ARGUMENT

A. Defendant's Contentions in Its Brief is Rife with Affirmative Concealments and Outright Falsehoods

Nothing in Defendant's brief changes the conclusion that a gross miscarriage of justice occurred in the trial court as a result of Defendant's campaign to abuse the judicial process, deprive plaintiff's constitutional and statutory rights during discovery and at trial. In fact, Defendant's brief sheds new light on the continuing effort of the Dealer to conceal genuine issues and cover-up its outrageous misconducts in the court of law.

Beyond dispute**,** the Dealer cannot present a shred of admissible evidence in its defense. Indeed, in the section of "Statement of Facts", Defendant provides no *fact* whatsoever to support its contentions on substantive matters, for example: (1) At page 3, Defendant failed to specify when and how Defendant made "several requests" for car keys when referencing to its Bystander Report (S00055 at ¶¶46-47). As plaintiff pointed out that such a statement is not only argumentative, but also misleading and false (Plaintiff's October 10, 2007 Motion to Strike filed in this Court, page 6 at ¶¶24-27; and page 8 ¶¶35-36). (2) At page 5 of its brief, Defendant recycled an argument of "no gas in the subject vehicle's gas tank", which had been stricken by the trial court (Id page 9 at ¶¶36-37). And in the same section, Defendant submits false contentions on procedural matters as well, for example: (1) At page 5, Defendant argued "On October 11, 2005, the trial judge declined to hear the case." The record shows that such a contention is false (S181-182 at ¶¶2-5). And the instant case was transferred from courtroom 1304 to court 1501, then, assigned to courtroom 1307 on October 20,

2005 (C23 at ¶2). (2) At page 6, Defendant asserts "For reasons that are unclear from the record, on December 8, 2005, Judge Ronald Davis transferred the matter back to the presiding judge for reassignment to another judge for hearing on Plaintiff's motion, (S00220)". Here, under no circumstance Defendant did not know what the reason was (S187-199; S203-209; S210-215). (3) At page 7, the Dealer argued that "It was not until May 3, 2005, *** that Plaintiff filed interrogatories and request to produce upon Defendant." The record shows Defendant's contention here is patently false (See C183 and C221-222).

The "Argument" section in Defendant's brief is more problematic since most of the Dealer's factual contentions therein are based on its Bystander's Report (S49-70). Which is a collection of affirmative concealments, material omissions and outright falsehood laced with irrelevant up-to-date arguments (Plaintiff's October 10, 2007 Motion to Strike filed in this Court). And it is noteworthy that at the last paragraph of page 16, Defendant's counsel even pretended she could not recognize her own handwritings .The fact is, in 2005, Defendant wanted a trial without filing an Answer, but no judge in the Circuit Court would accept that. And on October 11, 2005, at courtroom 1304, the Dealer wanted a trial date, but it failed, Judge Casandra Lewis stated "Plaintiff is entitled to have an Answer from Defendant first." Then, Defendant claimed the instant case was assigned to courtroom 1307 instead. After laborious maneuver, the Dealer did get what it wanted on October 20, 2005. And after plaintiff presented the evidence (S213; A112), eventually, Judge Davis professionally granted plaintiff's motion for substitution of judge on December 8, 2005.

B. Whether the Trial Court had Proper Jurisdiction Is An Important Issue for Review on Appeal

It is important to note that our Supreme Court Rules do differentiate between "small claims" and other cases. A small claims court has a limited jurisdiction as evidenced by Rule 281. Further, Rules 281 through 289 would apply for small claims only. As such Defendant's current contention is patently without merit. After the instant case was transferred to courtroom 1104, whether the trial court had proper jurisdiction became an important issue And it is indisputable that the case was processed as or like a small claim, Rule 218 conference had never been held for the instant case at courtroom 1104. Further, plaintiff properly asserted that the "final Judgment" was predetermined and biased, (plaintiff's brief at pp. 34 –35), plaintiff's due process rights were deprived (Id. pp.35-38). Under such circumstances, Defendant's contentions for review standard in its sections VII A, C-E are incorrect. Since the predetermined "final judgment" was not based on any evidence in the first place (C662, A73), the pertinent issues should be reviewed de novo. And after Defendant's motion to strike Count IX was denied, according to Defendant theory given at page 12 of its brief, it would be *reasonable* to transfer the case to Law Division of the Court below, but the trial judge would not allow it happen for sure. And at trial, without question, Defendant did put the trial judge into an improper position by asking for more than $30,000 for its frivolous Counterclaim.

