IN THE SUPREME COURT OF OHIO
COLUMBUS, OHIO

MIKE LALLY and TIM LALLY CHEVROLET, INC. d.b.a. LALLY ISUZU, Appellants, vs. AMERICAN ISUZU MOTORS, INC., Appellee.	)))))))))))	Case No. 2006-1520 On Appeal from the Franklin County Court of Appeals, Tenth Appellate District, Case No. 05APE-10-1137 Franklin County Court of Common Pleas Case No. 03CVF01-00974

APPELLANTS' MOTION FOR RECONSIDERATION

Christopher M. DeVito (0047118)
Stanley Morganstern (0005861)
Morganstern, MacAdams & DeVito
623 West Saint Clair Avenue
Cleveland, Ohio 44113
(216) 687-1212
(216) 621-2951 - Facsimile

Counsel for Appellants Lally

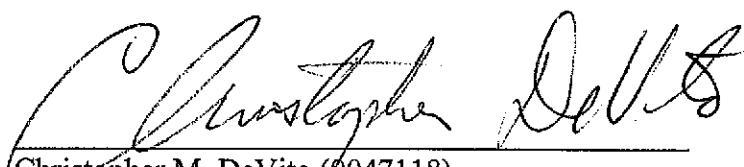
Michael H. Carpenter, Esq. (0015733)
Jeffrey A. Lipps, Esq. (0005541)
Carpenter & Lipps, LLP
280 N. High Street, Suite 1300
Columbus, Ohio 43215
(614) 365-4100
(614) 365-9145 - Facsimile

Counsel for Appellee Isuzu

FILED
DEC 08 2006
MARCIA J. MENGEL, CLERK
SUPREME COURT OF OHIO

Now come Appellants, Mike Lally and Tim Lally Chevrolet, Inc. d.b.a. Lally Isuzu ("Lally"), by and through undersigned counsel, and respectfully submit their Motion for Reconsideration pursuant to S.Ct.R. XI, Section 2. For the reasons fully set forth in the attached Memorandum, Appellants respectfully request that their Motion for Reconsideration be granted and the Court accept the discretionary appeal. There have been three (3) intervening Ohio Motor Vehicle Dealers Board ("Board") decisions. All three administrative agencies orders have failed to award the **mandatory** attorney fees and costs. Thus, the within appeal has great general interest regarding Ohio's economy, automobile businesses, manufacturers, employees, and consumers. Ohio's public policy, as legislatively set forth in the Dealer Act (R.C. Chapter 4517), needs to be promoted and enforced by accepting jurisdiction and requiring the Board and appellate courts to follow the statutory requirements of R.C. § 4517.65(C).

Respectfully submitted,



Christopher M. DeVito (0047118)
Stanley Morganstern (0005861)
Morganstern, MacAdams & DeVito Co., L.P.A.
623 West Saint Clair Avenue
Cleveland, Ohio 44113-1204
(216) 687-1212
(216) 621-2951 - Facsimile

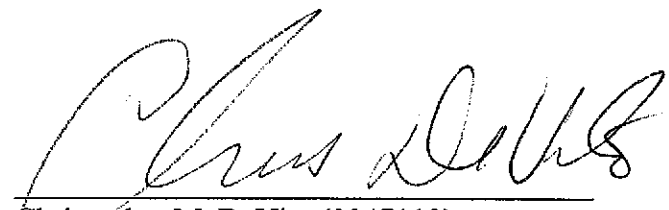
Counsel for Appellants Lally

CERTIFICATE OF SERVICE

A copy of the foregoing **Appellants' Motion for Reconsideration** was sent via facsimile and regular U.S. mail this 7th day of December, 2006, to the following:

Michael H. Carpenter
Jeffrey A. Lipps
Carpenter & Lipps, LLP
280 North High Street, Suite 1300
Columbus, Ohio 43215

Counsel for Appellee



Christopher M. DeVito (0047118)
Morganstern, MacAdams & DeVito Co., L.P.A.

