RECORD NO. 07-2185(L)
CROSS-APPEAL NO. 08-1022

IN THE

United States Court of Appeals

FOR THE FOURTH CIRCUIT

In Re: TELEPHIUS LETOINNE PRICE; SHAWANA DENISE PRICE,

Debtors,

WELLS FARGO FINANCIAL ACCEPTANCE,

Appellant/Cross-Appellee,

v.

TELEPHIUS LETOINNE PRICE,
SHAWANA DENISE PRICE,

Appellees/Cross-Appellants,

INGRID M. HILLINGER; MICHAEL HILLINGER; ADAM J. LEVITIN; MICHAELA M. WHITE; JEAN BRAUCHER; NATIONAL ASSOCIATION OF CONSUMER BANKRUPTCY ATTORNEYS,

Amici Supporting Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION

AMICUS BRIEF OF GMAC LLC IN SUPPORT OF WELLS FARGO FINANCIAL ACCEPTANCE

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CORPORATE DISCLOSURE STATEMENT

No. 07-2185 Caption: Wells Fargo Financial Acceptance v. Telephius Price et al.

Pursuant to FRAP 26.1 and Local Rule 26.1,

GMAC LLC (name of party/amicus) who is amicus (appellant/appellee/amicus),

makes the following disclosure:

1. Is party/amicus a publicly held corporation or other publicly held entity?
☐ YES ☒ NO
2. Does party/amicus have any parent corporations?
☒ YES ☐ NO
If yes, identify all parent corporations, including grandparent and great-grandparent corporations: General Motors Corp. owns 100% of GM Finance Co. Holdings LLC, which owns 49% of GMAC LLC, and FIM Holdings, LLC owns 51% of GMAC LLC.
3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity?
☒ YES ☐ NO
If yes, identify all such owners:
General Motors Corp., Stock symbol GM.
4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation (Local Rule 26.1(b))?
☒ YES ☐ NO
If yes, identify entity and nature of interest:
Wells Fargo has the same issue in Case No. 07-2185(L).
5. Is party a trade association? (amici curiae do not complete this question)
☐ YES ☒ NO
If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:

6. Does this case arise out of a bankruptcy proceeding?
☒ YES ☐ NO
If yes, identify any trustee and the members of any creditors' committee:
John F. Logan, Esq. (Trustee for Mr. and Mrs. Price)

/s/ Katherine M. Sutcliffe Becker (signature) January 23, 2009 (date)

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STATEMENT PURSUANT TO FRAP 29(C)(3)

GMAC LLC is the assignee of retail installment sale contracts ("RISCs") from dealerships nationally who provide financing for consumers that purchase motor vehicles from them on an installment sale basis. It has been directly impacted by a voluminous amount of litigation arising under the "Hanging Paragraph" (the "HP") that the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA") added at the end of Section 1325(a)(9) of the Bankruptcy Code to prevent cramdowns of certain claims secured by motor vehicles "if the creditor has a purchase money security interest [("PMSI")] securing the debt that is the subject of the claim . . . ." Specifically, numerous courts have addressed the issue of whether the HP applies to a RISC that includes debt attributable to the financing of negative equity ("NE") on a trade-in vehicle.

GMAC has been actively involved in litigating this issue for the past two years, including two cases originating in the Bankruptcy Court for the Eastern District of Virginia that resulted in decisions adverse to GMAC. *In re Pajot*, 371 B.R. 139 (Bankr. E.D. Va. 2007); *In re LaVigne*, 2007 WL 3469454 (Bankr. E.D. Va. Nov. 14, 2007). GMAC appealed those decisions to the District Court, which reversed both with respect to the NE issue. *GMAC v. Horne*, 390 B.R. 191 (E.D. Va. 2008). GMAC and the debtors filed cross appeals to this Court (Case Nos. 08-

1848 and 08-1850). Due to the importance of this issue to GMAC, it seeks leave to file this amicus brief.

SUMMARY OF THE ARGUMENT

The case arises out of a motor vehicle retail installment sale transaction in which the Debtors financed their purchase of a 2001 Lincoln LS ("Lincoln") on an installment sale basis pursuant to a RISC they entered into with Capital Mazda of Cary (the "Dealer"). The principal issue presented is whether a portion of the security interest granted to the Dealer in connection with its retail installment sale of the Lincoln was not a PMSI because the amount financed in connection with their installment sale transaction included NE attributable to the trade in vehicle[1]

[1] As reflected in the RISC Itemization of the Amount Financed, and as disclosed in accordance with an official staff interpretation of the federal Truth in Lending Act ("TILA"), the portion of the NE that was financed by the Debtors (the "net NE") was $1,437.96. The net NE amount is equal to the difference between the gross trade-in allowance and the payoff amount paid by the Dealer to discharge the lien on the trade-in vehicle ($2,861 less $5,698.96, or a negative $2,837.96) less any cash down payment and/or cash rebate ($1,400). (*See* RISC, Itemization of Amount Financed, Items 2 & 4H (App., pg. 51); *see generally* 12 C.F.R. Pt. 226, Supp. I, ¶¶ 2(a)(18)-3, at 458, 18(j)-3, at 548 (2008) (Add. A); Board of Governors of the Federal Reserve System, Official Staff Interpretation, 64 Fed. Reg. 16614, 16614-17 (Apr. 6, 1999) (Add. B)).

and a charge for gap insurance ("GAP").[2] The resolution of this question depends on whether the indebtedness at issue was a purchase money obligation ("PMO").

