty hands. It's got to be equitable. It has to have shown equity, it has to have acted reasonably. Their hands aren't unclean, they're filthy from July 19th. They're filthy from coming in and doing what they did on July 19th and putting 70 people out of work. Unclean hands bars the enforcement of that forbearance agreement.

App.1953a.

For four reasons, the district court erred in holding that unclean hands prohibited GMAC from enforcing plaintiffs' waiver and release of all claims in the Forbearance Agreement. *First*, as even the district court's jury charge makes clear, the doctrine of unclean hands only applies against a party that is seeking "affirmative relief." *See Brentwater Homes, Inc.* v. *Weibley*, 369 A.2d 1172, 1179 (Pa. 1977) ("It is clear that under the unclean hands doctrine a chancellor in equity has the discretionary power to deny affirmative relief to a party whose conduct toward the party from whom relief is sought has, in the matter

in litigation, been willfully inequitable."). Here, GMAC was not seeking any affirmative relief against plaintiffs; rather, GMAC was merely defending against plaintiffs' breach of contract claim.

Second, under Pennsylvania law the doctrine of unclean hands may only be invoked in court as an equitable defense to a claim seeking equitable relief. *See Official Comm. of Unsecured Creditors of Allegheny Health Educ. and Research Found.* v. *PriceWaterhouseCoopers, LLP*, 989 A.2d 313, 328 & nn.15–16 (Pa. 2010). Here, by contrast, the district court allowed plaintiffs to invoke the doctrine of unclean hands to deprive GMAC of a contract–based defense, arising from the Forbearance Agreement's provisions, to a breach of contract action brought by plaintiffs seeking damages at law. The district court reasoned that because the defenses of waiver and release can be viewed as equitable in nature, it was appropriate for plaintiffs to invoke the doctrine of unclean hands to defeat those defenses.

What the district court's reasoning overlooked, however, is that the defenses of waiver and release are not equitable in nature when invoked in defense of a breach of contract claim seeking damages at law. Moreover, as the district court's jury instructions correctly

explained, the doctrine of unclean hands can only be invoked to defeat an affirmative claim for relief, and GMAC was not asserting waiver and release as an affirmative claim for relief but rather only as a defense against plaintiffs' breach of contract claim. App.1939a; *see also Brentwater Homes, Inc.*, 369 A.2d at 1179 (Supreme Court of Pennsylvania decision recognizing that unclean hands applies as a defense against a party seeking "affirmative relief"). For these reasons, as a matter of Pennsylvania law, the doctrine of unclean hands was not available to plaintiffs to escape the judicial enforcement of the waiver and release of claims that plaintiffs voluntarily and knowingly entered into by means of the Forbearance Agreement.

Third, even if the evidence could support a jury finding that GMAC had acted unconscionably or in bad faith toward Mente and his dealerships either in demanding immediate repayment of all amounts loaned under the Wholesale Security Agreement's "on demand" provision or in entering into the Forbearance Agreement, GMAC's allegedly wrongful conduct was fully disclosed to plaintiffs and in no way hidden from plaintiffs as of the date plaintiffs entered into the Forbearance Agreement. Because unclean hands is an equitable

defense, the defense can only apply under circumstances where it is equitable to do so. *See Universal Builders, Inc.* v. *Moon Motor Lodge, Inc.*, 244 A.2d 10, 14 (Pa. 1968) (recognizing that the doctrine of unclean hands "should not be invoked if its application will produce an inequitable result").