Counsel for Appellants Lally

MEMORANDUM IN SUPPORT OF RECONSIDERATION

I. INTRODUCTION

This cause came before this Honorable Court upon Appellants Mike Lally and Tim Lally Chevrolet, Inc. d.b.a. Lally Isuzu's ("Lally") Notice of Appeal, filed August 11, 2006. The instant Motion for Reconsideration is being submitted in response to this Honorable Court's decision declining to hear the discretionary appeal.[1] Said decision was journalized November 29, 2006.

Lally's original argument in support of jurisdiction was based upon Appellants being the "prevailing party" in a protest brought before the Ohio Motor Vehicle Dealers Board (the "Board") and entitled to an award of attorney fees and costs pursuant to Ohio Revised Code § 4517.65(C). However, the underlying decision from the Tenth District Court of Appeals denied Lally's attorney fees and improperly eviscerates the remedial legislation and deterrent purpose of R.C. § 4517.65(C).

The grounds for this Motion are as follows: (1) since the filing of Appellants' Notice of Appeal, the Board has issued three (3) separate decisions in favor of automobile dealers in their protests against their respective automobile manufacturers;[2] (2) the dealers in each of those proceedings were declared the "prevailing party" and timely requested attorney fees and costs pursuant to R.C. § 4517.65(C); however, (3) before the Board had the opportunity to rule on the dealers' requests for attorney fees, each of the manufacturers appealed the Board's decisions to the

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[1]Justice Pfeifer dissented and would have accepted jurisdiction to determine the discretionary appeal on its merits because it has great general and public interest involving Ohio's automobile industry comprised of dealerships, consumers, manufacturers, employees, and suppliers.

[2]*Halleen Chevrolet, et al. v. General Motors Corporation*, Motor Vehicle Dealers Board Case No. 03-05-MVDB-277-SS; *Andy Chevrolet Company, et al. v. General Motors Corporation*, Motor Vehicle Dealers Board Case No. 05-01-MVDB-304-J; and, *Durnell's Indian Hallow, Inc., et al. v. R-Vision, Inc.*, Motor Vehicle Dealers Board Case No. 05-04-MVDB-307-LL.

Franklin County Court of Common Pleas;[3] and (4) despite the fact that attorney fees and costs pursuant to R.C. § 4517.65(C) are **mandatory,** the Board failed to award attorney fees to the prevailing party and is ignoring the remedial protections legislatively enacted.

The Board's failure, in the above referenced cases, to make a specific award of attorney fees and costs to the prevailing dealers completely negates and eviscerates the remedial nature and deterrent purpose of R.C. § 4517.65(C) in the exact same manner as the Tenth District's Opinion in the case at bar. The Tenth District and the Board are both failing to recognize that attorney fees and costs are **mandatory**, pursuant to R.C. § 4517.65(C), once a dealer has prevailed in its protest against a manufacturer. Automobile dealerships (and the consuming public) are being forced through expensive and protracted layers of appeal by economically superior, multi-billion dollar, and international corporate conglomerate manufacturers.[4]

Therefore, this Honorable Court should reconsider its decision to deny jurisdiction. The instant appeal has taken on an even greater significance in light of the Board's most recent failures to award attorney fees and costs. Accepting jurisdiction and making a determination on the merits will provide this Honorable Court with an opportunity to clarify and restore the remedial protections and promote the public policy and general interest that is being ignored by the Board and appellate courts below regarding the Dealer Act (R.C. Chapter 4517).

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[3]*General Motors Corporation v. Halleen Chevrolet, et al.*, Franklin County Court of Common Pleas Case No. 06-CV-011739; *R-Vision, Inc. v. Durnell's Indian Hallow, Inc., et al.*, Franklin County Court of Common Pleas Case No. 06-CV-012966; and *General Motors Corporation v. Andy Chevrolet Company, et al.*, Franklin County Court of Common Pleas Case No. 06-CV-013269.

[4]*Hal Artz Lincoln-Mercy v. Ford Motor Company* (Sept. 24, 1992), Tenth District Case No. 92-AP-442, unreported, 1992 WL 246014.