The federal question presented must be resolved by reference to the statutory text[3] and the cramdown-abuse prevention goal sought to be achieved by the enacting Congress[4] – subjects that Wells Fargo Financial Acceptance ("WF") has addressed fully in its briefs. Additionally, although the Bankruptcy Code does not

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[2] In the event of a total loss of the vehicle, "guaranteed automobile protection, or GAP, agreements . . . pay or satisfy the remaining debt after property insurance benefits are exhausted." 12 C.F.R. Pt. 226, Supp. I, ¶ 4(b)(10)-1, at 468 (2008) (Add. C).

[3] Three recent decisions hold that the plain language of the HP prohibits bifurcation of secured claims into PMSI and non-PMSI portions. *In re Shockley*, Case No. 07-15884 (Bankr. S.D. Ohio 2008) (Add. D); *In re Hampton*, Case No. 07-14990 (Bankr. S.D. Ohio 2008) (Add. E); *In re Dale*, Case No. H-07-3176 (S.D. Tex. 2008) (Add. F).

[4] Six Courts of Appeal have construed the HP to preclude debtors from surrendering their vehicles in full satisfaction of the underlying debt. *In re Barrett*, 543 F.3d 1239 (11th Cir. 2008); *Tidewater Fin. Co. v. Kenney*, 531 F.3d 312 (4th Cir. 2008); *In re Ballard*, 526 F.3d 634 (10th Cir. 2008); *In re Long*, 519 F.3d 288 (6th Cir. 2008); *Capital One Auto Fin. v. Osborn*, 515 F.3d 817 (8th Cir. 2008); *In re Wright*, 429 F.3d 829 (7th Cir. 2007). The Seventh Circuit concluded that state-law property rights, as governed by the UCC and the parties' RISC, mandate applying the HP in a manner that "***[r]estore[s] the Foundation for Secured Credit.***" *Id*. at 832. Consistent with that analysis, this Court construed the HP broadly to preclude surrender in full by enforcing the RISC as written: "The parties' sales contract provides Tidewater with a security interest in the vehicle, and such interest '*secures payment of all [Kenney] owe[s] on this contract.*'" *Tidewater Fin. Co.*, 531 F.3d at 321 (emphasis in original). The secured-creditor protection policy discussed in these decisions applies with equal force to the issues presented herein. *See also In re Long*, 519 F.3d at 294 ("there is little doubt that the 'hanging-sentence architects intended only good things for car lenders.'").

define the term "PMSI", Congress did not legislate in a vacuum. Congress is deemed to have acted with an awareness of pertinent existing law and its treatment of related issues.[5] Accordingly, this issue also should be analyzed in light of the environment within which Congress acted – the commercial and consumer protection laws reflecting the industry practices prevailing at the time the HP was enacted. Congress legislated against a backdrop that featured three sets of laws allowing for the inclusion of NE in motor vehicle RISCs – (i) TILA and its implementing Regulation Z; (ii) regulatory laws and decisions in 37 states expressly authorizing NE to be included in the amount financed as part of the purchase money package that is a RISC (Add. G); and (iii) the Uniform Commercial Code ("UCC") definitions of a "PMSI" and a "PMO" (Add. H). These statutes regulate various aspects of dealership installment sales and therefore properly can be read *in pari materia*. They, and the industry practices which they allow, informed the Congressional understanding of the term "PMSI" used in the HP.

The portion of the amount financed attributable to the NE and GAP was a PMO that was incurred in connection with the Debtors' acquisition of the Lincoln. The Debtors acquired their vehicle in a single installment sale transaction

[5] *E.g., Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 184-85 (1988) ("Congress is knowledgeable about existing law pertinent to the legislation it enacts").

evidenced by a single RISC, securing a single asset. All of the indebtedness evidenced by the RISC was intimately related to the purchase of the Lincoln. Indeed, neither of the charges at issue would have been incurred absent the purchase of the Lincoln. This conclusion is supported by TILA, which defines the "Total Sale Price" in a credit sale transaction to include any amount financed for NE and GAP.

It also is consistent with the UCC definition of a PMO, which is an obligation incurred: (i) to pay all or part of the "price" of the collateral; or (ii) as part of the "value given to enable" the debtor to purchase the collateral. The "price" of the collateral and the "value given to enable" are defined by an Official Comment to include any "[o]bligations for expenses incurred ***in connection with*** acquiring rights in the collateral" and any other secured obligations that bear a "close nexus" to the purchase of a new vehicle. UCC § 9-103 cmt. 3 (2001) (emphasis added) (Add. H). Amounts financed under a RISC for NE and GAP qualify as such obligations.

State consumer regulatory laws also recognize that NE and GAP are integral parts of vehicle installment sales. The North Carolina Retail Installment Sales Act ("NCRISA"), which is *in pari materia* with the UCC definition of a PMO, is a case in point. It authorizes the inclusion of NE and GAP charges in the amount financed under a RISC. *See* N.C. Gen. Stat. Ann. §§ 25A-8(b), 9(a)(2), (3) (Add. I

and J). The North Carolina ("NC") legislature thus has determined that each type of debt at issue benefits consumers and is closely connected with the transaction, which is why the NCRISA permits them to be included in RISCs.

