IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH DAKOTA
NORTHWESTERN DIVISION

Bonnie Delorme, Individually and on Behalf of all persons similarly situated Plaintiff, vs. Autos, Inc., a North Dakota Corporation d.b.a. "Global Auto"; RW Enterprises, Inc. a North Dakota Corporation, Robert Opperude, an individual, Randy Westby, an individual, and James Hendershot, an individual, Defendants.	)	Case No. 4.11-cv-00039

BRIEF IN SUPPORT OF
MOTION FOR SUMMARY JUDGMENT ON
COUNT I. USURY

STATEMENT OF THE CASE

This civil action was initially filed in State District Court, then removed by Defendants to U.S. District Court under Federal question jurisdiction. This civil action seeks declaratory relief, injunctive relief, and monetary damages relating to multiple aspects of Defendants' unlawful consumer lending practices as are described within the Complaint. This Motion for Summary Judgment addresses Count I of the Complaint, Usury.

SUMMARY OF THE CASE

In January, 2007, the Defendants entered into a conspiracy to charge usurious interest rates to the retail installment sales customers of Autos, Inc.. The plan involved one party putting up the capital and the others securing credit desiring customers – then they shared in the obscene profits to be made in a lending enterprise which operated without the regulatory and staffing overhead of the banks and finance companies. The scheme worked. In four short years, they wrote more than 500 contracts with more than $3.5 Million in credit extended, with an expectation of receiving more than $1.5 Million in interest. In this relationship, Mr. Westby would earn an obscene profit margin on his cost of money (5% when borrowed from the bank vs 15% when lent to his partners); and Mr. Opperude and Mr. Hendershot would earn an additional obscene profit margin from their credit customers (15% when borrowed form Mr. Westby vs the 25% charged most customers). The scheme, as existed at the time of the commencement of this law suit, was set to net nearly $1 Million in profits from the contracts already written.

In the instant case, Bonnie Delorme purchased a used car from Autos, Inc., on credit provided directly by Autos, Inc., d/b/a "Global Auto," and indirectly provided by RW Enterprises, Inc.. As a portion of the dollar amount financed, Bonnie was charged both a "financing fee" in the amount of Three Hundred Dollars ($300.00); and a "document administration fee" in the amount of One Hundred Ninety-five Dollars ($195.00). Autos, Inc., intentionally did not include either fee when calculating and disclosing the Annual Percentage Rate and the Finance Charge. Such failure to include the such fees as a part of the disclosed cost of borrowing funds materially understates disclosure of both the Annual Percentage Rate and Finance Charge. The failure to include either fee with the calculation of both the Annual

Percentage Rate and Finance Charge are apparent on the face of the documents assigned to RW Enterprises, Inc, which disclose a simple interest rate applied on the unpaid balance to be exactly the same rate as the disclosed Annual Percentage Rate, even though the purchase documents assigned clearly, on their face, document the assessment of both fees.

FACTS

On August 8, 2006, Mr. Westby, an experienced Certified Public Accountant with multiple business interests, created a new business entity, RW Enterprises, Inc. (Westby Tr. P. 7) Mr. Westby created this new business entity with the specific intent that the corporate entity would provide consumer credit financing, and in particular, it would provide consumer retail installment sales credit financing through automobile dealerships. (Westby Tr. Pp. 12-14) At the time Mr. Westby created RW Enterprises, Inc., Mr. Westby testified he did not yet have a particular automobile dealership selected with whom to do business, just that he wanted to be involved in automobile finance. (Westby Tr. Pp. 13-14)

Mr. Wesby, acting through his newly formed corporate entity, RW Enterprises, Inc., began underwriting consumer automobile retail installment sales contracts with Autos, Inc., in January of 2007, and entered into more that Five Hundred contracts similar to that of the instant case. (Westby Tr. Pp. 12-4;) From January 17, 2006, and continuing until this litigation was commenced, RW Enterprises purchased more than Five Hundred retail installment sales contracts from Defendant, Autos, Inc. The last Retail Installment Sales Contract was purchased by RW Enterprises on March 30, 2011. RW Enterprises ceased purchasing financing contract from Autos, Inc., immediately after the commencement of this law suit, but continues to derive

the benefit of all outstanding contracts without modification of terms.. (Westby Tr. P. 28)