Here, plaintiffs voluntarily elected to accept $59,000 from GMAC and an extended period of forbearance, within which plaintiffs could seek to maximize the return on their assets, obtain replacement financing, and/or sell the Dealerships to a third–party, in exchange for among other things releasing any and all claims they had or may have against GMAC. Plaintiffs' unclean hands argument, as accepted by the district court, would provide plaintiffs with the unfair option of obtaining any amount of additional consideration from GMAC in exchange for promises made by plaintiffs that are illusory and never subject to enforcement. In this case, plaintiffs obtained the full benefit of the Forbearance Agreement, never once complaining about the equities of the situation until long after the forbearance period expired and plaintiffs initiated this lawsuit. *See In re Estate of Long*, 615 A.2d 421, 422 (Pa. Super. Ct. 1992) (noting the "well recognized principle that a

party to a voidable contract may lose his right to rescind or avoid the contract if he fails to disaffirm or demonstrates an intention to affirm"). Whether viewed as ratification or knowingly opting to shake the unclean hands of the other contracting party, the doctrine of unclean hands under Pennsylvania law has never previously been interpreted to allow the inequitable result that the district court's ruling endorses, nor is the doctrine properly applied to facilitate such a result.

And *fourth*, in the Forbearance Agreement itself, Mente and his Dealerships not only released any and all claims that they possessed against GMAC, but they also agreed to waive any and all defenses that they possessed to GMAC's exercise of its rights under the Forbearance Agreement and the underlying contracts between the parties. App.2476a–77a. Because the facts giving rise to the unclean hands defense were fully disclosed to plaintiffs before plaintiffs entered into the Forbearance Agreement, plaintiffs' waiver in the Forbearance Agreement of all defenses to GMAC's exercise of its rights constitutes a waiver of plaintiffs' ability to invoke unclean hands to defeat enforcement of the Forbearance Agreement itself.

Accordingly, this Court should hold as a matter of law that the district court erred in ruling that the equitable defense of unclean hands could be invoked by plaintiffs to void the release of any and all claims that plaintiffs knowingly and voluntarily provided to GMAC by entering into the Forbearance Agreement. Because the jury properly found that consideration supported the formation of the Forbearance Agreement, and because the district court erroneously invoked unclean hands to invalidate the Forbearance Agreement, this Court should hold that plaintiffs are bound by the waiver and release of all claims against GMAC set forth in the Forbearance Agreement.

4. The jury's finding that at least one of plaintiffs' claims arose after execution of the Forbearance Agreement cannot salvage plaintiffs' breach of contract claim against GMAC

The jury verdict slip used at trial asked the jury "Did any of the claims pursued by Mente in this case accrue after the date of execution of the Forbearance Agreement?" App.399a. In response to that question, the jury answered "Yes." *Id.*

As explained above, the jury considered a total of five claims that plaintiffs asserted against GMAC: (1) breach of contract; (2) violation of

the federal Dealers Day in Court statute; (3) violation of the Pennsylvania Dealers Day in Court statute; (4) the tort of conversion; and (5) tortious interference with contract. App.400a–02a. Ultimately, the jury found in favor of GMAC on all claims other than breach of contract. *Id.*

For better or worse, however, the jury interrogatory addressing the issue of claim accrual was not tied only to whatever claim or claims the jury resolved in plaintiffs' favor; rather, the jury interrogatory asked whether "any" of the plaintiffs' claims accrued after the date of execution of the Forbearance Agreement. Here, it is undisputed that plaintiffs' claim for tortious interference with contract pertained to the period after execution of the Forbearance Agreement, because that claim sought to hold GMAC responsible for plaintiffs' inability to sell its franchises to a third–party. That sale was attempted and, had it in fact taken place, would have occurred after the Forbearance Agreement had been entered into.

Under Pennsylvania law, when a claim accrues is ordinarily an issue that a court resolves as a matter of law. *See Cochran* v. *GAF Corp.*, 666 A.2d 245, 248 (Pa. 1995). Here, it was plaintiffs' assertion that GMAC

had breached the underlying contracts by claiming that Mente and his dealerships were out of trust on July 19, 2007 when GMAC conducted an audit of the Dealerships while Johnson was away on vacation. Very soon thereafter, and long before the parties entered into the Forbearance Agreement, GMAC demanded repayment of all outstanding amounts loaned pursuant to the "on demand" provision of the Wholesale Security Agreement.

