

No. 16-1275

**UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT**

RACHEL C. WILLIAMS,
on behalf of herself and others similarly situated
Plaintiff – Appellant

v.

AMERICAN HONDA FINANCE CORPORATION
Defendant – Appellee

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

**MOTION BY AMERICAN FINANCIAL SERVICES ASSOCIATION
FOR LEAVE TO FILE THE ACCOMPANYING AMICUS CURIAE
BRIEF SUPPORTING DEFENDANT-APPELLEE AMERICAN HONDA
FINANCE CORPORATION AND AFFIRMANCE**

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Dated: August 29, 2016

The American Financial Services Association (“AFSA”) respectfully moves this Court, pursuant to Federal Rule of Appellate Procedure 29(b), for leave to file the proposed amicus brief submitted contemporaneously herewith in support of Defendant-Appellee American Honda Finance Corporation (“Honda”). Honda has consented to the filing of the proposed *amicus* brief. Plaintiff-Appellant Rachel C. Williams (“Williams”) does not oppose the filing of the proposed *amicus* brief.

AFSA is the national trade association for the consumer credit industry, protecting access to credit and consumer choice. Over the years, AFSA has been dedicated to the consumer credit industry and has been an *amicus* in several noteworthy cases. *See e.g. City of Miami v. Bank of America*, Case Nos. 15-1111 and 15-1112 (United States Supreme Court 2016); *ACA International et al. v. Federal Communications Commission, et al.*, Case No. 15-1211 (D.C. Cir 2015); *PHH, et al., v. Consumer Financial Protection Bureau*, Case No. 15-1177 (D.C. Cir. 2015); *Harris v. Viegelahn*, Case No. 14-400 (United States Supreme Court 2014); *Texas Department of Housing and Community Affairs, et al. v. The Inclusive Communities Project, Inc.*, Case No. 13-1371 (United States Supreme Court 2013).

AFSA has an interest in this matter because the interpretation of the Massachusetts Motor Vehicle Retail Installment Sales Act (“MVRISA”) advanced by Plaintiff-Appellant Rachel C. Williams (“Williams”) – that an auction sales

price cannot reflect the fair market value of a given vehicle – places an unwarranted burden on vehicle finance companies. This burden is at odds with what the MVRISA requires, namely a credit to borrowers for the “fair market value” of the specific vehicle. The MVRISA provides that the fair market value of any particular vehicle in a proceeding for a deficiency requires a vehicle-specific determination and thus, under the statute, is a question for “the court to determine” on a case-by-case basis. Under modern auction practices, the auction price often is the fair market value of any particular vehicle. As a national trade association for the consumer credit industry, AFSA is concerned by Williams’s position.

The proposed amicus brief provides an in-depth analysis of the current used car marketplace, in particular the modern auto auction market. The authorities and topics discussed in AFSA’s proposed *amicus* brief are not cited or discussed by any of the parties or any other *amicus*. In particular, the proposed brief updates the market research from the 1960s and 1970s cited by Williams and the National Consumer Law Center, a proposed *amicus* in support of Williams. As the proposed brief explains, contrary to the statements made by Williams and the NCLC, today’s auctions do not produce low prices. There is nothing inherently wrong, “horrible,” or unjust about an auto auction, nor is there any reason – if there ever was – to think that modern automobile auctions yield less than fair market

value.¹ Today's auctions are producing all-time high prices, quickly and efficiently. Indeed, the majority of auction volumes are coming from *retail* dealers, who have realized that often times quick and efficient auction sales result in a higher overall retail price than could be obtained if the vehicle were sold on the dealer's own lot. Rising auction prices have resulted in more and more cars being sold at auction and, ultimately, narrow margins on traditional lot vehicle sales. The proposed brief analyzes the District Court's decision in light of actual conditions as opposed to those hypothesized by the NCLC based on decade's out-of-date law review articles.

For the reasons set forth herein and in the accompanying brief, AFSA respectfully request that this Court grant the instant motion for leave to file the proposed *amicus curiae* brief. *See Neonatology Assocs., P.A. v. Comm'r*, 293 F.3d 128, 133 (3rd Cir. 2002) ("I think that our court would be well advised to grant motions for leave to file amicus briefs unless it is obvious that the proposed briefs do not meet Rule 29's criteria as broadly interpreted. I believe that this is consistent with the predominant practice in the courts of appeals.") (Alito, J.) (citations omitted); Michael E. Tigar and Jane B. Tigar, *Federal Appeals*

¹ *See* Brief for Amicus Curiae NCLC at 5, *Williams v. American Honda Finance Corporation*, (No. 16-1275) (describing "horribles").