To protect the capital is was lending to Autos, Inc., RW Enterprises not only took a perfected security interest in each automobile being financed, but also took a first security interest in the entire business enterprises of Autos, Inc. (Westby Tr. P. 26); and also obtained personal guarantees of the individual owners of Autos, Inc, the individually named Defendants herein, Robert Opperude and James Hendershot. (Exhibit 2)

Autos, Inc., and its principal have a separate history. Several year earlier, in the year 2001, Defendants Robert Opperude and James Hendershot had become 50-50 partners in a newly organized used car dealership under the trade name "Global Auto." On July 1, 2002, they incorporated the business entity under the corporate name of "Autos, Inc.," but continued to do business under the trade name "Global Auto." (Opperurde Tr. P. 20) Initially, Autos, Inc. only wrote cash transactions. These were transactions in which financing was provided by the customer's personal funds, or had been obtained from the customer's personal bank or finance company. (Opperude Tr. P. 23-4) Eventually the business developed an on-going business relationship with an area banks in which Autos, Inc., would complete credit applications on behalf of their potential customers, send the application to the bank, and if credit worthy, the bank would directly extend a loan to the customer in the Bank's own name. Over time, Autos, Inc., took its role in providing customer financing one step further by writing a select few sales transactions in its own name -- this involved extending its own cash to the credit customer. These "self-financed transactions" occurred only in a small handful of cases in which otherwise credit worthy customers had been turned down by the bank solely because the customer lived outside the trade territory of the bank. (Opperude Tr. P. 24) Prior to commencing business with

RW Enterprises, Inc., these "self-financed transactions" represented a very small portion of the business of Autos, Inc..

Commencing in January of 2006, however, Autos, Inc. entered into the above described business relationship with RW Enterpries, Inc., to obtain a larger pool of capital to write more "seller financed" automobile sales to help it increase volume and to share in the interest earnings of the contracts. Over the course of the next four years, Autos, Inc. wrote more than 500 retail installment sale contracts, extending more than $3,500,000.00 of purchase money consumer credit, with more than $1,500,000.00 of interest accruing on the terms of said contracts. (Exhibit 1, Found at **Docket Number 46** and not re-filed herewith, being digital copies of the Buyer's Order; the Retail Installment Contract; the Assignment to RW Enterprises, Inc., and the RW Enterprise's 15% rate of return amortization schedule; and Exhibit 3, an Excel Spread Sheet summarizing the data extracted from Exhibit 1 documents) RW Enterprises, Inc., provided all the necessary capital to allow Autos, Inc., to write these sales contracts, and in return, extracted a Fifteen Percent (15%) rate of return on its capital invested.

From 2006 through 2011, RW Enterprises, Inc. provided more than $3,500,000.00 of principal capital to Autos, Inc. to enable it to expand its business volume. With access to the capital of RW Enterprises, Inc., Autos, Inc, proceeded to extend credit in its own name to five hundred twenty-four customers. (Exhibits 1 and 3)

Pursuant to their Agreement, commencing on January 17, 2006, and continuing twice monthly thereafter until sued by Plaintiff, representatives of Defendant Autos Inc., would meet with Mr. Westby for the purpose of the sale and "assignment" of the company's prior two week's worth of credit sales contracts. The assignments were "limited" assignments because Mr.

Westby did not fully step into the shoes of Autos, Inc., but rather, only took a fixed rated of return regardless of the stated percentage rate on the individual contracts with the customers. RW Enterprises obtained the right to one hundred percent of the outstanding principal due, but only a fifteen percent (15%) interest rate of return on such principal, regardless of the stated rate of interest being charged the consumer. (Exhibit One and Two) The assignments were made under terms of full recourse and backed by the personal guarantees of the principals of Autos, Inc, Mr. Opperude and Mr. Hendershot. (Westby Tr. Pg 12-17, 29; Opperude Tr. Pg. 52-3; Exhbit Two) This practice continued through the date of the commencement of this lawsuit, and resulted in over five hundred (500+) "assignments" made during the five year period of time, with approximately 330 contracts still outstanding at the time of the commencement of this law suit. (Westby Tr. Pg 42, 65)