Those two events — GMAC's declaration that Mente and his dealerships were "out of trust" as of July 19, 2007 and GMAC's demand for repayment of all outstanding amounts loaned to plaintiffs — constitute the breaches of contract that plaintiffs had pursued at trial. Although the damages that plaintiffs sustained as a result of those alleged breaches of contract may have continued to grow even past the time that the parties entered into the Forbearance Agreement, under Pennsylvania law the mere fact that damages continue to flow from an earlier breach of contract does not result in the continued accrual of separate and distinct breach of contract claims into the future. *See Minnis* v. *Baldwin Bros. Inc.*, 150 Fed. Appx. 118, 120 (3d Cir. 2005) (applying Pennsylvania law); *see also Nettles* v. *AT&T Co.*, 55 F.3d

1358, 1364 (8th Cir. 1995) (reaching the same result under Missouri law); *K&K Recycling, Inc.* v. *Alaska Gold Co.*, 80 P.3d 702, 724–25 (Alaska 2003) (same under Alaska law); *Ely–Cruikshank Co.* v. *Bank of Montreal*, 615 N.E.2d 985, 986–87 (N.Y. 1993) (holding under New York law that breach of contract accrues at the time of breach even if damages do not occur until later); *Carl Rose & Sons Ready Mix Concrete, Inc.* v. *Thorp Sales Corp.*, 245 S.E.2d 234, 235 (N.C. Ct. App. 1978) (holding under North Carolina law that the date on which a claim for breach of contract accrues "is not altered by the fact that damages continue to accrue").

Accordingly, the jury's finding that at least one of plaintiffs' claims accrued after the parties entered into the Forbearance Agreement does not preclude entry of judgment as a matter of law in GMAC's favor because: (1) that finding did not specifically pertain to plaintiffs' breach of contract claim; and (2) as a matter of Pennsylvania law, plaintiffs' breach of contract claim accrued long before the parties entered into the Forbearance Agreement. For these reasons, the district court committed reversible error in denying GMAC's Rule 50(b) motion for judgment as a matter of law on plaintiffs' breach of contract claim.

5. The Underlying Wholesale Security Agreement Authorized GMAC To Request Repayment Of All Amounts Loaned "Upon Demand" At Any Time And For Any Reason, And Thus The Jury's Finding Of Breach Of Contract Cannot Stand

Even without regard to the enforceability of the Forbearance Agreement, the jury's finding of breach of contract cannot stand. Although the jury resolved the question of whether Mente's motor vehicle dealerships were "out of trust" as of July 19, 2007 in favor of plaintiffs based on the jury's understanding of the "faithfully and promptly" repayment obligation contained in the Wholesale Security Agreement, the Wholesale Security Agreement contained an entirely separate provision entitling GMAC to request repayment "upon demand" of any and all amounts owed to GMAC. App.2462a.

Plaintiffs do not dispute that the Wholesale Security Agreement entitled GMAC to seek repayment of all amounts loaned "upon demand" at any time, within GMAC's sole discretion, whether for cause or without cause. Moreover, the facts confirm that GMAC invoked this "upon demand" provision of the Wholesale Security Agreement to demand repayment in full of all amounts loaned soon after July 19, 2007.

As the facts recounted above make clear, Mente's motor vehicle dealerships were businesses in sharp decline, hemorrhaging cash and spiraling deeper and deeper into losses. If any legitimate criticism were to be leveled against GMAC, it is that GMAC reacted too slowly, rather than too precipitously, in seeking to enforce its rights and conclude its business relationship with Mente and his dealerships. Even if GMAC prevails on this appeal, it will not emerge unscathed from its relationship with Mente and his dealerships. Mente and the Dealerships still owe $1.45 million to GMAC even after all collateral has been liquidated, and GMAC's ability to collect any or all of that amount from Mente is seriously in doubt.

It was plaintiffs' argument that, because GMAC breached the contract in declaring Mente to be out of trust on July 19, 2007, that breach of contract improperly tainted every other action that GMAC took to enforce its rights under the contract thereafter. What that line of reasoning impermissibly overlooks, however, is that the Wholesale Security Agreement separately and independently gives GMAC the right, for any reason or for no reason whatsoever, to "upon demand"

require the Mente dealerships' repayment of all outstanding amounts loaned. App.2462a.