C. All Orders Issued in November of 2005 Should Be Void or Voidable

At page 14, Defendant argued that the "filing date" of a motion is different from the "presentation date." At page 16, Defendant further contended "Even if the

November 8, 2005, dismissal of Counts VII and VII is void, other orders in the case are not affected." These are not a correct statement of law. In re C.M.A 306 Ill. App. 3d 1061; 715 N. E. 2d 674, 680 (1st Dist. 1999) ("It has long been the law in Illinois that if a petition for substitution for judge is timely made and is in the proper form, the trial court has no discretion to deny it, and any other orders entered after its presentation is a nullity" Therefore, all orders entered by the judge after the filing date are void and of no legal effect.); Alcantar v. Peoples Gas Light & Coke Co., 288 Ill. App. 3d 644, 681 N. E. 2d 993, 995 (1997) ("The substitution of judge as a matter of right is absolute where the motion requesting the substitution is *filed* before the judge presiding in the case has made a substantial ruling.") At page 5, Defendant argued its "Motion to Strike and Dismiss was stricken, without prejudice, in order to allow the trial court to decide the motion (C23)". Defendant did not and cannot cite a single case-law to support its position. In fact, no such authority exists. After Defendant's motion was stricken on October 20, 2005, it was of no legal existence and Defendant became in default. As a result, Defendant's arguments at pp 17-19 had no legal ground. At page 14, Defendant argued its stricken motion should be heard first on November 8, 2005. That is wrong, the trial judge should not ignore a motion for substitution of judge but rule on a motion of no legal effect (C24).

D. Part 1 of the "Final Judgment Order" Should Be Reversed

1. The Unlawful Nature of the Sale Cannot Be Concealed. Defendant Violated MVICSA, and the Title Transfers from and to the Dealer Were Illegal

At trial, plaintiff presented two Odometer Statement forms produced by the Dealer (A48 and A49). The registered mileage of the subject car was 24514 miles

when it was sent to repair on June 26, 2003 (A47). Such a reading was recorded by the Illinois Department of Motor Vehicles, and it was provided by a commercial website - CarFax. On the September 4, 2003 form (A48), the Dealer asserts 24520 miles for the odometer reading whereas it "affirmatively" states the reading is 24509 miles (A115) as shown on the October 6, 2003 form (A49).

The October 6, 2003 form (A49) reveals several material facts: (1) Defendant, refusing to produce the original title, fails to identify the real previous owner. It is in violation of 49 C. F. R. § 580.5(c) under MVSICA; (2) on September 4, 2003, at the time of the sale, Defendant did not have ownership of the subject vehicle under 49 U. S. C. § 32702 (7). Hence, the subject sale is illegal. (3) Defendant violated 49 U. S. C. § 32705 (a)(3), when accepting an incomplete Odometer Statement form; (4) the specific October 6, 2003 Odometer Statement form was created for the purpose of title transfer, and the odometer reading of 24509 miles therein was falsified.

Notably, four years after the sale in question, the Dealer failed to provide an accurate odometer reading at the time of the sale, but contended "the vehicle mileage had been overstated (by six miles)" (Defendant's brief at page 26; S63 at ¶86) and "there were additional miles on the odometer statement [24520 miles] than on the car" (S63 at ¶87). Such statements on their face are express violation of MVICSA. 49 U. S. C. § 32705 (a)(1). Upon consideration of the odometer reading on June 26, 2003 was 24514 miles, according to the current version of a story from Defendant, not a single mile add to the reading in the next two months, any one can figure out that the Dealer actually conceded that either (1) the odometer was disconnected or rolled back by the Dealer during the time period from June 26 to October 3, 2003; or (2) Defendant

misrepresented the history of the subject vehicle at the time of the sale. That means the previous owner sent the car to repair for the sole purpose to get rid of it; the repair on June 26, 2003 was a complete failure, the subject car was towed to Defendant, and no one, *including plaintiff,* had a test-drive of the car. Since there are only two possibilities left as to the car history, and the latter cannot be true, even it could be, the Dealer's "intent to defraud" would still be indisputable.