In each instance, the "assignment" involved Mr. Westby, on behalf of his corporate entity, RW Enterprises, Inc., being presented with a copy of the "Buyer's Order;" a copy of the "Retail Installment Contract and Security Agreement;" and a loan amortization schedule showing a schedule of blended interest and principal payments computed to amortize the customer's loan over the same period of time as did the Retail Installment Contract, but with the constant 15% annual interest rate agreed to, regardless of the customer's stated rate on the Contract. (Westby Tr. Pg 31, 37; Opperude Tr. Pg. 52-3; Exhibits One and Two) Each of the documents are described below.

Buyer's Order. This is the first document executed between a new customer and Autos, Inc., doing business as "Global Auto". From the Buyer's Order, one can learn the name and address of the customer, the date of the agreement, a description of the automobile being

purchased and a monetary description of the transaction. From this document one can learn the agreed to purchase price; government fees and taxes charged, **dealership fees and charges related to the credit transaction**, the down payment, if any, and the unpaid principal balance due. Of particular importance, in every instance Autos, Inc. charged every credit customers two special fees: a "**document administration fee**" and a **"loan fee**." (Opperude Tr. Pg 87-88; Westby Tr. P. 37; Exhibit One) These fees (a $300.00 loan fee and a $195.00 document administration fee) are both charged on Bonnie Delorme's contract. (Exhibit 4, consisting of Bonnie's Buyer's Order, her Retail Installment Contract; the contract assignment to RW Enterprises, Inc., the RW Enterprises, Inc. 15% Amortization schedule) On the first few contracts in January and February of 2007, the document administration fee was only a $65.00 fee, but commencing in March, 2007, the document administration fee escalated to a $195.00, and continued at that level for the balance of the practice (Contracts #1082 through #1584). The "loan fee" also varied throughout the term of the business relationship. The loan fee started at $200.00, was sometimes charged as high as $400.00, but throughout most of the term, and including Bonnie's contract, the contract a $300 loan fee was charged. (Westby Tr. Pg. 37-9; Opperude Tr. Pg. 87-8)

Both special dealership fees, the loan fee and the document administration fee were then included in the amount to be financed, **but never included in the calculation of the consumer's cost of borrowing funds as disclosed in the statement of the Annual Percentage Rate and Finance charge**.. (Opperude Tr. Pg 87-88; Westby Tr. Pg. 38-9; and Exhibits 1 and 4)

Retail Installment Contract and Security Agreement. This is the second document between the new customer and Autos, Inc. It contains the terms of the promissory note for the

funds borrowed from the dealership and is the only document in which the rate of interest upon the credit being extended is addressed. In addition to granting a security interest in the automobile, the contract form also contains the promissory note between the parties, telling the buyer the amount due on the note, the simple rate of interest to be applied upon the amount due, the amount of the monthly installments, and the penalty fee to be charged should the buyer be more than ten days late in making a scheduled payment. The contract form is one Autos, Inc., cannibalized from bank forms. (Opperude Tr. Pg. 26-8) More than three-fourths of the language of the Bank form relied upon is omitted in the form used by Autos, Inc..

In every instance, including that of Bonnie Delorme, the contracts specified a $25.00 late fee would be charged for any payment received more than ten days past the due date. (Opperude Tr. Pg 86; Westby Tr. P. 56; and Exhibit 1 and 4)

The contract also has a series of blocked "disclosures" under the heading "Truth In Lending Disclosures." There are five Truth-In-Lending Disclosure boxes:

1) **Annual Percentage Rate**;
2) **Finance Charge**;
3) **Amount Financed**;
4) **Total of Payments; and**
5) **Total Sales Price**.

It is admitted that on every contract the disclosed "**Finance Charge**" and the calculation to compute the "**Annual Percentage Rate**" never included either the assessed dealership "loan fee" or the "document administration fee" even though theses fees appear upon the face of every credit customer's Buyer's Order form and were added into the "unpaid balance" due. (Opperude Tr. Pg 87-88; Westby Tr. Pg. 39; Exhibits 1 and 4) Typical of the majority of the contracts, the disclosed Annual Percentage Rate on Bonnie Delorme's contract is Twenty-five percent (25%)

(Exhibits 1 and 4).