II. LAW AND ARGUMENT

With the purpose of the statute and the intent of the legislature in mind, Ohio and Federal Courts have repeatedly held since 1985 that the Dealer Act is a remedial law which must be "liberally construed to promote its remedies and means". See R.C. 1.11; *Mercure v. General Motors*, U.S.D.C., N.D. of Ohio Case No. 4:02CV2124 (March 17, 2003), quoting; *Car Business, Inc. v. Fleetwood Motor Homes of Indiana, Inc.* (1985), 23 Ohio Misc.2d 40, 42, 492 N.E.2d 488, 491; and *Earl Evans Chevrolet, Inc. v. General Motors Corporation* (1991), 74 Ohio App.3d 266, 276, 598 N.E.2d 1187, 1193; and *Durnell's v. R-Vision, supra.*

One of the remedial remedies, which must be liberally construed to promote the Dealer Act and protect dealers, is the attorney fees and costs provision which deters "manufacturers from using their vast resources to outspend opponents. That purpose will be ill-served if manufacturers can drag dealers through layers of expensive court appeals despite a victory at the Board." (emphasis added). *Hal Artz Lincoln-Mercury v. Ford Motor Company* (Sept. 24, 1992), Tenth District Case No. 92-AP-442, unreported, 1992 WL 246009.

The underlying Tenth District Opinion, and the three (3) most recent failures of the Board to award attorney fees to the prevailing dealers, are all examples of the very circumstances that the *Hal Artz* Court said the Dealer Act was designed to avoid. Thus, the Tenth District Opinion, and the recent Board decisions, do not properly apply the Dealer Act and the mandatory attorney fees and costs provision of R.C. § 4517.65(C) to protect dealerships.[5] Instead, the manufacturers have been given the opportunity to "drag dealers through layers of expensive court appeals despite victory at the Board." *Hal Artz, supra.* The proper procedure, which is not being followed, is that once a

[5]The protection of Ohio automobile dealerships is of great general and public interest because it employs thousands of Ohio residents, provides competition for the Ohio automobile buying public, and generates millions in tax revenues for the state.

dealer has prevailed in its protest, and upon the dealer's timely request for attorney fees,[6] the Board must award the dealer its reasonable attorney fees and costs in order for the manufacturers have a final appealable order. Otherwise, as was the case in the instant appeal and as is the case in the three (3) pending dealer board proceedings referenced above, the manufacturers can use their vast resources to outspend opponents in the appellate courts. *Hal Artz, supra.*

By properly awarding attorney fees, upon the timely request of a prevailing dealer, (a) the manufacturers have at least some deterrence from continuing to drag the protest through the court system and (b) dealers are provided with the security of knowing that they will be properly compensated for having to oppose the manufacturers' spurious, delaying, and expensive appeal. Conversely, when attorney fees are not properly awarded, as was the case in the instant appeal and in the recent Board proceedings, manufacturers can drag the protest through the court system, delay paying attorney fees and costs, and avoid posting a bond to secure the reimbursement of the dealer's attorney fees. This forces dealers to exhaust even more monetary and non-monetary resources on litigation <u>without</u> timely being reimbursed or having security that they will eventually have their attorney fees paid.[7]

The consequence of the Board's failure to award attorney fees is that dealerships will be reluctant to continue spending their limited resources to battle the manufacturers through layers of appeals and will be forced to give in to the manufacturers unscrupulous actions. This is the very consequence that the attorney fees and costs provision is designed to avoid. *Hal Artz, supra.*

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[6]*General Motors Corporation v. Joe O'Brien Chevrolet* (1997), 118 Ohio App.3d 470, 693 N.E.2d 317.

[7]Alternatively, <u>after</u> the Board determines the amount of attorney fees and costs, the automobile manufacturer could post a supersedeas bond, as every other judgment debtor must provide, in order to appeal the Board's order and stay collection proceedings by the dealer as a judgment creditor.

However, this result will undoubtedly occur with regularity if this Honorable Court does not accept jurisdiction of the instant appeal and provide clarification and instruction to the Board and appellate courts below.