The reasoning of the lower courts, and the arguments advanced by the Debtors and *amici*, cannot withstand scrutiny. They are conclusory in nature, readily distinguishable, contradictory of the authority upon which they purport to rely, and/or premised upon false hypotheticals. For example, relying principally on cases that have been reversed in part,[6] both lower court decisions announced, in conclusory fashion, that NE is not part of the "price of the collateral" because it is "'significantly and qualitatively different from the fees, freight charges, storage costs, taxes, and similar expenses that are typically part of an automobile sale.'" 363 B.R. at 741. Similarly, both of the courts below stated that the charge for GAP was not part of "the price" because "'[i]t is neither mandatory, a component of the loan agreement, nor a value-enhancing add-on, and thus is dissimilar to the examples listed in the Official Comment[.]'"[7] *Id.*

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[6] *In re Peaslee*, 358 B.R. 545 (Bankr. W.D.N.Y.), *rev'd*, *GMAC v. Peaslee* 373 B.R. 252 (W.D.N.Y. 2007), *appeal pending*, 547 F.3d 177 (2d Cir. 2008) (certifying UCC issue to NYS Court of Appeals); *In re Pajot*, 371 B.R. 139 (Bankr. E.D. Va. 2007), *aff'd in part, rev'd in part*, *GMAC v. Horne*, 390 B.R. 191 (E.D. Va. 2008) (reversing with respect to NE), *appeal pending*, Nos. 08-1848, -1850 (filed Aug. 8, 2008 4th Cir.).

[7] The lower courts' statement that the charge for GAP was not "a component of the loan agreement" is flatly contradicted by the underlying RISC, whose Itemization

The lower court decisions imply that a PMO may only include obligations that are incurred in connection with every vehicle installment sale. This suggestion is contradicted by the text of the relevant UCC Comment, which does not impose a "necessity" standard but merely states instead that: (i) PMOs include any "obligations for expenses incurred in connection with acquiring rights in the collateral"; and (ii) the concept of a PMO merely "requires a close nexus between the acquisition of the collateral and the secured obligation." Unable to reconcile the irreconcilable, the Debtors and *amici* effectively seek to rewrite the Comment in a manner that deletes the close nexus standard and deprives the reference to "obligations incurred in connection with acquiring rights" of its free-standing nature.

Although the district court recognized the relevance of the NCRISA authorization to include NE in a RISC,[8] it erroneously concluded that the NCRISA's treatment of NE supported the Debtor's position that such charges were not PMOs. The district court distinguished decisions relied upon by WF, stating

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of Amount Financed reflects a $600 charge for gap insurance. RISC, Itemization, Item 4.H (App. pg. 51). Similarly, their wholly subjective assertion that GAP is not a "value-enhancing add-on" is belied by the NCRISA. (*See* Section II *infra*.)

[8] *Foard v. Avery County Bank*, 610 S.E. 2d 460, 463 (N.C. App. 2005) ("'[w]hen multiple statutes address a single . . . subject, they must be construed together, in *pari materia*, to determine the legislature's intent.' ") (internal citations omitted).

that "courts which have allowed the inclusion of [NE] in the price . . . rely on state [RISAs] which include [NE] in the statutory definition of 'cash price'" whereas the NCRISA "does not include [NE] in the 'sales price' of a vehicle; it simply permits the financing of [NE as an additional charge] in an [RISC]." *Wells Fargo v. Price*, 2007 WL 529709, at *3 (citations omitted). This reasoning is fundamentally flawed both in its own right and in its myopic focus on the PMO definitional reference to "the price of the collateral."

There is considerably more to the UCC definition of a PMO than its reference to "the price of the collateral." The district court erroneously failed to consider the import of the NCRISA NE and GAP authorization in the context of: (i) the UCC "close nexus" test that establishes the legal standard for determining purchase money status; and (ii) the free-standing reference in the Comment to "obligations incurred ***in connection with*** acquiring rights in the collateral." (emphasis added). The NCRISA provisions authorizing the inclusion of NE and a charge for GAP in a RISC are statutory acknowledgements of: (i) the fact that a trade-in payoff advance and a charge for GAP are "expenses incurred in connection with acquiring" the new vehicle in a retail installment sale; and (ii) the intimate relationship between the debt attributable to those expenses and a retail installment sale.

Finally, the Court should not be misled by the Debtors' and *amici's* suggestion that a ruling in WF's favor would open a Pandora's Box and bestow purchase-money status upon wholly unrelated debt. The UCC Comment and the NCRISA are the Guardians of Pandora's Box. Pandora's Box is firmly locked by the UCC requirements that a PMO be one "for expenses incurred ***in connection with acquiring rights*** in the collateral," the limitation that a PMO "requires a close nexus between the acquisition of the collateral and the secured obligation," and the strict limits that the NCRISA places on the items that may be included in an RISC.