Assignment of Retail Installment Contract. All of the lending activity in each and every instance was initiated in the name of Autos, Inc., d/b/a Global Auto. It was only after the purchase money loan was finalized that RW Enterprises became involved via partial assignment. The Assignment of Retail Installment Contract form was drafted by Mr. Westby on behalf of RW Enterprises, Inc., his wholly owned corporate entity. (Opperude Tr. Pg 52-53) While the assignment document does not disclose the Westby return on investment, it does when read together with the master "agreement" (Exhibit Two), and the attached amortization schedule. Each assignment limits the assignee to a fifteen percent fixed rate of return, regardless of the simple interest rate charged the retail customer. (Opperude Tr. Pg. 52-3; Westby Tr. P. 31; Exhibit One, Two and Four) Each Assignment Agreement is supplemental to the master agreement which explains the fifteen percent rate of return guaranteed RW Enterprises, Inc.. Under these agreements, the assignment of a particular contract such as that of Bonnie Delorme, provided, inter-alia:

* Global Auto was responsible for all collections
* Global Auto was free to charge and collect for itself "**other fees, such as late fees, loan fees, additional interest and documentation fees**"
* Global Auto was free to charge whatever rate of interest it chose to charge for each individual retail customer, and the to keep for itself all interest payments received over and above its cost of money. In the case of Bonnier Delorme, that difference represented a ten percent margin of profit (25% charged less it 15% cost of money)

* Global Auto was responsible for the maintenance of insurance on the auto collateral
* Loans could be amortized anywhere from six to forty-eight months
* RW Enterprises was to receive amortized payments computed at a fixed 15% interest for the entire term of the loan unless paid off early
* RW Enterprises was to be listed on the automobile title as the first lien holder
* Global Auto had a right of pre-payment
* Autos, Inc.; Robert Opperude and James Hendershot each personally guaranteed the payment stream to RW Enterprises on each contract, regardless of actual cash flow received from the retail customer
* All payments received from the retail customer ten or more days late would be subject to a $25.00 late fee.

Thus, it is not in dispute that Defendants charged and collected a "loan fee" and a "document administration fee" from each credit customer which amounts were never included in either the calculation and disclosure to their customers of either the Annual Percentage Rate or the Finance Charge.

Repossession Event. On September 30, 2010, Defendant Autos, Inc., did repossess the automobile being purchased by Bonnie Delorme. The payment then alleged past due was in the amount of $317.48, and was only fifteen days past such payment's due date. Before she was permitted to obtain the return of her vehicle, on October 1, 2010, Bonnie Delorme was required to make a cash payment to RW Enterprises, Inc., in the following amounts:

* A Twenty-Five ($25.00) Dollar Late Fee

* A Two Hundred ($200.00) Dollar Repossession Fee

* The late payment in the amount of $317.48

* The remainder of her down payment ($350.00) previously agreed to be due at the end of the term of the contract. (RW Enterprises Payment Receipt dated October 1, 2010, Exhibit Five)

Total of Interest Payments. After regaining possession of her automobile, Bonnie Delorme continued making regular payment under the terms of her contract through April 15, 2010. After April 15, 2011, Bonnie ceased making payments on the contract. Through April 15, 2010, Bonnie Delorme had paid $1,513.69 in interest on her note, and had paid the $300.00 loan fee at the inception of her contract. (Exhibit Four and Exhibit Six, a three year monthly amortization schedule of a $7,985.00 principal balance with a 25% simple interest rate applied, commencing July, 2010)

Unregulated Lenders. Defendant Autos, Inc., the originator of all lending herein, admits it is not, and never has been, a "regulated lenders" as that term is used in Section 47-14-09((2)(e), or Section 51-15-03(1), N.D.C.C. (Opperude Tr. Pg. 76, 77, and 79).