Here, the district court apparently accepted plaintiffs' argument that merely because GMAC was wrong (according to the jury's verdict) to declare the Mente dealerships to be "out of trust," GMAC lost or forfeited its ability to invoke its rights under the separate contractual provision to demand repayment in full of all amounts loaned "upon demand." This view of the contract, however, gains no support from either the language of the Wholesale Security Agreement or from governing Pennsylvania law. *See Weston & Co.* v. *Bala Golf Club*, 391 Fed. Appx. 152, 155 (3d Cir. 2010) (applying Pennsylvania law in recognizing that "[w]hen the words of a contract are clear and unambiguous, the meaning of the contract is ascertained from the contents alone").

In sum, given the Wholesale Security Agreement's "upon demand" repayment provision (App.2462a), GMAC did not breach or violate the Wholesale Security Agreement when deciding in its discretion, whether for a valid or invalid reason, to enforce its rights and terminate its lending relationship with plaintiffs, requiring repayment of all

outstanding amounts loaned. *See LJL Transp., Inc.* v. *Pilot Air Freight Corp.*, 962 A.2d 639, 648 (Pa. 2009) ("we will not interpret one provision of a contract in a manner which results in another portion being annulled"). For these reasons as well, the district court erred in denying GMAC's Rule 50(b) renewed motion for judgment as a matter of law.

B. The District Court Erred In Holding That Plaintiffs' Damages Were Not Unduly Speculative And In Allowing Plaintiffs To Recover For Losses Allegedly Sustained, If At All, By Non–Parties

1. Standard of review

This Court exercises plenary review of a district court's ruling on a renewed motion for judgment as a matter of law, viewing the evidence in a light most favorable to the jury's findings and verdict. *See Foraker*, 501 F.3d at 234. And in *Public Interest Research Group of New Jersey, Inc.* v. *Magnesium Elektron, Inc.*, 123 F.3d 111, 119 (3d Cir. 1997), this Court explained that "[s]tanding is a legal issue. We exercise plenary review over the district court's determination that plaintiffs had standing to sue * * *."

2. Plaintiffs lacked standing under Pennsylvania law to sue for damages sustained, if at all, by non–parties

Plaintiffs have no standing to advance claims as to two of the parcels of real estate, and Mente has no standing whatsoever. Standing cannot be waived because only a real party in interest that suffered injury can maintain a lawsuit. *See Hertzberg* v. *Zoning Bd. of Adjustment of Pittsburgh*, 721 A.2d 43, 46 n.6 (Pa. 1998) (recognizing that "[t]he core concept of standing is that a person who is not adversely affected in any way by the matter he seeks to challenge is not 'aggrieved' thereby and has no standing to obtain a judicial resolution of his challenge"); *Beers* v. *Com. Unemployment Compensation Bd. of Review*, 633 A.2d 1158, 1160–61 (Pa. 1993). At the heart of the law of damages is the fundamental concept that the damaged party owns or has some interest in the property that gives rise to a claim for compensation. *See Brandywine Heights Area School Dist.* v. *Berks County Bd. of Assessment Appeal*, 821 A.2d 1262, 1267 n. 7 (Pa. Commw. Ct. 2003).

Plaintiffs do not have standing to recover damages related to the loss or the diminution in value of the real estate for the two Dealership properties that were owned by non–party entities, and which were in fact owned by registered Pennsylvania limited partnerships, the

principal limited partner of which was Mente. A limited partner is not the proper plaintiff to commence an action on behalf of a partnership. *See Alvin* v. *Suzuki*, 227 F.3d 107, 122 (3d Cir. 2000) ("Under Pennsylvania law, a limited partner loses the right to conduct business in exchange for limited liability, and may not sue for harms to the partnership."). Additionally, losses relating to diminution of value in property are not the type of harm suffered directly by the individual partners but harms suffered by the partnership itself. *See Kenworthy* v. *Hargrove*, 855 F. Supp. 101, 106 (E.D. Pa. 1994). Therefore, Don's LP and Don's Second LP (the latter of which Mente identified as owner of the Chrysler Dodge Jeep building, App.823a) were the only proper parties to bring a claim for damages on behalf of the limited partnerships, and yet those entities were not identified as plaintiffs here.