Jurisdiction and Practice § 2:21 (2016 ed.) (“Even when the other side refuses to consent to an amicus filing, most courts of appeals freely grant leave to file...”).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 29th day of August, 2016, this document was filed through the Electronic Case Filing system, and that copies will be sent electronically to the registered participants identified on the Notice of Electronic Filing:

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**AMICUS BRIEF OF AMERICAN FINANCIAL SERVICES
ASSOCIATION IN SUPPORT OF DEFENDANT-APPELLEE
AMERICAN HONDA FINANCE CORPORATION AND AFFIRMANCE
OF THE DISTRICT COURT DECISION**

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RULE 29(c) STATEMENT

Pursuant to Rule 29(c) of the Federal Rules of Appellate Procedure, American Financial Services Association (“AFSA”) states that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than AFSA or its counsel contributed money that was intended to fund preparing or submitting this brief.

AFSA CORPORATE DISCLOSURE STATEMENT

The American Financial Services Association (“AFSA”) is the national trade association for the consumer credit industry, protecting access to credit and consumer choice. AFSA members include traditional installment lenders, vehicle finance/leasing companies, consumer and commercial finance companies, mortgage lenders, credit card issuers, industrial banks and industry suppliers. AFSA is a not-for-profit membership organization, it does not have a parent corporation, nor does any publicly held corporation hold 10% or more of its stock.

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INTEREST OF AMICUS CURIAE

The American Financial Services Association (“AFSA”) is the national trade association for the consumer credit industry, protecting access to credit and consumer choice. AFSA members include traditional installment lenders, vehicle finance/leasing companies, consumer and commercial finance companies, mortgage lenders, credit card issuers, industrial banks and industry suppliers.

AFSA has an interest in this matter because the interpretation of the Massachusetts Motor Vehicle Retail Installment Sales Act (“MVRISA”) advanced by Plaintiff-Appellant Rachel C. Williams (“Williams”) – that an auction sales price cannot reflect the fair market value of a given vehicle – places an unwarranted burden on vehicle finance companies. This burden is at odds with what the MVRISA requires, namely a credit to borrowers for the “fair market value” of the specific vehicle. The MVRISA provides that the fair market value of any particular vehicle in a proceeding for a deficiency requires a vehicle-specific determination and thus, under the statute, is a question for “the court to determine” on a case-by-case basis. Under modern auction practices, the auction price often is the fair market value of any particular vehicle.

The District Court’s decision correctly reflects the statutory mandate that the fair market value determination is a question for the court while also creating an

analytical framework that is flexible enough to account for the realities of today's auto marketplace. Accordingly, the District Court's decision should be affirmed.

SOURCE OF AUTHORITY TO FILE

AFSA respectfully submits this proposed brief in support of Defendant-Appellee, American Honda Finance Corporation ("Honda") and affirmance, with its motion for leave from the court to participate as *amicus curiae* in the present case. Honda consents to the filing this brief. Williams does not oppose.

INTRODUCTION

The District Court granted Honda's motion for summary judgment because Williams failed to introduce evidence to prove that Honda violated Section 20B of the Massachusetts Motor Vehicle Retail Installment Sales Act ("MVRISA") when, in calculating her deficiency after repossession, it credited Williams the full amount of the sale price of her vehicle at auction. *Williams v. American Finance Honda Corp.*, No. 14-12859, Dkt. 74, at 12 (D. Mass Jan. 1, 2016) ("Magistrate Decision"). In reaching this decision, the District Court correctly relied on the statutory mandate in Section 20B, which provides that the fair market value of the repossessed vehicle is a question of fact for the court to determine. *Id.* The court also correctly concluded that in opposing summary judgment the Plaintiff failed to point to admissible evidence that could sustain a finding that the auction proceeds applied by Honda, as a reduction to the borrower's account, was less than the fair

market value of the automobile at the time of sale.¹ *Id.* The District Court’s decision should be affirmed.