Similarly, the Trustee and *amici's* characterization of the NE as "antecedent debt"[9] misleadingly suggests that it is comparable to a series of sales financed by the same creditor to whom the existing debt is owed. The instant case is readily distinguishable from antecedent debt cases involving existing debt owed to a creditor who is extending additional credit, such as a retailer who consolidates multiple PMOs owed to it or a credit card issuer who finances a series of multiple purchases. The Debtors' existing vehicle finance obligation was not owed to the Dealer, who created a new secured obligation by giving new value in the amount of the NE payoff advance order to satisfy the Debtors' existing obligation to a third party.

[9] *E.g*, NCBA Br. at 11 ("antecedent debt"); Debtor's Br. at 8 ("pre-existing debt"); Professors' Br. at 14 ("old car loan").

ARGUMENT

Congress is presumed to have known about other pertinent laws relating to retail installment sales when it adopted the HP. These laws included TILA and its uniform cost of credit disclosure requirements. *See* 15 U.S.C. § 1601 *et seq.*; 12 CFR Pt. 226. In 1999, the Federal Reserve Board amended its Official Staff Commentary to Regulation Z to include detailed guidance authorizing automotive creditors to disclose NE as part of the "Amount Financed" and the "Total Sale Price" under a RISC.[10] Subject to certain disclosure requirements, Regulation Z also authorizes creditors to disclose charges for GAP as part of the "Amount Financed" and the "Total Sale Price."[11]

Moreover, "PMSI" is a term of art derived from the national body of commercial law that is the UCC and Congress is deemed to have been aware of its liberal "close nexus" requirement for purchase money status. Finally, existing state consumer credit regulatory laws and decisions in 37 states expressly authorized NE to be included in the purchase money package that is a motor

[10] *See* note 1 *supra*; (citing NE amendments to the Regulation Z Commentary).

[11] 12 C.F.R. §§ 226.4(b)(10) (listing debt cancellation coverage as a type of finance charge unless specifically excluded under Section 226.4(d)); 226.4(d)(3) (excluding voluntary charges for debt cancellation coverage from the finance charge subject to certain conditions) (Add. K). Debt cancellation coverage "includes guaranteed automobile protection, or GAP, agreements which pay or satisfy the remaining debt after property insurance benefits are exhausted." *Id*. Pt. 226, Supp. I, ¶ 4(b)(10)-1, at 468 (2008) (Add. C).

vehicle RISC. Thus, the existing law of which Congress presumptively was aware acknowledged the close nexus between NE and GAP and the "Amount Financed" and the "Total Sale Price" under motor vehicle RISCs.

I. The Expansive UCC Definition of "PMSI" Includes Debt Attributable to NE and GAP.

The UCC definition of a "PMSI" focuses on the purchase-money "obligation" that is secured by purchase money collateral. [12] N.C. GEN. STAT. § 25-9-103(a), (b)(1). The UCC defines a PMO as "an obligation of an obligor incurred as all or part of the price of the collateral or for value given to enable the debtor to acquire rights in or the use of the collateral if the value is in fact so used." *Id*. § 25-9-103(a)(2). This definition contains two alternative prongs: (i) ***the price of the collateral***; and (ii) ***value given to enable the debtor to buy the collateral.***

A. The "price" of a new vehicle includes the debt attributable to the NE and the charge for GAP.

Although the text of UCC § 9-103 does not include a definition the "price" of the collateral, Comment 3 thereto [13] specifies that:

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[12] The UCC definitions of a PMSI and a PMO, and the related Official Comments, are identical in all 50 states. For ease of reference, however, the UCC citations used herein are to the NC General Statutes.

[13] NC courts and the Fourth Circuit recognize the Official Comments to the UCC as persuasive guidance to the legislative intent. *Rentenbach Constructors, Inc. v. CM P'ship*, 181 N.C. App. 268, 639 S.E.2d 16 (2007); *Buettner v. R.W. Martin & Sons, Inc.*, 47 F.3d 116 (4th Cir. 1995).

> [t]he "price" of collateral or the "value given to enable" includes ***[o]bligations for expenses incurred in connection with acquiring rights in the collateral***, sales taxes, duties, finance charges, interest freight charges, costs of storage in transit, demurrage, administrative charges, expenses of collection and enforcement, attorney's fees, and other similar obligations.

N.C. GEN. STAT. § 25-9-103, cmt. 3 (emphasis added). The phrase "obligations for expenses incurred in connection with acquiring rights in the collateral" is clearly broad enough to include obligations for NE and GAP expenses. The phrase: (i) begins the illustrative list of PMOs in Comment 3; (ii) stands by itself and is separated from the remainder of the list by commas; and (iii) is not followed by words of limitation like "such as." These textual facts are significant because they make clear that "obligations for expenses incurred in connection with acquiring rights" need not be of the same type or magnitude as the other items on the list.[14] The express language of Comment 3 instead treats "obligations for expenses incurred" as the first item on an illustrative list of 11 ***separate and***

[14] *See United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 241-42 (1989). Further support for this broad interpretation of the first item – "obligations for expenses incurred in connection with" – is found in the last item – "other similar obligations." The last item demonstrates that the first item – "obligations for expenses incurred" – is not limited to obligations that are similar to the items thereafter specified. Otherwise, the first and last items in the list would be redundant, a result not permitted by basic principles of statutory construction. Indeed, tethering "obligations for expenses incurred" to the items thereafter specified makes no sense since the items thereafter specified are not themselves similar to each other (*e.g.*, "sales taxes" and "enforcement costs and attorneys' fees").

independent types of obligations that are part of the price of the collateral or the value given to enable its acquisition.