Under MVSICA**,** "constructive knowledge or reckless disregard is sufficient" to support a private cause of action. Smith v. Walt Bennett Ford, Inc. 314 Ark. 591, 864 S. W. 2d 817, 830 (1993). While ordinary negligence is not enough, "gross negligence" by a professional dealer in cars is sufficient basis for a finding of intent. Tusa v. Omaha Auto Auction Inc., 712 F. 2d 1248, 1253 (8th Cir. 1983). At the time of the sale, the Dealer knew or should have known that the annual mileage of the subject car was below the industry average (S451). Therefore, it had an affirmative duty of further inquiry of the accuracy of the odometer reading. Resendiz v. Eatinger, 1990 U. S. Dist. LEXIS 7112, *4 (N. D. Ill. 1990) Oettinger v. Lakeview Motors, Inc., 675 F. Supp. 1488, 1493 (E. D. Va. 1988); Adams v. Neil Huffman Nissan, Inc., 1989 Ky. App. LEXIS 51 *10 (1989) (33, 000 miles on a six-year-old car was unusually low, and this placed a dealer on notice). But in the instant suit, the Dealer has failed to take any steps to independently verify the accuracy of the odometer reading. This amounts to reckless disregard for the purpose of the MVICSA. Heiffler v. Joe Bells Auto Service., 946 F. Supp. 348, 352 (E. D. Pa. 1996). Further, Defendant contended it did not have financial record when it "bought" the vehicle, and it took three years, at trail, the Dealer had to confess that at the time of the sale, it did not have a title for the

subject car (A66, ¶83). Therefore, it would be an accurate statement that Defendant violated MVICSA with intent to defraud with respect to the mileage, ownership, repair record, warranty terms of the subject vehicle. If Defendant could get away with this kind of business practice, it would be foreseeable that, in the future, our State, especially Chicago area would be an ideal place for "title washing". As such, the trial court's pertinent judgment should be reversed.

2. The Dealer Violated Federal Regulations Under the Magnuson-Moss Act. Without Preexisting Terms and Conditions, the Contract of The Sale Is Not Enforceable.

At trial, plaintiff presented two different copies of the front sides of a Buyer's Guide submitted by the Dealer (S25 and S26) during discovery.

From the time of the sale, plaintiff has seen four versions of a Buyer's Guide for a single used car: (1) the original Buyer's Guide with only WARRANTY box was marked at the Dealership (Plaintiff's Bystander's Report at ¶¶19-20, A58); (2) the front side of the Buyer's Guide on which the Dealer put a 50% warranty stamp and faxed to plaintiff (Id. at ¶¶29-30, A35; S475), where the SERVICE CONTRACT box was unchecked; (3) part of front side and rear side of a Buyer's Guide produced by Defendant in response to Request to Produce during discovery (S25, S487 and S488); (4) front side and part of rear side of a Buyer's Guide served upon plaintiff in Defendant's Request to Admit (S26, S485 and S486), where the SERVICE CONTRACT box was marked .

It is uncontested that the Dealer fails or refuses to produce a single sheet of the original Buyer's Guide with both the front side and rear side even as of this day; the

Dealer did not incorporate the original Buyer's Guide into the contract. Further, as plaintiff pointed out in the trial court (C218 at ¶4; and S 464 at ¶¶20-22), Defendant had fabricated the third and fourth versions of the Buyer's Guide. And documentary evidence clearly shows: (1) Defendant asserted Charles Rollins was the author of the Buyer's Guide, but presented two versions of a document with handwritings from at least three persons, and the name of Henry Holton appeared on the rear sides of those manufactured documents; (2) the stain and handwriting on the rear side of the third and fourth versions of the document are identical; and notably (3) the front and back sides of the fourth document are not even in the same scale.