Contrary to the statements made by Williams and the amicus curiae supporting Williams, the National Consumer Law Center (“NCLC”), today’s auctions do not produce low prices. There is nothing inherently wrong, “horrible,” or unjust about an auto auction, nor is there any reason – if there ever was – to think that modern automobile auctions yield less than fair market value.² Today’s auctions are producing all-time high prices, quickly and efficiently. Indeed, the majority of auction volumes are coming from *retail* dealers, who have realized that often times quick and efficient auction sales result in a higher overall retail price than could be obtained if the vehicle were sold on the dealer’s own lot. Rising auction prices have resulted in more and more cars being sold at auction and, ultimately, narrow margins on traditional lot vehicle sales. For example, the average gross margin on a lot-sold used car in the last three years has ranged from

¹ Even for issues that ordinarily present a question of fact summary judgment should be granted when the non-moving party fails to respond to a proper motion for summary judgment with admissible evidence sufficient to create a triable question on an essential element of its claim. *See e.g. Bricklayers and Trowel Trades Intern. Pension Fund v. Credit Suisse Securities (USA) LLC*, 752 F.3d 82, 97 (1st Cir. 2014) (affirming dismissal of claims at summary judgment that were not supported by admissible evidence).

² *See* Brief for Amicus Curiae NCLC at 5, *Williams v. American Honda Finance Corporation*, (No. 16-1275) (describing “horribles”).

\$194 to \$269 – not exactly a large margin and a far cry from the “horribles” that the Plaintiff and the NCLC cite.³

Williams’s and NCLC’s arguments to the contrary miss the mark. Williams and the NCLC rely entirely on studies conducted in the 1960s and 1970s, which do not reflect the reality of today’s auto markets. Like most industries in the United States, the used car industry has experienced significant change in the last 50 years. In particular, in the last 15 years, online and mobile sales⁴ have opened the auction market to additional participants who had traditionally been excluded due to limited physical capacity.⁵ The increased access has created more competition. For example, mobile auction sales have risen by 22% in just the last two years. *See infra* Argument Section A.4., 11. At the same time, advances in technology

³ According to the articles cited by the Plaintiff and NCLC, in the 1960s and 1970s, repossession auction sales produced between 51% and 64% of retail value, depending on the study, resulting in thousands of dollars in margins. *Compare with infra* Argument Section A.5, at 12.

⁴ In this context, a “mobile sale” refers to a sale that occurs at a local seller’s lot which is simultaneously broadcast online. *See* 2016 MANHEIM REPORT, at 20 (explaining that through “mobile sales the full auction experience is transported to a local seller’s lot including an auctioneer, a single auction lane with cars driven through, and simulcast broadcasting to online buyers.”). A “mobile sale” also refers to sales that occur through mobile smartphone applications. *See* MANHEIM, *Mobile Applications*, <https://publish.manheim.com/en/services/mobile-applications.html> (explaining that Manheim’s smartphone applications allow for “full vehicle” searches and vehicle purchases “from anywhere”).

⁵ In other words, limited physical space for vehicles at auction houses prevented cars from being sold at auction. In contrast, vehicles auctioned online can be housed offsite.

have made the market more efficient. These benefits, in turn, have been passed on to consumers in the form of narrower margins, as described above. In other words, “view the narrower used vehicle margins as a sign of a competitive industry passing on some of its efficiency gains to consumers.” *See infra* Argument Section A.5., at 12. Any construction of the MVRISA should account for these facts and reflect today’s competitive and efficient auction market, not the market of the 1960s and 1970s described by Williams and the NCLC. That is exactly what the District Court has done.

First, the District Court’s decision gave effect to the Legislature’s recognition in Section 20B(e)(2) that the fair market value of a repossessed automobile is a question of fact for “the court to determine.” Magistrate Decision, at 8. Accordingly, the District Court required the Plaintiff to come forward with admissible evidence sufficient to establish the fair market value of her car. *Id.* at 12.

Second, the District Court’s decision recognized that an auction price can produce fair market value, which permits the individual facts to govern and allows the effect of increased market efficiency to filter into the analysis.