LEGAL ARGUMENT

Standard for Granting Summary Judgment. The standard for summary judgment is well-established:

> "'Summary judgment is a procedural device for the prompt resolution of a controversy on the merits without a trial if there are no genuine issues of material fact or inferences that can reasonably be drawn from undisputed facts, or if the only issues to be resolved are questions of law. A party moving for summary judgment has the burden of showing there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. In determining whether summary judgment was appropriately granted,

> we must view the evidence in the light most favorable to the party opposing the motion, and that party will be given the benefit of all favorable inferences which can reasonably be drawn from the record. On appeal, this Court decides whether the information available to the district court precluded the existence of a genuine issue of material fact and entitled the moving party to judgment as a matter of law. Whether the district court properly granted summary judgment is a question of law which we review de novo on the entire record.'" Alerus Fin. NA v. Marcil Grp. Inc., 2011 ND 205, ¶9, __ NW2d___ (N.D., 2011), citing First Int'l Bank & Trust v. Peterson, 2011 ND 87, ¶ 7, 797 N.W.2d 316 (N.D. 2011); Lucas v. Riverside Park Condo.Unit Owners Ass'n, 2009 ND 217, ¶ 16, 776 N.W.2d 801 (N.D. 2009)

In the instant case, there is no question of fact as to what interest rate the Defendants intended to charge Bonnie Delorme. Further, it is not contested whether Bonnie Delorme in fact paid blended amortized principal and interest payments over a period of time. There is no question of fact as to what the applicable usury rate was for the State of North Dakota during the applicable time frame. There remains only a question of law: Did the rate of interest charged under the promissory notes written by Defendant Autos, Inc., and assigned to Defendant RW Enterprises, Inc., exceed the lawful rate of interest unenforceable through judicial process of the State of North Dakota.

USURY. Commonly defined as the charging of a rate of interest on borrowed funds at a rate greater than applicable civil law will allow to be enforced. Usury is defined by the laws of the State of North Dakota in two different contexts, one civil usury, and the other, criminal usury.

Civil Usury. Section 47-14-09, N.D.C.C. defines "usury" as the "taking of interest greater than five and one-half percent per annum (5 ½%) higher than the current cost of money as . . . computed and declared on the last day of each month by the state banking commissioner." Attached hereto and marked Exhibit Two, is the North Dakota usury rate for non-regulated lenders for the years 1999 through September, 2011. (This chart of usurious interest rates is freely accessible to the public at http://www.nd.gov/dfi/financial) For all of calendar years 2009

through the present, North Dakota's usury rate has been set by the state banking commissioner at its statutory minimum, seven per cent per annum (7%) Unless a lender qualifies for one of the statutory exceptions enumerated at Section 47-14-09((2)(e), N.D.C.C., the charging of interest at a rate greater than the published usury rate is unenforceable through judicial civil process of the State of North Dakota.

Not one contract of the more than Five Hundred contracts (see Contracts 1160 et. al) sets forth an annual percentage rate less than 15%. Most of the contracts charge between 21% and 25%.

Every single contract, on its face, charges a usurious rates of interest unenforceable through judicial process in the State of North Dakota. These contracts are not even close to the statutory limit. The penalty for civil usury is statutory is broken into two parts: First, a calculation for those who have not yet paid any usurious interest; and a Second calculation for those who have made payment of the usurious rates of interest. Section 47-14-10, N.D.C.C., provides:

> The taking, receiving, reserving, or charging of a rate of interest greater than is allowed by the laws of this state relative to usury shall be deemed a forfeiture of the entire interest which the note, bill, or other evidence of debt carries with it or which has been agreed to be paid thereon, and in addition thereto, a forfeiture of twenty-five percent of the principal thereof. In case the greater rate of interest has been paid, the person by whom it has been paid, or that person's legal representative may:
>
> 1. Recover back twice the amount of interest thus paid, together with twenty-five percent of the principal from the person taking or receiving the same, but an action must be commenced for such purpose within four years after the time when the usurious transaction occurred; or
>
> 2. Offset twice the amount of such interest against any indebtedness which the person who paid the same owes to the party or parties receiving such usurious interest.

The math is simple to calculate for Plaintiff, Bonnie Delorme, and should class action status be granted, the math results, although unique to each member of the class depending upon whether the usurious note has been fully paid or a balance remains – each can be calculated with mathematical certainty as of the date of judgment. There is no off-set or other variable.