15 U. S. C. § 2303(a) requires a warrantor to specify whether a written warranty is a full or limited warranty, and the FTC Used Car Rule 16 CFR Ch. I (1-1-03 Edition) §455.2(a) requires a dealer must prepare the Buyer's Guide before a sale, and FTC Used Car Rule 16 CFR Ch. I (1-1-03 Edition)§455.3(b) requires a dealer must incorporate the Buyer's Guide into the contract. In all these respects, the Dealer failed. Further, Defendant filed a frivolous Counterclaim, in which the Dealer demanded storage fees counting from the first day it towed back the car. Such hidden cost, deceptive in nature, would forfeits an otherwise valid contract, let alone an unlawful one. Therefore, the trial court's judgment should be reversed.

3. Indisputable Evidence Shows The Dealer Breached Written And Express Warranty, Violated ICFA and Committed Common Law Fraud

It is well established that statements of existing facts or comments that ascribe specific virtues to a product are not generally considered puffing and may be the subject of a fraud claim. Totz v. Continental Du Page Acura, 236 Ill. App. 3d 891,

904, 602 N. E. 2d 1374, 1382 (1992). Therefore, all statements of material facts from the Dealer at the time of sale (Plaintiff's opening brief at page 6) are enforceable. During the sale, the Dealer chose to provide false statements while it knew for certain that (1) the subject car was not a "trade-in" at Defendant, (2) Defendant did not have the title at hand, it did not own the vehicle legally and financially; (3) the subject car did have multiple repair record; (4) the Dealer did not conduct a mechanical-check-up on the car at plaintiff's request; and (5) the Dealer had no intention to offer competitive warranty terms as compared to that from CarMax. Therefore, plaintiff should prevail under Federal and State law.

Further, in addition to prohibit a false statement of material fact, the ICFA also expressly covers "false pretenses", "false promise" and omissions. At the time of the sale, the Dealer did not have the original title at hand, it did not own the subject vehicle either legally or financially, but it pretended otherwise. Even for this reason alone, plaintiff should prevail on claims of violation of ICFA.

4 The Dealer Does Not Have Unlimited Right to "Cure" Under Federal and State law. Plaintiff Should Prevail on Count IV – Revocation of Acceptance.

Beyond any dispute, at the time of the sale, Defendant did misrepresent the repair record, previous owner, warranty terms, history and condition of the subject vehicle; also Defendant did not have the original title of the subject vehicle; further, the Dealer failed to clarify the terms and conditions before the sale; and the Dealer failed to incorporate the original Buyer's Guide into the sales documents. Under Magnuson-Moss Warranty Act, ICFA and 810 ILCS 5/2-721, there is no such thing to "cure" non-compliance of Federal and State statutes.

Without question, when the subject car stalled at highway speed, further material breach of implied warranty and express warranty occurred. Defendant towed back the car and conceded the subject vehicle was dangerously defective by its action. For the purpose of revocation of acceptance, it is sufficient that the buyer's faith in the product, or the seller's ability to place it in good working order, has been substantially impaired, and its operation is fraught with appreciation. Lathrop v. Tyrrel, 128 Ill. App. 3d 1067, 1068, 471 N. E. 2d 1409, 1051 (3rd Dist. 1984). After plaintiff was forced to file the instant suit, the Dealer contended there was no private cause of action under Magnuson-Moss Act and there was no private cause of action for revocation of acceptance under Illinois UCC (Plaintiff's opening brief at pp 26-27); also Defendant claimed all of implied warranty had been disclaimed, that was equivalent to declare that the subject car was sold "As Is" according to 15 U. S. C. § 2308. And as the Dealer's president confessed at trial that in his career as salesperson and car dealer, he never refunded money on purchase made (A64-65 at ¶68). The Federal Court, applying Illinois law, holds affirmative misrepresentation of a consumer's rights constitutes an unfair and deceptive practice. Heastie v. Community Bank of Greater Peoria, 727 F. Supp. 1133, 1139 (N. D. Ill. 1989).