Section 8591 of Title 15, Pennsylvania Consolidated Statutes Annotated, states that "[a] limited partner may bring an action in the right of a limited partnership to recover a judgment in its favor if general partners with authority to do so have refused to bring the action or if an effort to cause those general partners to bring the action

is not likely to succeed." 15 Pa. Cons. Stat. Ann. §8591. Mente never established that Don's Corporation refused to bring the present action; he also never established that an effort was made on his part to bring this action on behalf of Don's LP and Don's Second LP that "was likely not to succeed," which is a prerequisite to his ability to bring the action in a derivative capacity.

The district court sought to avoid this issue entirely by concluding that other evidence supported the damages award. Reversal is warranted here because the sole post–Forbearance Agreement damages plaintiffs ever pinpointed is the purported tortious interference with plaintiffs' relationships with General Motors and Chrysler. But the jury rejected that claim entirely, leaving the $4,000,000 award unsupportable and barred by plaintiffs' release.

3. The jury's award of $4 million in damages is unduly speculative and should be vacated

Plaintiffs presented evidence concerning unconsummated contracts for the sale of the Dealerships and the prices that would have been paid if any of these hypothetical transactions had been completed. App.1273a–74a. Such contracts are of no value, however, and cannot

support any measure of damages. *Mellon Bank (EAST) National Ass'n* v. *Pennsylvania Restaurant of A.B.E. Inc.*, 528 A. 2d 654, 655 (Pa. Super. Ct. 1987).

Furthermore, to the extent the jury intended to award to plaintiffs the value of possible loan from Citizens Bank, this is equally unsupportable. Galvin's testimony does not support the damages award. Galvin testified that Citizens Bank presented a letter to plaintiffs regarding a prospective loan. App.1052a, 2457a. However, the document at issue was solely a proposal for a possible loan — it did not constitute a loan commitment. App.2457a. A contingent loan approval is not tantamount to a binding promise or a commitment to loan a specified amount. *See RCN Corp.* v. *Paramount Pavilion Group LLC*, 2004 WL 627057, at *7–8 (E.D. Pa. Mar. 10, 2004) (where agreement was contingent on the occurrence of certain events, the evidence submitted was not sufficient to demonstrate the agreement was a binding loan commitment), *aff'd*, 164 Fed. Appx. 291, 296 (3d Cir. 2006). Nonetheless, plaintiffs' counsel relied on this contingent loan approval in his closing argument as a damages measure. App.1956a–57a.

As this Court explained, applying Pennsylvania law, in *Weston & Co.*, 391 Fed. Appx. at 155 (quoting *Spang & Co.* v. *U.S. Steel Corp.*, 545 A.2d 861, 866 (Pa. 1988)), "the party alleging breach of contract 'has the burden of proving damages resulting from the breach,'" and "'damages are not recoverable if they are too speculative, vague or contingent and are not recoverable for loss beyond an amount that the evidence permits to be established with reasonable certainty.'" The jury's ultimate damages award in this case is completely speculative, which presents an independent basis for the entry of judgment as a matter of law in GMAC's favor.

VIII. CONCLUSION

For all of the foregoing reasons, this Court should reverse the district court's judgment with directions to enter judgment against plaintiffs and in favor of defendant GMAC.

Respectfully submitted,

Dated: March 31, 2011

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This brief complies with the type–volume limitations of Fed. R. App. P. 32(a)(7)(B) because this brief contains 12,195 words excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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Dated: March 31, 2011

/s/ *Howard J. Bashman*
Howard J. Bashman

CERTIFICATION OF BAR MEMBERSHIP

I hereby certify that I am a member of the Bar of the United States Court of Appeals for the Third Circuit.

Dated: March 31, 2011

/s/ *Howard J. Bashman*
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