Several important conclusions can be gleaned from the UCC definition of a PMO as amplified by Comment 3. **First**, the term "price" has an expansive meaning, consistent with the desire to encourage purchase-money financing. This favored status normally manifests itself in priority disputes between purchase-money creditors and other *secured* creditors. Why then would this favored status not apply *a fortiori* in bankruptcy relative to *unsecured* creditors? **Second**, the term "price" is not limited to the cash price of the goods. This is evident from the fact that the term "price" includes finance charges, which are added to the cash price to determine the "time sale price" for goods. [15] **Third**, the definition of "price" is not limited to a layman's understanding of the term. For example, the "price" of collateral includes expenses of enforcement and attorney fees – expenses that are not normally thought of as part of the purchase price of goods and may not be incurred until years after the transaction.

Fourth, the fees, expenses and charges encompassed within the broad

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[15] The use of the term "cash price" in other sections of UCC Article 9 reinforces the conclusion that the term "price" used in its PMO definition has a broader meaning than the term "cash price." *See* N.C. GEN. STAT. §§ 25-9-620(e)(1) (employing the term "cash price"); 25-9-625(c)(2) (employing the terms "time price" and "cash price")

definition of "price" are not limited to those legally required for the debtor to take title to the goods or to those incurred in connection with every purchase. Many of the listed items are contingent in nature and not identifiable at the time of the transaction. **Fifth**, even though the list contains 11 separate items in addition to the cash price of the goods, it is not exhaustive. For example, it does not include the amount paid to the manufacturer for the wholesale cost of the vehicle. Yet not even the Debtors would argue that the wholesale cost of the vehicle is not an obligation for an expense incurred in acquiring rights.

The fact that NE and GAP are not specifically mentioned in the illustrative list of PMOs is neither noteworthy nor remarkable given the broad scope of UCC Article 9. Motor vehicle retail installment sales are merely one type of secured transaction subject to UCC Article 9. UCC Article 9 applies generally to a wide range of transactions that involve security interests in personal property, most of which do not involve trade-ins or GAP. In order to draft the Comment broadly enough to accommodate all transactions involving a security interest in "goods," the drafters simply used an illustrative list and a generic reference to "obligations for expenses incurred in connection with acquiring rights in the collateral." Accordingly, no negative inference should be drawn from the absence of an express reference to a trade-in, NE or GAP. Several recent decisions rely heavily

upon the "expenses incurred in acquiring rights" language of Comment 3 in holding that debt attributable to NE is a PMO.[16]

Indeed, the Comment discussion of items that the "price" includes must be so construed in order to avoid rendering the Comment internally inconsistent. The Comment is comprised of two paragraphs, the second of which reads as follows:

> The concept of '[PMSI]' requires ***a close nexus between the acquisition of collateral and the secured obligation***. Thus, a security interest does not qualify as a [PMSI] if a debtor acquires property on unsecured credit and subsequently creates the security interest to secure the purchase price.

N.C. GEN. STAT. § 25-9-103, cmt. 3 (emphasis added). This second paragraph sets forth the legal standard that must be satisfied for an expense to qualify as a PMO. This "close nexus" standard is a liberal one – all it requires is a close connection between the acquisition of the vehicle and the secured obligation.[17] It establishes the parameters for what can be included in the "price" of the collateral and the list in the first paragraph of Comment 3 merely illustrates types of expenses that bear a "close nexus" to the acquisition of the collateral.

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[16] *Graupner*, 537 F.3d at 1302; *In re Myers*, 393 B.R. 616, 620 (Bankr. S.D. Ind. 2008); *Horne*, 390 B.R. at 201; *In re Dunlap*, 383 B.R. 113, 117 (Bankr. E.D. Wis. 2008); *Peaslee*, 373 B.R. at 258-59; *In re Honeycutt*, Case No. 06-48771 (Bankr. E.D. Mich. Nov. 11, 2006), written transcript, pgs. 6-7 (Add. L).

[17] Treating NE and GAP as PMOs does ***not*** require the Court to do likewise with respect to unrelated debt such as the payoff of an unrelated purchase-money loan for consumer goods or additional funds advanced for some unrelated purpose such as a trip to Las Vegas. There is no nexus between such financings and the acquisition of a vehicle.

There is an intimate connection to the acquisition of a vehicle where the lien with respect to a trade-in is paid off by the seller as part of its retail installment sale and the associated expenses are included in its RISC. The same type of intimate connection exists when GAP is sold in connection with the installment sale of a vehicle. GAP provides for the satisfaction of the purchase money obligation when the vehicle is lost or stolen. *See* note 11 *supra*. Accordingly, by its very nature, GAP requires a direct relationship between the secured obligation and the acquisition of the collateral.