Third, the District Court’s decision recognizes that published guides, even if properly introduced in admissible form, can at most create a rebuttable presumption, and that when rebutted with competent evidence of the value of the

specific car at issue, fair market value becomes a question for the court to determine. As the District Court recognized, under such circumstances expert testimony often will be needed to establish fair market value. *Id.* Among other reasons, this approach makes sense because there are a variety of variables that affect the value of a vehicle that are not captured by published guides, such as maintenance history, accident history, and the number of prior owners. In contrast, an auction price captures these variables, and others, as it reflects the amount a willing buyer and seller actually agreed to for the specific car at issue.

Finally, Williams’s own experience demonstrates that auctions produce realistic and fair values. First, the Black Book wholesale value for Williams’s vehicle was \$7,750, the Black Book retail value for the car was \$9,800, and the NADA trade in value for the car was \$9,500.⁶ Williams was credited \$8,900, “which is not substantially different” than the guide estimates. Second, any difference between “book” value and what the actual sale generated can likely be accounted for by the condition of Williams’s vehicle, which was in rough, below-average condition for a car of its age. In any event, given these facts – the condition of the vehicle, the modest difference between various book values and

⁶ While the District Court implicitly and correctly recognized that the correct evidentiary foundation was not laid to receive the Black Book guide value into evidence (Magistrate Decision, at 6 and fn. 6), AFSA refers to Black Book retail value for illustrative purposes.

sale price, and the fact that an actual willing buyer and willing seller agreed to \$8,900 – the District Court correctly held that there was insufficient evidence to conclude that Honda violated the MVRISA.

For these reasons, and for the reasons articulated by Honda, the District Court’s decision should be affirmed.

ARGUMENT

A. Today’s Auctions Do Not Produce Prices That Are Invariably Less Than Fair Market Value.

Williams and the NCLC argue at length that used car auctions produce “notoriously low” prices that are invariably lower than fair market value. If that was ever true, it is not true today. Today’s auction market produces prices that very often reflect fair market value. The bright line that Plaintiffs argue exists between “auction” and “retail” used car channels of trade no longer exists and, in many instances, auctions will be the most efficient, highest grossing, and only market available for a given vehicle. In other words, an auction price, which reflects what an actual willing buyer and seller would agree to, may in fact be the fair market value of a given vehicle.

1. The NCLC and Williams Rely on Outdated Market Research.

The NCLC and Williams principally rely on three studies from the 1960s and 1970s to argue that finance companies, like Honda, should not be allowed to

use the actual sales price of a vehicle in calculating a deficiency. See NCLC Brief, at 4 (citing Philip Shuchman, *Profit on Default: An Archival Study of Automobile Repossession and Resale*, 22 Stan. L. Rev. 20, 31 (1969); John C. Firmin & Robert Simpson, *Business as Usual: An Empirical Study of Automobile Deficiency Judgment Suits in the District of Columbia*, 3 Conn. L. Rev. 511 (1971); and Ellen Barrie Corenswet, *I Can Get It For You Wholesale: The Lingering Problem of Automobile Deficiency Judgments*, 27 Stan. L. Rev. 1081 (1975)).⁷ These studies are woefully out-of-date. Today’s auction market does not produce the low prices that the 1960s and 1970s studies complain about. The market has changed. Today’s auction market is about efficiently and quickly moving vehicles to those who can make the highest and best use of them.

2. *Today’s Auctions Are Producing High Returns.*

Far from yielding the “distressed” prices described in the NCLC’s *amicus* brief (at 4, 6-7, 13-15, 17), today’s auctions are producing record high prices, and market trends suggest that prices will only continue to rise. According to a 2016

⁷ Williams and NCLC cite additional cases and treatises for the same proposition. However, each such source is either (a) also from the same time period or (b) reliant on a study published in the 1960s, 1970s, or 1980s. For example, Williams and NCLC repeatedly cite Thomas B. Merritt, Massachusetts Practice Series, Consumer Law, § 20:87 (3d ed. 2015), for the proposition that auctions produce “meager distressed” results. Although the Massachusetts Practice Series is from 2015, it in turn cites the FTC’s Final Staff Report on Proposed Credit Practices Rule from 1980. Again, these studies do not accurately reflect today’s marketplace.

report by Manheim,⁸ “[w]holesale prices . . . increased in both 2014 and 2015 on an average annual basis, and they have been in an elevated range for six years.” MANHEIM, 2016 USED CAR MARKET REPORT, 13 (21st Ed. 2016) (“2016 MANHEIM REPORT”). The 2016 Manheim Report explains just how far the market has come in the last 16 years with the following example of the average price of a vehicle at auction: In 2000, \$5,000 would buy a car with 84,000 miles. In 2015, in contrast, the same \$5,000 would buy a car with about 120,000 miles. *Id.* at 28. That is nearly a 50% increase in the average mileage of a \$5,000 vehicle. As mileage is a key driver in a used car’s value, such a large increase in average mileage for a \$5,000 vehicle reflects a significant increase in prices.