The need for this Honorable Court to clarify the procedure for awarding attorney fees and costs is evidenced by the Recommendation of the Hearing Examiner, which was fully adopted by the Board, in one of the above referenced protests. In *Durnell's Indian Hallow, Inc., et al. v. R-Vision, Inc.*, the Hearing Examiner went into great detail about how the Ohio Dealer Act is designed to protect automobile dealers and that it is remedial in nature and must be broadly construed. The Hearing Examiner referenced numerous Ohio court opinions holding that the Dealer Act was enacted to protect dealers and must be liberally construed. For example:

> By enacting *R.C. SECTION 4517.54, et seq.*, the Ohio legislature created statutory procedures to protect existing automobile dealerships from "abusive and unfair franchise practices by the powerful automobile manufacturing industry." See, e.g., *Men-Guer Chrysler-Plymouth, Inc. v. Chrysler Corp.* (6th Cir. Ohio 1994), 16 F.3d 1220 (Joiner, J., dissenting), quoting *In re Hal Artz Lincoln-Mercury, Inc. v. Ford Motor Co.*, No. 91AP-1493, 1992 WL 246014 (10 th Dist. Ct. App., Franklin, 9-24-92); see also *Bob Danielas Buick Co. v. General Motors Corp.*, No. 97APE12-1701, 1998 WL 720018 (10th Dist. Ct. App., Franklin, 10-13-98).

Durnell's Indian Hallow, Inc., et al. v. R-Vision, Inc., Motor Vehicle Dealers Board Case No. 05-04-MVDB-307-LL, Recommendation of Hearing Examiner, p. 27. The Hearing Examiner then quoted the Opinion of the Eleventh District Court of Appeals in *Earl Evans Chevrolet, Inc. v. General Motors Corp.* as follows:

> **Thus, *R.C. Chapter 4517***, which sets forth remedies and means of recovery for franchisees who have been mistreated by their franchisors, including the definition of franchise contained in *R.C. SECTION 4517.01(V)*, **is remedial and is therefore to be liberally construed to promote said remedies and means**. (emphasis added).

Durnell's Recommendation, p. 27, quoting, *Earl Evans Chevrolet, Inc. v. General Motors Corp.* (Lake 1991), 74 Ohio App.3d 266, 276, 598 N.E.2d 1187. The Hearing Examiner concluded her

Recommendation by stating: "Finally, Durnells are entitled to the reasonable reimbursement of attorney fees and litigation expenses. (R.C. SECTION 4517.65)[.]", and gave instructions to both parties as to the procedure for filing a request for and objections to attorney fees. *Durnell's* Recommendation, p. 51.

However, despite the Board fully adopting the *Durnell's* Recommendation, and despite the fact that the dealer timely filed its request for attorney fees, the Board failed to act upon its own award of attorney fees and costs. To date, the manufacturer's appeal has been allowed to go forward, without making a ruling on the amount of attorney fees to be awarded.[8] Thus, the Board's decision has yet to become final and appealable, and the Board's inaction is serving to negate and eviscerate the very purpose and nature of the Dealer Act, which the Board recognized in its decision adopting the *Durnell's* Recommendation of the Hearing Examiner.

The circumstances of the *Durnell* protest are substantially the same as those of the two other protests referenced above, and each are analogous to the case at bar, in that they all permit manufacturers, who did <u>not</u> prevail before the Board, to drag each dealer through the appellate process without the dealers receiving their **mandatory** awards of attorney fees and costs. The Appellants in the case at bar and the dealers in the above-referenced protests are not being protected as they should be according to the law, and, in turn, the deterrent purpose and remedial protection of R.C. § 4517 is being undermined. Therefore, it is clear that this Honorable Court should accept

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[8]In all three (3) recent Board decisions and the manufacturers' appeals to the Franklin Court of Common Pleas, the automobile dealerships as appellees have filed (1) motions to dismiss for lack of jurisdiction and (2) motions to remand because a final, appealable order does <u>not</u> exist without the Board determining the mandatory attorney fees and costs. None of the common pleas judges have ruled on these issues, which have been fully briefed and are ripe for adjudication.

jurisdiction of the instant appeal in order to clarify the law and restore the deterrent purpose and remedial remedies of R.C. § 4517 that have been ignored by the Board and appellate courts below.