For each person to whom a usurious rate of interest was charged, Defendants shall be ordered pay back twice the interest actually paid by each member of the class; shall forfeit the right to collect all unpaid interest not yet due; and shall forfeit one-forth of the principal upon which the usurious interest was computed. §47-14-10, N.D.C.C.) Applied to the uncontested facts as of the date of judgment, a sum certain may be calculated for each member of the class in compliance with the "civil" penalty for charging usurious rates of interest. Penalties would cease at that point but for Defendants' extreme level of usury law violation.

Criminal Usury. By statute, usurious promissory notes are unenforceable through the judicial process of the State of North Dakota. The charging of usurious rates of interest subjects a lender to the above cited harsh civil penalties. However, under the additional uncontested facts of the instant case, the charging of usurious interest becomes the basis for criminal and special additional civil sanctions in addition to those cited above.

Section 12.1-31-02, N.D.C.C. defines criminal usury for transactions occurring within the State of North Dakota as one who "knowingly engages in, or directly **or indirectly provides financing for**, the business of making extensions of credit at such a rate of interest that repayment or performance of any promise given in consideration thereof is unenforceable through civil judicial process." (Emphasis is added to draw attention to the role of RW Enterprises, Inc. and its principal, CPA Westby who indirectly provided financing for the

criminal usurious scheme)

In every instance the usurious lending rates appear on the face of the written documents! Most charge 21% to 25%. Bonnie Delorme was charged 25%. The question of fact for application of the criminal penalties is whether such conduct was "knowingly engaged." North Dakota State Law defines three circumstances under which the law will **presume** a lender is "knowingly engaged" in criminal usury:

> "2. Knowledge of unenforceability shall be presumed, in the case of a person engaging in the business, if any of the following exist, and in the case of a person **directly or indirectly providing financing**, if he knew any of the following:
>
> a. It is an offense to charge, take, or receive interest at the rate involved.
>
> b. **The rate of interest charged, taken, or received is fifty or more per centum greater than the maximum enforceable rate of interest**.
>
> c. The rate of interest involved exceeds forty-five per centum per annum or the equivalent rate for a longer or shorter period." §12.1-31-02(2), N.D.C.C. (Emphasis added)

Knowledge of the unenforceability of a charged rate of interest is presumed in the case of a person directly or indirectly providing financing, if the rate of interest charged, taken, or received is fifty or more per centum greater than the maximum enforceable rate of interest. That lawful rate was seven (7%) percentum.

In the instant case, even during the relevant time period in which the calculated and published rate of usury was at its highest rate -- ten and one-half percent per annum (10.5%) – Defendants, in every instance, exceeded the presumptive fifty percent over charge rate threshold (which at its highest would equal fifteen and seventy-five hundredth percent (15.75%)) . The interest rate disclosed on every one of the 524 contracts exceeds such maximum enforceable rate

of interest by "fifty or more per centum." (Contracts #1060 et. al) ***The presumptive criminal knowledge and intent threshold is reached in every instance!***

Every contract charges a usurious rate of interest. The actual rate of interest on every contract exceeds the statutory presumption that the usurious interest *was being charged knowingly*. The necessary elements exist to criminally indict all five named Defendants with felony usury charges under Section 12.1-31-02 as persons or entities "d**irectly or indirectly provides financing for"** a usurious lending enterprise; and/or as accomplices under Chapter 12.1-03, N.D.C.C.

An Innocent Mistake? A Defendants' assertion that they did not know their conduct violated usury laws is not a defense – culpability is not a required element as to the fact a Defendant's conduct violates criminal law. §12.1-02-02(5), N.D.C.C. Ignorance of the law is no excuse. They each knew exactly what they were doing and fully intended to do it. It begs all credibility to believe an experienced Certified Public Accountant, personally involved in a multitude of business activities, and having created a new business entity expressly to get into the consumer finance business, was not aware of the existence and significance of usury laws.

The extension of credit from RW Enterprises to Autos, Inc. for the known purpose of charging usurious interest, facilitates the criminal purpose of the relationship and together, the parties to the crime have obtained obscene profits thereby.