The rise of auction prices has not come suddenly. It is part of a long term evolution of the used car marketplace. Indeed, auction prices have been on the rise for many years now. Building off the example above, Manheim explains that in nearly every year since 2000, average mileage for the typical \$5,000 auction purchase rose. *Id.* Manheim’s Used Vehicle Value index confirms that the

⁸ Manheim is the world’s largest automobile auction company. Finance companies, wholesalers, used and new car dealers purchase and sell millions of cars through Manheim every year. MANHEIM, *About Manheim*, <https://publish.manheim.com/en/about-manheim.html> (explaining (1) that “Manheim is the world’s leading provider of vehicle remarketing service,” (2) that Manheim sells “7 million used vehicles annually and facilitates transactions representing almost \$46 billion in value,” and (3) that “Manheim brings together qualified sellers and [] buyers of used vehicles that include automotive dealerships, banks, car rental agencies, car manufacturers and government agencies”).

average sales price of a car at auction rose by approximately 10% between 2000 and 2016.⁹ Meanwhile, the United States Department of Labor Consumer Price Index, over the same period, saw a 5% *decrease* in the value of retail used cars.¹⁰ In other words, the “wholesale” and “retail” markets are converging, resulting in narrower margins on used car retail lot sales.

3. *Auction Volumes Are Increasing.*

The increased auction prices have resulted in more cars being sold at auction than ever before. *Id.* at 14. For example, the auction market saw 6% growth last year, resulting in record volumes. Analysts predict that the market will only continue to rise in the coming years. *Id.* at 14.

4. *“Retail” Car Dealers Are Driving Auction Growth.*

One of the key drivers behind auction growth has been traditional “retail” dealer consignments. *Id.* Retail dealers, who are traditionally considered purchasers of cars at auction, are increasingly turning to auctions to sell their own cars. *Id.* at 23. Dealer consignments now make up the majority of auction volume. *Id.* This means that for many used cars, at least in the first instance, there

⁹ MANHEIM, *Manheim Used Vehicle Value Index*, https://www.manheim.com/content_images/content/ManheimUsedVehicleValueIndex-WebTable0716.png (compare January 2000 index price of 115.3 with 2016 index price of 125.2) (last visited August 19, 2016).

¹⁰ United States Department of Labor Bureau of Labor Statistics, Data Tools, Customizable Tables Series ID CUSR0000SETA02, <http://data.bls.gov/>.

is effectively no “retail” market available. *Id.* Dealers acquire cars and immediately, or shortly thereafter, send them to auction. Thus, the auction value of these and other cars *is* the fair market value, i.e. the amount a willing buyer and seller would agree to.

Several factors are driving increased dealer auction volumes. First, new technology has increased efficiencies and has opened the market to retail dealers. Traditionally, “limited physical capacity, as well as prime lane and time slots,” “pushed out dealer consignments.” *Id.* at 29. “Not so today. Online sales, multiblock selling, [] other online options, and mobile auctions have put all sellers on equal footing...” *Id.* at 29-30.¹¹ For example, Manheim’s mobile sales have seen a 22% increase in the number of vehicles sold in just the last two years. *Id.* at 20. “Going forward, mobile auctions (run by the auction houses) will become an increasingly important method for dealers to sell and source inventory.” *Id.* at 30. Jeff Carlson, NADA’s Chairman, explained the impact of recent technological changes as follows:

Buying and selling vehicles has become easier with internet auctions and the market has become more efficient. More dealers are

¹¹ Multiblock selling refers to vehicles being listed on multiple auction “blocks” at the same time. For example, the same vehicle may be available both on an online auction “block” and in-person on an auction “block.” *See* Webster’s Online Dictionary, Webster’s, “auction block,” <http://www.webster-dictionary.org/definition/auction%20block> (defining an auction block as a “platform from which an auctioneer sells”).

participating. It has become easier to match product to the best market, and all of this is done in a matter of seconds today. The used-vehicle market is incredibly transparent today for both buyers and sellers. *Id.* at 33.