In sum, all the Comment requires is a close nexus and the entire financing package provided by the Dealer meets this test.[18] The final price negotiated by the parties for the Lincoln is determined by the net NE obligation and GAP could not have been written had the Debtors not financed their purchase of the Lincoln. The dealer trade-in allowance and corresponding payoff of the lien on the trade-in is as much a part of the price, and is as closely related to the installment sale, as the down payment or a rebate. It is an integral part of the negotiating process that determines what the secured obligation will be. Such a key component of the price

[18] *See e.g. In re Petrocci*, 370 B.R. 489, 499 (Bankr. N.D. N.Y. 2007) ("[NE] financing is inextricably linked to the financing of the new car"); *In re Vinson*, 391 B.R. 754, 758 (Bankr. D.S.C. 2008) (financing NE assists consumers in their goal of taking home a new vehicle); *Horne*, 390 B.R. at 199 ("the discharge of the buyer's remaining obligation on the trade-in vehicle was part and parcel of the buyer's ability to use the trade-in vehicle to buy the new vehicles.").

plainly satisfies the "close nexus" test. *See Muldrew*, 396 B.R. at 926 ("a closer nexus to the collateral can hardly be imagined").

B. The debt attributable to the NE and GAP constitutes "value given to enable" the debtor to acquire rights in the collateral.

WF also has a PMSI even if the nature of the secured obligations were to be analyzed under the second prong of the UCC definition, which defines the term "PMO" to include an obligation incurred "for value given to enable the debtor to acquire rights in . . . the collateral if the value is in fact so used." N.C. GEN. STAT. § 25-9-103(a)(2). Comment 3 states that, like the "price" of the collateral, the "value given to enable" its acquisition includes "obligations for expenses incurred in connection with acquiring rights in the collateral" and requires only a "close nexus" "between the acquisition of collateral and the secured obligation." Accordingly, the analysis under the "price" prong of the PMO definition applies equally to its "value given to enable" prong.[19]

II. The NCRISA, Which Authorizes the Financing of NE and GAP as Part of a Single Installment Sale Transaction, Should Be Read *In Pari Materia* with the UCC and TILA Definitions of a "PMO" and the "Total Sale Price".

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[19] *E.g. Graupner*, 537 F.3d at 1302 ("the [NE] was an 'integral part of,' and 'inextricably intertwined with,' the sales transaction. To hold otherwise would not be a fair reading of the UCC"); *In re Austin*, 381 B.R. 892, 897 (Bankr. D. Utah 2008); *In re Cohrs*, 373 B.R. 107, 111 (Bankr. E.D. Cal. 2007); *In re Smith*, Case No. 07-30540, at 19 (Bankr. S.D. Ill. June 24, 2008) (Add. M); *C. Bean Lumber Transport Inc., v. USA*, 68 F. Supp. 2d 1055, 1060 (W.D. Ark. 1999) ("the transfer of the [trade-in] to the dealer, irrespective of the form or technique through which [it] is accomplished, represents but a step in a single integrated transaction").

The NCRISA authorizes automobile dealers, in their capacity as installment sellers, to include debt attributable to NE and GAP in the amount financed as part of the purchase money package that is a retail installment sale. The NCRISA does so by defining the permissible "amount financed" to include any "amount . . . paid by the seller pursuant to an agreement with the buyer to discharge a security interest or lien on property traded in" and "[a]dditional charges for insurance described in G.S. 25A-8(b) . . . ." N.C. GEN. STAT. §§ 25A-9(a)(2), (3) (Add. J); *see also id*. § 25A-8(b) (excluding from the finance charge "charges excluded by Section 226.4(a) of Regulation Z") (Add. I); 12 C.F.R. § 226.4(d)(3) at 471 (2008) (excluding debt cancellation coverage from the finance charge subject to certain conditions). The statutory authorization to finance these amounts as part of an installment sale constitutes a legislative acknowledgement of the "close nexus" between such a sale and indebtedness attributable to NE and GAP.

NC is not alone in this regard. As evidenced by Addendum G, 36 other state regulatory statutes expressly authorize the inclusion of NE in the amount financed under a motor vehicle RISC. A review of the statutes listed reveals that state legislatures address the financing of NE in two different ways. Some states, like North Carolina, authorize the inclusion of NE as part of the amount financed – referred to variously as the "principal balance," "principal amount financed" or "amount financed." *Muldrew*, 396 B.R. at 925; *In re Schwalm*, 380 B.R. 630

(Bankr. M.D. Fla. 2008); *In re Dunlap*, 383 B.R. 113, 117 (Bankr. D. Wis. 2008); *In re Smith*, Case No. 07-30540, at 18 (Bankr. S.D. Ill. 2008) (Add. L). Other states, like New York and Georgia, specifically authorize its inclusion in the "cash sale price." *Graupner*, 537 F.3d at 1301; *Peaslee*, 373 B.R. at 259. The difference in the nomenclature used by the states is immaterial. The salient point is that the vast majority of the states have acknowledged legislatively that debt attributable to NE is so intimately related to financed vehicle sales that it should be treated as a integral part of such sales and the RISCs that evidence them.