Section 12.1-31-02, of the North Dakota Century Code specifically includes within its scope one who **"directly or indirectly provides financing"** for the business of usurious lending. Without an entity to pass off the bad paper and provide new capital for the next customer, Autos, Inc. and its principals would have quickly run out of capital, limiting the harm they could cause.

However, with the capital resources of RW Enterprises, Inc., and its principal, millions could be extended in usurious credit. The harm escalated to damage more than five hundred families in less than four years time, writing more than 500 retail installment sale contracts, extending more than $3,500,000.00 of purchase money consumer credit, with more than $1,500,000.00 of interest accruing on the terms of said contracts in four short years.

Exceptions. There are statutory exceptions to the usury rate limitations imposed by Section 48-14-08 of the North Dakota Century Code, but neither the conduct of the Defendants or their business entities qualify for such exceptions. The statutory exceptions to the enforcement of usurious interest rate limitations include: (1) Bona fide pawnbroking transactions in an amount not exceeding one thousand dollars which is made by a bona fide pawnbroking business transacted under a pawnbroker's license; (2) Loans made to a foreign or domestic corporation, foreign or domestic limited liability company, cooperative corporation or association, or trust; (3) Loans made to a partnership, limited partnership, or association that files a state or federal partnership income tax return; (4) Loans or forbearance of money, goods, or things in action the principal amount of which amounts to more than thirty-five thousand dollars; (5) Loans made by a lending institution which is regulated or funded by an agency of a state or of the federal government; and (6) Loans made by state-chartered banks and the Bank of North Dakota, which may charge interest at a rate equal to the maximum allowable rate which lawfully may be charged for a particular type of loan by national banking associations or state or federally chartered savings and loan associations operating out of facilities located in this state. See §48-14-08 N.D.C.C. Defendants and their business entities do not qualify as any of these statutory exceptions.

More than thirty years ago, there was another statutory exception to the law against usury found in the Retail Installment Sales Act (Chapter 51-13, N.D.C.C.) which Act formerly contained specific interest rate cap applicable to retail installment sales, but such provisions were eliminated by the North Dakota Legislature in 1979. See S.L. 1979, ch. 517. No longer does the Retail Installment Sales Act seek to regulate consumer interest rate charges, rather, the Act now regulates rate disclosure and other non-interest rate related statutory requirements. The Act no longer contains specific interest rate caps as were discussed in , Mandan Supply, Inc. v. Steckler, 244 N.W.2d 698 (N.D. 1976).

Violation of the laws against usury are triggered by the charging of excessive rates of interest. Violations of the disclosure requirements of the Retail Installment Sales Act are triggered by a willful failure to comply with the disclosure requirements of that Act. The Retail Installment Sales Act no longer contains interest rate caps. The Retail Installment Sales Act encompasses dozens of non-interest rate related statutory requirements.. Each Act is independent of the other, except where specifically provided otherwise.

CONCLUSION

In January, 2007, the Defendants did enter into a conspiracy to charge usurious interest rates to the retail installment sales customers of Autos, Inc.. The scheme worked well. In four short years, they wrote more than 500 contracts with more than **$3.5 Million in credit extended**, with a gross profit margin of **$1.5 Million in interest**, and a **net profit margin of nearly $1 Million** on the contracts already written prior to the commencement of this litigation. Why would the Defendants quit this obscenely profitable business relationship? If they knew they

were engaged in a lawful enterprise, why not continue to rake in the Millions?

The Defendants wanted Bank profits without incurring Bank regulatory compliance. They wanted Bank profits without the capital risks faced by a financial institutions which fails to comply with the rules designed to protect the consuming credit from deceptive representation of the cost of credit; or the collection of unlawful late charges; or engaging in unlawful collection practices They wanted a Bank's gross lending profit, without a Bank's costs. Through their bad practices, their consumers are harmed; and their competitors are harmed (the lawful lending institutions and competing car dealerships).

No questions of fact remain to be decided, only questions of law. The interest rate charged is admitted. The business character of the entities charging the interest rate are known. The class of consumer borrowing the funds, the purpose for which the funds were borrowed, and the amount borrowed are all known. All the circumstances under which the funds were advanced and re-payment received are uncontested. The law is equally black and white.

Submitted to the Court this ____ day of December, 2011.

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