With an open market, retail dealers have realized they can often obtain higher profits by quickly selling cars as-is at auction. Quick auction sales reduce expenses, such as storage costs and vehicle depreciation, while also promoting an efficient allocation of used vehicles. *Id.* at 16.

5. *Retail Dealers Are Seeing Low Per-Vehicle Profit Margins on Used Vehicle Sales.*

Higher auction prices have reduced dealer profit margins on used vehicles. For example, dealer net per-vehicle profit margins on sales in 2011, 2012, and 2013 was \$269, \$194, and \$254, respectively. NATIONAL AUTOMOBILE DEALERS ASSOCIATION, STATE OF THE INDUSTRY REPORT 2013, at 21; NATIONAL AUTOMOBILE DEALERS ASSOCIATION, STATE OF THE INDUSTRY REPORT 2014, at 7. At the same time, “[i]ncreased price transparency in the used vehicle market, in addition to the narrowing of margins, also reduced the ranges of grosses on individual transactions.” 2016 MANHEIM REPORT, at 27. In other words, there is now a “lack[] [of] ‘home run’ (high-gross) deals.” *Id.* These slim margins are also part of a long term trend – there has been a steady decline in dealers’ used vehicle gross margins since at least 2007. *Id.* at 26.

This does not mean that retail used car dealers are not making a profit; they are just doing it differently. “Despite narrowing gross margins, used vehicle operations at franchised dealerships produced record profits due to quicker inventory turns, reduced selling expenses, and [other] income.” *Id.* at 25. In other words, the narrower margins are “a sign of a competitive industry passing on some of its efficiency gains to consumers.” *Id.*

In light of the realities of the used car market described above, the “notoriously low,” “distressed” auction prices that Plaintiff and the NCLC complain about cannot be seen as a realistic description of today’s market. Auction prices and auction volumes have been up on a year over year basis for many years and are continuing to trend in that direction. Meanwhile, traditional lot used car dealer margins are narrower and trending downward. The market is far more efficient and more competitive than ever before, and the auction prices of the 1960s and 1970s are no longer a reality. Indeed, as the increase in dealer consignments illustrates, in many instances, the traditional “retail” market is not available and auctions are the only available market for a given vehicle.

B. The District Court Correctly Applied the “Fair Market Value”

Standard of the MVRISA.

The District Court correctly dismissed Plaintiff’s argument that auction sales invariably result in less than “fair market value” within the meaning of the

MVRISA. As explained above, auctions produce quick results and high values, with less overhead and depreciation costs. In many instances, it is the most efficient resale avenue, even for traditional retailers. It is therefore fitting that the District Court required Plaintiff to prove the fair market value of her specific vehicle. The District Court required the Plaintiff to come forward with evidence that the auction sale in question resulted in Plaintiff receiving an adjustment to her account that was less than fair market value. This approach was entirely appropriate.

First, as explained above, modern auction sales do not invariably produce sales prices that are less than the fair market value for a given vehicle. The auction process produces a value that reflects the amount an actual willing buyer and seller will pay for a specific vehicle in what is often the only market for that vehicle. It captures qualities specific to the vehicle at issue and, often times, produces the highest net value. The articles relied upon by the NCLC were built on a premise of two distinct markets: a wholesale market (informed primarily by dispositions at private auction) and a retail market (informed primarily by dispositions on “Main Street” at the local car dealership). Whatever the validity of that premise in the 1960s and 1970s, when these articles were written, that is not the reality today. The two markets have converged substantially such that it is no longer accurate to think of wholesale and resale prices as distinct or mutually exclusive. As the

District Court implicitly recognized, the fair market value of a repossessed vehicle at the time of resale is a question of fact to be determined at trial, considering the totality of the circumstances. The channel of trade is only one fact that affects whether fair market value was achieved in any particular sale.