As stated at page 25 in Plaintiff's opening brief, normally 810 ILCS 5/2-608 governs the issue of revocation of acceptance. Whenever there is any dispute, 810 ILCS 5/2-515 should be followed, evidence ought to be preserved, and an immediate inspection should be arranged. The record shows that, on September 9, 2003, plaintiff sent a timely fax and letter to Defendant, requesting the Dealer to respond in writing by fax within three days, but Defendant failed to do so ever since. Indeed, Defendant

had never asked for an inspection on the inoperable car before the instant suit was filed. The record demonstrates Defendant did not have any document in its possession to show the Dealer had ever perform its own inspection on the vehicle before the sale, neither it had any document to prove Defendant had conducted mechanical check-up at plaintiff's request (A104). As a result, the car stalled at highway speed. Under such circumstance, no one would believe that the Dealer was competent enough to fix the car. Indeed, after ten months of "investigation" Defendant failed to pinpoint any of the defective parts which caused the engine stall. Furthermore, there was simply no incentive for the Dealer to fix car before the lawsuit was filed, when it wanted to collect $30/day for storage. Therefore, plaintiff should prevail on Count IV – Revocation of Acceptance under Federal and State law.

After trial, Defendant up-dated its contention, by stating " UCC 810 5-2/508 allows a *revocation* under certain circumstances. The statute however, requires that the purchaser provide an opportunity to cure." Here, the Dealer intentionally conceals the difference between "*revocation*" and "*rejection*"; also it purposely ignores there are following sub-sentence and phrase in the same statute: "*time for performance has not yet expired*" and "*within the contract time*." Apparently, Defendant wants to use one phrase "opportunity to cure," but misplace the statute and misinterpret it completely. Such practice is impermissible. For the purpose of argument, assuming UCC 810 5-2/508 applied in this case, or assuming Defendant had rights to "cure" after revocation took place, in the instant case, the Dealer still has no defense. (1) The date of purchase should be the "time for performance" to provide terms and condition of the sale, and to produce the original title or a power of attorney form, but Defendant failed. (2)

After the Dealer towed back the car, on September 9, 2003, Plaintiff requested Defendant to respond her letter and fax in writing by fax within three days, Defendant did not do it within 30 days required by UCC 810 5-2/609(4). (3) Defendant might argue that Early sent an undated letter (A38) in response to the inquiry from the Illinois Attorney General's Office ("IAGO"). But still, the time of performance for Defendant had expired in October of 2005. (4) Finally, Defendant might argue there was a letter dated September 10, 2003 (A39), which was attached to Early's response to IAGO. This is the Defendant's last hope to create an illusion that the Dealer did "attempt" to honor its content-changed warranty (A35). But as already pointed out (Plaintiff's Opening Brief at page 28 and citation therein), the purported September 10, 2003 letter was inadmissible in the court of law. And Defendant had forfeited its right to argue the reasonableness of revocation of acceptance after October 9, 2003, because Defendant did not do it within 30 days, and the Dealer did not respond plaintiff's specific request within one month, As such, there would be no "cure" after Defendant had repudiated a contract, legal or not.

Furthermore, it is important to note that plaintiff received an October 17, 2003 "Thank you" note (A40) from Defendant and an October 21, 2003 letter for IAGO (A41). That means Early wrote his undated response to IAGO (A38) and attached the purported September 10, 2003 letter (A39) thereto at about the same time when Defendant sent plaintiff a "Thank you" note. Reading these four documents in whole, in October of 2003, Plaintiff received a clear message, with Defendant's mocking laughter ringing in the air, that although no dealer dared ignore a inquiry from the State Attorney General's Office, but Defendant could deal with it by manufacturing a

purported September 10, 2003 letter. This is why Early undated his letter and this is why Defendant concealed the author of the purported September 10, 2003 letter during discovery. No party should get away with this kind of egregious misconduct.