GMAC respectfully submits that the import of this fact was lost on the District Court, which distinguished decisions relied upon by WF on the basis that "courts which have allowed the inclusion of [NE] in the price . . . rely on state retail installment sales acts which include [NE] in the statutory definition of 'cash price'" whereas the NCRISA "does not include NE in the 'sale price' of a vehicle: it simply permits the financing of NE in an installment sale contract." *Price*, 2007 WL 5297071, at *3 (E.D.N.C. 2007).[20] The conclusion is fundamentally flawed in its myopic focus on "the price of the collateral" because it does not consider the import of the NCRISA NE authorization in the context of: (i) the reference in Comment 3 to "obligations for expenses incurred in connection with acquiring

[20] Even assuming *arguendo* that the District Court's fixation on the term "sale price" were material, NE is included in the TILA disclosure of the "Total Sale Price."

rights in the collateral"; (ii) the "close nexus" test that establishes the legal standard for determining purchase money status; or (iii) the "value given to enable" prong of the UCC definition of a "PMO."

The UCC also defines the term "PMO" as an obligation incurred "for value given to enable the debtor to acquire rights in" the collateral. N.C. GEN. STAT. § 25-9-103(a)(2). Comment 3 states that the term "value given to enable" includes "obligations for expenses incurred in connection with acquiring rights in the collateral." By defining a NE payoff amount as an "amount financed" that is part of a retail installment sale, the NCRISA confirms that the trade-in payoff advance made by the Dealer was "value given to enable" the Debtors' acquisition of their new vehicle and is "an expense incurred in connection [there] with."

Moreover, under either prong of the PMO definition, the "close nexus" standard is the standard that must be met in order for a secured obligation to qualify as a PMO. *See* UCC § 9-103(a)(2) cmt. 3 (2001) (Add. H). By its terms, the "close nexus" standard merely requires a close nexus between the acquisition of the vehicle and the secured obligation. Although the District Court failed to consider the point, GMAC respectfully submits that the NCRISA plainly reflects an express legislative acknowledgement of an intimate relationship between the secured NE and GAP obligations and the retail installment sale of which they were a part.

III. The *Amici* Premise Their Arguments On False Foundations

Amicus briefs supporting the Debtors' position have been filed by the NACBA and a small group of law professors. The professors argue that treating NE as part of a PMO requires a "redefinition" of that term. However, such treatment is entirely consistent with the established notion of a PMO.

The professors make WF's point by relying upon cases holding that a debt must be "related to the acquisition" of the collateral to qualify as a PMO. They rely heavily on *Bucyrus-Erie Co. v. Casey*, 61 F.2d 473 (3d Cir. 1932), where a conditional seller of construction equipment financed not only the price of the equipment and its repair cost, but also money due under a ***totally unrelated open account.*** The court held that the price and the repair costs were PMOs because they were "incidental to the transaction," but that the debt attributable to the payoff of the unrelated open account was not. There is nothing remarkable about that holding, which is entirely consistent with the UCC requirement that the expense be one that is incurred "in connection with" the acquisition of the collateral and that the secured obligation have a "close nexus" with such acquisition.

In sharp contrast with the totally unrelated open account in *Bucyrus-Erie*, the NE on a trade-in has a clear "connection" and "nexus" with the acquisition of the new vehicle. Indeed, as the District Court noted in *Peaslee*, it is difficult to imagine how the NE expense required to clear the title to a trade-in could ***not***

qualify as an "expense incurred in connection with acquiring rights in the collateral." *Peaslee*, 373 B.R. at 259. The professors ask what Grant Gilmore, the primary drafter of UCC Article 9, would do. Professor Gilmore would disagree with the lower court decisions herein. He recognized that transaction costs arising "***in connection with*** the financing of new acquisitions by the borrower" should be protected. Gilmore, *The Purchase Money Priority*, 76 HARV. L. REV. 1333, 1334 (1963). His views on the subject are reflected in the broad language in Comment 3 to UCC § 9-103.

What is remarkable is the inability of the professors to apply the words that actually are there.[21] The professors quote Comment 3 to UCC § 9-103, which defines "PMOs" as "obligations for expenses incurred ***in connection with*** acquiring rights in the collateral . . .." (Professors' Br. at 14 (emphasis added)). The professors purport to apply the quoted language by noting that "a debtor's obligation to repay a new car lender for funds it advances to pay off an old car lender is not an obligation incurred ***to*** acquire rights in the new car." (*Id.* (emphasis added)). Their paraphrase of the Comment omits the liberal "in connection with" language and substitutes narrower language. In a similarly inattentive vein, they argue that the transaction expenses contemplated by

[21] *See generally Graham v. United States*, 96 F.3d 446, 450 (9th Cir. 1996) (statutory 'interpretation . . . is a process whereby we figure out the meaning of the words that actually are there") (Kozinski, J., dissenting).

Comment 3 are limited, by the list of specific expenses set forth therein, to obligations that would be incurred by any purchaser on secured credit, while failing to acknowledge and reconcile the fact that the broad phrase "expenses incurred in connection with acquiring rights in the collateral" is grammatically independent of the items thereafter specified. (*See id.* at 12-13; *see also* note 14 *supra*.)

It is thus the professors who are trying to "redefine" the term "PMO" by effectively rewriting the Comment, ignoring the "close nexus" standard, erroneously asserting that a single secured transaction is really two separate transactions, characterizing a present advance as "antecedent debt," and recharacterizing a statutorily-regulated installment ***sale*** transaction between a retail buyer and a dealership as a "purchase money ***loan***."