Second, the District Court's approach recognizes that every vehicle is unique and that as a result, expert testimony will often be needed to interpret various guides in light of the condition and other facts about the vehicle. *See e.g., In re Roberts*, 210 B.R. 325, 330-331 (Bankr. N.D. Iowa 1997); *In re Wcislak*, 417 B.R. 24, 29 (Bankr. N.D. Ohio 2009). Even vehicles of the same make, model, and mileage can be in a different mechanical or cosmetic condition that significantly affects the car's value. Indeed, courts across the country recognize that in calculating "retail" value, something more than just a published guide is usually needed. *See e.g., In re Morales*, 387 B.R. 36, 45 (Bankr. C.D. Cal. 2008) (holding that retail value of a vehicle should be calculated by adjusting published guide value based on evidence of vehicle condition and other factors); *In re Ortiz*, 2007 WL 1176019, at *2-3 (Bankr. S.D. Fla. Feb. 27, 2007) (calculating retail value of car by deducting the hypothetical cost of repairs from the retail value established by expert testimony). Rather, some type of individualized inquiry is necessary to determine the value of a specific vehicle, i.e., an individualized inquiry is necessary to determine the highest price a willing buyer will pay a willing seller.

Third, the District Court's approach is entirely consistent with the statutory requirements of the MVRISA. Under § 20B(e), the fair market value of a vehicle is a question for the court to determine – “[i]n a proceeding for a deficiency the fair market value of the collateral shall be a question for the court to determine.”

Plaintiff's proffered approach – reliance on published guides and nothing more – takes the question from the court and improperly assumes that any approach to valuation that applies auction prices necessarily involves “notoriously low” prices.

As explained above, Plaintiff's assumptions regarding auction prices are incorrect. In any event, Plaintiff's proposed approach is not the approach authorized by the MVRISA. If the legislature wanted to impose a formula dictated solely by published guides, it could and would have said so expressly. *Wilson v. Comm'r. of Transitional Assistance*, 441 Mass. 846, 855, 809 N.E.2d 524, 531 (2004) (“If the Legislature intended [a certain effect], it would have said so, and it has not.”). It did not. Instead, the legislature suggested that book value could be used as a starting point to determine fair market value in a proceeding for a deficiency, but left the fair market value determination to the facts of each particular sale to be adduced at trial. In exercising its fact-finding role, the court should be able to consider whatever competent evidence is before it, including auction price. In this case, the Plaintiff did not offer admissible evidence of the vehicle's book value and, even if the Plaintiff had, as the District Court correctly

noted, the Plaintiff would likely need to introduce expert testimony to establish the fair market value of her vehicle, especially given the rough, below average condition of the vehicle. This approach is appropriate.

C. Honda Did Not Receive a “Notoriously Low” Price for Plaintiff’s Vehicle.

Williams’s own experience demonstrates how the market has changed. As Williams admits, in calculating her deficiency, Honda credited her with \$8,900, the full amount Honda obtained for the vehicle at auction. Pls’ App. Br. at 26. Meanwhile, the Black Book retail value identified as the “basepoint” (Magistrate Decision, at 6) for generally similar vehicles was \$9,800 and the NADA trade in value for generally similar cars was \$9,500. Magistrate Decision, at 6, 12; Pls’ App. Brief, at 26. The Black Book and NADA estimates are, as the District Court put it, “not substantially different from the price Honda obtained for the vehicle.” *Id.*

Moreover, the modest difference in price alone does not provide a sufficient basis to conclude that the auction sales price was presumptively too low or that it was not the fair market value of the vehicle. Indeed, given the rough to below-average condition of Williams’s vehicle and the potential for extra storage costs and further depreciation due to lapse in time, \$8,900 is likely *more* than Williams would have netted had the vehicle been sold on a traditional “retail” lot. Williams

offered no competent evidence to the contrary. For example, Williams did not introduce evidence from which the court could determine (1) that her car was actually in a condition that would have allowed a lot sale at a higher price or (2) that a lot sale would have occurred before further depreciation. Williams nonetheless asks the Court to presume that her car was worth more than what Honda actually obtained for it in an arm's length, competitive transaction simply because it was sold at auction. This is not the law.

CONCLUSION

For the reasons stated above, and the reasons articulated by Honda, the District Court's decision should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE UNDER FED. R. APP. P. 32(a)(7)

I hereby certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because: (1) this brief contains 4,352 words excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii); and (2) this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in 14 point proportionally spaced using Times New Roman font.

/s/ Fredrick S. Levin

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I hereby certify that on this 29th day of August, 2016, this document was filed through the Electronic Case Filing system, and that copies will be sent electronically to the registered participants identified on the Notice of Electronic Filing:

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