E. For Two Years Defendant Abused the Judicial Process in the Trial Court. Calculated Schemes to Defraud Can Not Be Characterized as "Inadvertent Error." Courts of All Jurisdictions Recognize "Fraud on Court" As A Serious Offense

The documentary evidence shows that Defendant's Answer to the Complaint, Interrogatories, Request for Admissions, and the Dealer's Response to Request to Produce are a collection of false denials, affirmative concealment and outright falsehoods, as plaintiff had pointed out in her motions filed in the trial court (S271-290; S357-387; S388-403; C183-216; C221-239; C405-415). After plaintiff was forced to initiate a lawsuit, Defendant became eager and eager to change the condition of the subject car, and Defendant was determined to destroy the physical evidence. Defendant even demanded court permission to depose the subject vehicle (S127 (b)). After the Dealer failed to get a court order it wanted, the subject car was vandalized at Defendant's premise anyway. Such a calculated scheme, at the very least should be sanctioned under our Supreme Court Rule 137.

In the instant suit, the trial exhibits show that the Dealer manufactured and submitted several pieces of inadmissible and/or false evidence: (1) The Purported September 10, 2003 letter (A39); (2) Two versions of a Buyer's Guide, with front side and back side (S25; S26; A102 and A103); and (3) four letters written by Defendant's counsel (S40-42; S44 and S45). Many courts have found the fabrication of evidence to be an abusive litigation practice, or even a type of fraud on court. Pope v. Fed. Express

Corp.,138 F. R. D. 675, 683 (W. D. 1990) ("Litigants must know that the court are not open to persons who would seek justice by fraudulent means"); Tramel v. Bass, 672 So. 2d 78, 82 (Fla. Dist. Ct. App. 1996) (affirming default judgment against defendant who tampered evidence).

Documentary evidence shows that during discovery Defendant refused to produce (1) A copy of the original Buyer's Guide, which should be one piece of a document with front and back side; (2) A copy of the previous title of the subject car; (3) A copy of the financial transaction record created when the Dealer "bought" the vehicle; and (4) a copy of documents the Dealer sent to the Office of Secretary of State for title transfer. As such, plaintiff's statutory right under Magnuson-Moss Act and MVISCA had been deprived, and pertinent orders issued at evidentiary hearings should be void. Also the record shows that Defendant deliberately concealed the identification of the following potential key witnesses:(1) Four or five salesmen at scene during the subject sale. (2) Persons whose handwriting or hard-to-read signatures appeared on each of the sales documents. (3) The person who handed sales documents to plaintiff. (4) The person who received plaintiff's call regarding the Buyer's Guide and the person who faxed the front side of the content-changed Buyer's Guide to plaintiff. (5) The person who received plaintiff's call regarding the engine stall and the person who arrange the tow. (6) The persons who sent plaintiff "Thank you" notes and the "trade-in' ad material. (7) The person who signed the October 6, 2003 Odometer Statement form; and (8) the person who created a purchase note for the subject vehicle (A118). Without question, Defendant should be sanctioned for its affirmative concealment in violation of our Supreme Court Rule 219(c). Compen v. Executive Hotel, Inc., 105 Ill.

App. 3d 576, 588 (1st Dist. 1982) As the frequency and severity of the Dealer's abuses of the judicial system demonstrate, Defendant's misconduct cannot be attributed to either "clerical error" or "inadvertent errors" or "record-keeping" problems. In one sense, Defendant's tactics and laborious maneuver were successful. Defendant did prolong a simple clear-cut case for two years. It did get away with manufactured evidence and amazingly, it won a trial. Yet this kind of "victory" came at a great cost. It is no overstatement to say that, as a result, the integrity of the judicial process has been cheapened and sullied. The U. S. Supreme Court held that a court had the power to conduct an independent investigation in order to determine whether it had been the victim of fraud. Universal Oil Products Co. v. Root Refining Co., 328 U. S. 575, 580 (1946). And the inherent power of the courts to "fashion appropriate sanction(s) for conduct which abuses the judicial process" was reaffirmed in Chambers v. NASCO, Inc., 501 U. S. 32, 44 (1991).

Date: _____ Respectfully submitted.

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