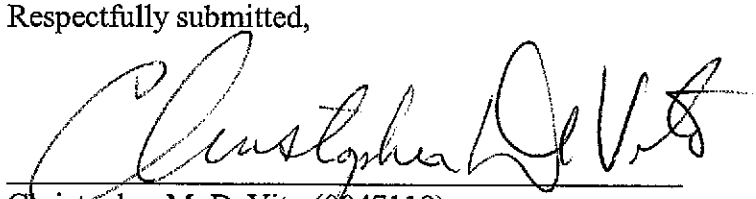
It should also be noted that the Honorable Justice Pfeifer dissented from this Honorable Court's decision to deny jurisdiction. In light of the grounds set forth in this Motion for Reconsideration, hopefully the other Honorable Justices of this Honorable Court will align themselves with the opinion of Justice Pfeifer and accept this discretionary appeal.

Finally, this Honorable Court should accept jurisdiction because the underlying appellate court decision, and the recent three (3) Board decisions, not only have a chilling affect upon dealerships attempting to enforce the Ohio legislature's Dealer Act protections, but they also hamper judicial efficiency and contradict the public policy concerns for an efficient court system. Lally does not contend that manufacturers should not be able to appeal decisions of the Board. Rather, Lally contends that when a manufacturer has not prevailed before the Board, the Board is required to rule on the issue of attorney fees and costs before the manufacturer can appeal. Otherwise, we are left with the present inefficient situation that is occurring: the non-prevailing manufacturer appeals the findings and decision of the Board, before a determination of appropriate attorney fees and costs, forcing the dealerships to expend more attorney fees on expensive and time-consuming appeals, without payment or a bond to secure future payment. Thus, it is easy to see the inefficiency that will result as a consequence of the underlying interpretation by the Tenth District, as well as the Board's inaction in the above-referenced protests. This messy and inefficient situation can easily be avoided by a ruling from this Honorable Court clarifying that the Board must make a specific award of attorney fees to the dealer, when the manufacturer is the non-prevailing party, before any appeals can be heard. To hold otherwise allows spurious appeals of Board orders, which are not final and appealable, and causes further economic hardships on dealerships.

III. CONCLUSION

In light of the above, Appellants Lally have provided this Honorable Court with additional grounds for the acceptance of jurisdiction. When considering the within motion, concurrently with the original Memorandum in Support of Jurisdiction,[9] this Honorable Court should reach but one conclusion: the instant appeal is one of great public concern and jurisdiction is proper. A decision on the merits will provide this Honorable Court with the opportunity to enforce the deterrent and remedial nature of the attorney fee provision of the Dealer Act and mandate compliance of the Board and appellate courts presently disregarding the Ohio legislature's remedial Dealer Act requirements.

Respectfully submitted,



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(216) 621-2951 - Facsimile

Counsel for Appellants Lally

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[9]Appellants Lally's original grounds consisted of: (1) the appellate courts and Board are ignoring the plain language and mandatory provisions of R.C. §4517.65(C); (2) the appellate courts and Board are disregarding precedent and controlling case law of *Hal Artz Lincoln-Mercury v. Ford Motor Company, supra*, and *Slavin Ford, Inc. v. Ford Motor Company* (August 1, 1991), Tenth District Court of Appeals Case No. 191-AP-354, unreported, 1991 WL 151252; (3) the Ohio retail automotive industry is a substantial component of Ohio's economy through taxes generated and employment of Ohio residents; (4) it has been over twenty (20) years since the Supreme Court has addressed an issue regarding the Dealer Act; and (5) in the last few years there have been numerous attempts by dealers and manufacturers seeking this Honorable Court's review and interpretation of the Dealer Act.