The professors' would have one assume that the sales finance company in this case had made a loan to the Debtors, and was relying entirely on the "value to enable" prong of the UCC definition. That is demonstrably not the case.[22] This was a retail installment sale transaction, under which the Dealer allowed the Debtors to pay "the price" over time. It was originated by the Dealer pursuant to the NCRISA in its capacity as a retail installment seller; the RISC evidencing it was assigned to WF. No "loan" was made by the Dealer in this case.

The hypothetical postulated by the professors in which a lender issues two separate checks, one for the new car and another to pay off the lien on the old car, *see id.* at 13-14, could never arise in an installment sale transaction. Retail installment sales are strictly regulated by the NCRISA and are memorialized in a single installment contract/security agreement that includes the NE and GAP expense as part of a single secured transaction. Ironically, the professors quote Comment 1 to old UCC 9-107: "Under this Section a ***seller*** has a [PMSI] if he retains a security interest in the goods . . .." (Professors' Br. at 10 (emphasis added by *amici*).) (Add. M). That language, drafted by Gilmore, reflects WF's position precisely. Little wonder that the professors' focus shifts to hypothetical "loan" transactions.

The underlying RISC demonstrates that the portions of the Amount Financed attributable to the GAP and NE were part of an installment sale transaction and that the debt attributable to the NE was an entirely new obligation vis-à-vis the Dealer, which is the entity to whom the Debtors granted the security interest whose nature is at issue. The NE obligation was created pursuant to the RISC when the Dealer gave present consideration by advancing funds to pay off their existing vehicle finance obligation to the lienholder for the trade-in. (*See*

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[22] The *amicus* brief filed by NACBA contradicts the professors in this regard by focusing its analysis exclusively on the "price" prong of the PMO definition.

RISC Itemization, Line 4H.) Consistent with TILA, the NCRISA and the underlying RISC, the Dealer financed the unpaid portion of the transaction-specific NE payoff expense by including the net NE obligation in the "Amount Financed" and the "Total Sale Price" under the RISC. The net NE obligation was the child of the new installment sale transaction.

The District Court for the Eastern District of Michigan recognized the import of these facts:

> The amount Muldrew financed to pay off the negative equity on his trade-in vehicle involved ***a new, smaller amount, a new lender, a new piece of collateral, and a new contract. In short, it was not "antecedent debt."*** The negative equity was part of the bargained-for total cash price of the new vehicle Muldrew financed with Graff, as well as the value Graff gave to enable Muldrew to gain rights to and enjoy use of the collateral. A closer nexus to the collateral can hardly be imagined.

In re Muldrew, 396 B.R. at 926 (emphasis added).

In any event, regardless of whether a transaction is characterized as an installment sale or loan, the legal standard for determining "purchase money" status is the same liberal "close nexus" standard that includes "obligations for expenses incurred in acquiring rights in the collateral." (*See* Section I *supra*.) Former UCC § 9-107(b), upon which the professors rely, would compel the same result even assuming *arguendo*, as they do, that the trade-in payoff made by the Dealer was characterized as a loan transaction and analyzed under the "value given to enable" prong. This is the case because the trade-in payoff advance constituted

the furnishing of present consideration by the Dealer. The furnishing of present consideration by making an advance is precisely what Comment 2 to former UCC § 9-107(b) identified as the distinguishing feature of a PMO (as opposed to "antecedent debt") under the "value given to enable" prong. *Id.* § 9-107(b) cmt. 2 (the purchase money party must be one who has given "present consideration" "by making advances or incurring an obligation") (Add. N). Prior to the trade-in payoff advance made by the Dealer and their execution of the RISC, the Debtors owed the Dealer nothing with respect to the trade in vehicle.

Finally, the professors also assert that the primary purpose of BAPCPA was to protect unsecured creditors such as credit card issuers by forcing debtors to migrate from Chapter 7 to Chapter 13. This assertion disregards the purpose of the HP, as clearly reflected in the legislative history and acknowledged by the courts: to "restore the foundation for secured credit" by respecting the security agreement; to cure the "abuse" of consumers filing Chapter 13 petitions and then wiping out a large portion of the secured vehicle debt by cramdown; and to "give secured creditors fair treatment in Chapter 13." The HP admittedly carves out a significant exception to the general rule allowing cramdown – but that is exactly what Congress intended. As discussed in Professor White's Amicus Brief, that exception represents a legislative compromise between unsecured creditors and motor-vehicle financers. To argue, as the professors do, that a statutory provision

should be interpreted in light of some purpose other than its own is clearly erroneous.

IV. Conclusion

GMAC urges this Court to apply the HP to protect WF's entire claim from cramdown as a PMSI.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies pursuant to Federal Rules of Appellate Procedure 29(d) and 28.1(e)(2)(A)(i) that the Brief herein complies with the type-volume limitation contained in that rule. This Brief contains 6,969 words as calculated by the word processor with which this brief was produced, Microsoft Office Word 2003, Times New Roman, 14 point.

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I hereby certify that on this 23rd day of January, 2009 eight copies of the foregoing Brief of Amicus Curiae and Addendum were filed with the Clerk for the Fourth Circuit Court of Appeals via hand deliver and electronic filing and one copy was mailed, first class, postage paid, to counsel listed below:

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